INTERNATIONAL JOINT COMMISSION

REARGUMENT

IN THE MATTER OF THE MEASUREMENT AND APPORTIONMENT OF THE WATERS OF THE ST. MARY AND MILK RIVERS AND THEIR TRIBUTARIES IN THE UNITED STATES AND CANADA

UNDER ARTICLE VI OF THE TREATY OF JANUARY 11, 1909, BETWEEN THE UNITED STATES AND GREAT BRITAIN

OTTAWA, CANADA
MAY 3, 4, AND 5, 1920

WASHINGTON
GOVERNMENT PRINTING OFFICE
1921

MEASUREMENT AND APPORTIONMENT OF THE WATERS OF THE ST. MARY AND MILK RIVERS.

INTERNATIONAL JOINT COMMISSION,
Ottawa, Canada, May 3, 1920.

The Commission met at 10 o'clock a. m.

Present: C. A. Magrath (chairman for Canada), H. A. Powell, K. C., Sir William Hearst. O. Gardner (chairman for the United States), Clarence D. Clark.

Lawrence J. Burpee, secretary of the Commission for Canada.

Appearances:

Col. C. S. MacInnes, K. C., counsel for the Dominion of Canada, for the Provinces of Alberta and Saskatchewan, the Western Canada Irrigation Association, and the Cypress Hills Water-Users Association.

Hon. George Turner, counsel for the United States Government.

Mr. Will R. King, chief counsel for the United States Reclamation Service, with Mr. W. J. Egleston, of Helena, Mont., district counsel for the United States Reclamation Service.

Mr. W. N. Tilley, K. C., with Mr. G. A. Walker of Calgary, for the Canadian Pacific Railway Co.

Hon. Thomas J. Walsh, United States Senator from Montana.

Mr. A. P. Davis, director of the United States Reclamation Service, Washington, D. C.

Mr. E. F. Drake, director, Reclamation Service of Canada, Ottawa.

Mr. C. S. Heidel, hydrographer, engineer's office, State of Montana.

Mr. R. J. Burley, irrigation engineer, Department of the Interior, Ottawa.

Mr. C. H. Atwood, Water Power Branch, Department of the Interior, Ottawa.

Mr. Benjamin E. Jones, hydraulic engineer, Land Classification Board, United States Geological Survey.

Mr. Magrath presided.

Mr. MAGRATH. Gentlemen, it is my intention to make a very short statement to you as to the object of this meeting, but before doing so I may say that a request has come from Senator Walsh, who is coming by train and will not arrive here until noon. Senator Walsh would like that the argument be not gone on with until he arrives. We will, however, open the meeting this morning, and we will decide then as to the action we will take, which doubtless will be, unless there are very strong reasons to the contrary, that we shall adjourn until this afternoon.

It may not be amiss for me to briefly recite what has taken place in connection with the division of the waters of the St. Mary and Milk Rivers as required by Article VI of the treaty of 1909.

In accordance with the custom of the Commission that was followed for some time, namely, that two of its members—one from each country—be assigned to keep in intimate touch with each question

that came before it, Messrs. Powell and Gardner were named a committee for that purpose in connection with this question. They visited the location in the season of 1914 and finding that there was a difference of opinion on the part of interested parties as to the waters that were to be taken into account, they recommended that there should be a public hearing in order to give all interests an opportunity to put before the Commission their views respecting the interpretation of Article VI. The recommendation of the committee was adopted and a hearing was later on held in St. Paul, commencing May 24, 1915. At this hearing testimony was presented and arguments made by counsel for the various interests.

The date for the filing of briefs and other documents was at a later meeting extended to September 10, 1915, and such documents were duly filed on behalf of the Governments of the United States and Canada and the Canadian Pacific Railway Co. At the Washington meeting of the Commission in April, 1917, Judge King, on behalf of the United States Reclamation Service, made formal application for a reargument. The request was granted and the case was again taken up at Detroit, commencing May 15, 1917, all interests being duly notified of that meeting.

In accordance with permission obtained at Detroit, the Canadian Pacific Railway Co. filed a printed reply brief and argument. At the Detroit hearing, Mr. Wyvell, on behalf of the United States, requested further time for an argument in order that the Attorney General of the United States might have an opportunity of submitting the views of his Government to the Commission. On October 15, 1917, the Attorney General wrote that he had reached the conclusion that no further discussion on his part was necessary.

On November 7, 1917, the Secretary of State of the United States wrote the Commission to the effect that whatever conclusion was reached by the Commission in the St. Mary and Milk Rivers matter would not be regarded by his Government as binding upon it, in so far as it undertook to interpret Article VI. This letter was referred to a committee consisting of Mr. Tawney and Mr. Mignault, who on February 4, 1918, submitted the draft of an answer to the letter of the Secretary of State. This reply was adopted and sent under date of February 13, 1918. Under date of April 18, 1918, the Secretary of State wrote the Commission that he was unable to discern in the discussion presented in the commission's letter of February 13, 1918, sufficient cause for altering his views.

The letter of the Secretary of State of November 7, 1917, was transmitted to the Canadian Government through the British Embassy, and the views of that Government in regard to the right of the Commission to interpret Article VI were embodied in an order in council dated March 11, 1918. On November 11, 1919, the United States Secretary of State wrote the Commission explaining that the intention of his letter of November 7, 1917, was to reserve so far as the United States Government was concerned, any question of international right that might be involved, but that his Government had no intention to preclude the Commission from exercising its functions as a purely administrative body in determining what waters it should under Article VI measure and apportion.

Meanwhile, the Commission lost two of its members, first by the resignation of Mr. Mignault, who was appointed to the Supreme Court

of Canada in October, 1918, and by the death of Mr. Tawney in June, 1919. In March, 1920, the chairman for the United States wired me stating that Senator Clark—who succeeded the late Mr. Tawney—considered that a reargument was desirable. At the meeting of the Commission in Washington on April 7 last, it was decided to have the question of the interpretation of Article VI reargued, and and the place and date fixed was in this office in Ottawa to-day.

Now, gentlemen, in view of the request of Senator Walsh, I think we should adjourn until this afternoon.

Mr. Lawrence J. Burpee, secretary, read a list of the parties in interest on the Canadian side, to whom notices of the meeting had been sent.

Mr. Burpee stated that similar notices had been sent by Mr. Kluttz, secretary for the United States, to the parties in interest on the United States side.

Mr. CLARK. I have received the following telegram from Senator Walsh, which might be placed on the record:

NEW YORK, N. Y., *May 2, 1920.*

Hon. C. D. CLARK,
Chateau Laurier (or care Secretary, International Joint Commission), *Ottawa, Ontario.*

Delayed ship. Arriving Ottawa noon Monday. Kindly ask necessary delay.

T. J. WALSH.

Mr. MAGRATH. My colleague, Mr. Powell, has just drawn my attention to the absence of one of the members of the Commission; you have a letter, Mr. Burpee, bearing on that.

Mr. Burpee read a communication from Gov. Glenn, which stated:

In many respects I have improved in health but have now a case of lumbago, and as I heard the argument in St. Mary and Milk Rivers twice, I will not come to Ottawa but will join you at Sault Ste. Marie.

Mr. TURNER. On behalf of the United States, we would be glad to have the Commission accede to the request of Senator Walsh. He represents the interests of the people of Montana, and we would be glad indeed to have him here, so that he may hear all the argument.

Mr. POWELL. What about the absence of Gov. Glenn?

Mr. TURNER. I think, sir, we might proceed with this argument at this present time as ordered. Gov. Glenn, at a later period, after reading the argument, can make up a quorum for the determination of the question.

Mr. WILL R. KING. As representing the legal end of the Reclamation Service of the United States, I would prefer to have Senator Walsh present, and so I will be glad to have the case adjourned until this afternoon. As to Gov. Glenn, we waive his absence. Although we regret that he is not with us, we are willing to proceed as if he were present.

Mr. MAGRATH. All the testimony that has been presented in this case, and every word that had been uttered by way of argument, has been printed. The reason of this meeting is because two members of the Commission were not present at the hearings that were previously held. We now find that there is one member of the Commission who is not present here to-day and it seems to me that it is a question that the Commission should take into consideration in executive session as to the desirability of proceeding with this case now, in view of the reason that was advanced for holding this meeting.

Mr. TURNER. I believe it has been the practice of the Commission to consider a majority of the commission as constituting a quorum for all purposes except the actual making of a decision.

Mr. MACINNES. As to the request for adjournment on behalf of Senator Walsh, I may say that we would be very glad to accede to that postponement if it meets with the favor of the Commission. As to the absence of Gov. Glenn, one of the members of the Commission, I would submit that that is rather a matter for the Commission itself to decide, inasmuch as this reargument was requested, as we understand, by the Commission for the purpose of reaching a decision. As to that, it seems to me we would be bound by any conclusion that the Commission may reach.

Mr. BURPEE. There is a question as to the filing of the diplomatic correspondence that was put in at the St. Paul hearing. I took that matter up with the Washington office and I also made a request of the Director of the Reclamation Service here. Mr. Drake has put in certified copies of all documents that were filed by Col. MacInnes. I have had a message from Mr. Kluttz that he had taken up the matter with Mr. Wyvell's office, which is in daily touch with the department, and it was understood that certified copies were to be put in on the United States side.

Mr. CLARK. Were they not published in the record?

Mr. BURPEE. The documents were published, but we have not on file the certified copies in the office.

Mr. POWELL. I move adjournment until half-past 2 o'clock this afternoon.

The Commission adjourned until half-past 2 o'clock this afternoon, when the Hon. Senator Walsh was in attendance.

Mr. MAGRATH. We will be very pleased, Senator Walsh, to hear your argument.

Mr. TURNER. There is some question about the order of argument. My idea was that as there will be several arguments on each side that we should alternate. Inasmuch as Canada closed the argument on a former occasion, I think that counsel for Canada might open the argument to-day. I believe that Col. MacInnes and Mr. Tilley are the only counsel to argue on the Canadian side, and my suggestion is that one of them should open the case, that he should be followed by Senator Walsh and Judge King, and that I as representative of the United States would close the argument. Col. MacInnes, whom I have consulted, thinks that the United States should open the argument, and inasmuch as we can not agree we leave it to the Commission to determine.

Mr. MACINNES. Mr. Tilley and I came here to-day in the expectation that the same practice would be followed as before, that the United States would open the case and that we could then deal with it, and if there should be any matters requiring reply, the procedure of the Commission we understood would be to let either side reply to any points that might seem to require to be further dealt with. We are dealing with this matter, as I understand, with the idea of getting everything before the Commission in the way of argument and explanation. So far as closing the argument is concerned, Senator Turner is not quite correctly informed as to that—at the St. Paul hearing I understand that Canada did conclude, but at Detroit it was the other way. I submit, in further argument in favor of my

contention, that the view of the Canadian side as you know is that this Commission is dealing with an article of the treaty which we submit is quite clear in its terms, and that the water should be measured and dealt with in accordance with these terms. It would seem to me that one would get a more intelligent dealing with the matter if the difficulties which are said to exist could be presented clearly before the Commission, and then later Canada would have the right to reply. We, of course, are not dealing with this matter technically in any sense, but with a view of getting all the light possible upon it. Mr. Tilley and I have come here in that view, and in the expectation that the case on the part of the United States would be presented in part, if not in whole, at the opening of the session.

Mr. TURNER. Canada is insisting on the literal reading of the treaty which would include all tributaries. And the contention of the United States is that the word "tributaries" must be limited. I have some experience in international tribunals, and I must say that the course I now suggest has been that which has been invariably followed. We think it a fair proposition that Canada should take the opening, inasmuch as we assumed that burden at a former hearing.

Senator WALSH. I shall be quite willing to introduce the argument if that is deemed to be desirable. Then, that of course will give us the privilege of having Senator Turner to close.

Mr. TURNER. Since Senator Walsh has expressed himself as ready to go on, that of course meets the difficulty. The United States can be heard from at the end of the argument.

Mr. TILLEY. I do not know what Senator Turner means by saying that we are to hear from the United States at the end of the argument.

Mr. TURNER. Let the argument alternate between the two parties.

Mr. TILLEY. My submission is that the United States should say what they have to say in opening, that the counsel for the United States can say what they have to say, and then Mr. MacInnes and I can state what we have to say. Of course, so far as I am concerned, I have no objection to anything that is really reply being said by either side. There seems to be no difficulty about that, but certainly we are entitled to hear from Senator Turner, on behalf of the United States. The United States is really asking for this rehearing.

Mr. CLARK. I was going to say, Mr. Chairman, that the statement just now made by counsel is not exactly correct. The request for the rehearing came from me personally, as a member of the Commission, without reference to the particular interest which the United States might have in the rehearing or what interest Canada might have. I did try to familiarize myself as far as I could with this long record, but I felt that my judgment would be enlightened, as a member of the Commission, if I could receive the argument right off the bat. I therefore made a request to the Commission for this rehearing. My request has no bearing whatever upon the attitude of the United States or upon the attitude of Canada; I want to make that explanation.

Mr. TILLEY. That would not detract from what I say, that we should have the full view of the United States presented to this commission before we are called upon to say what we have to say, without any objection on our part to a reply if there is anything that really needs reply, either by one or by both. I submit that we are entitled to have the full view of the United States presented, so

that we may deal with it and so that we may not have to deal with it piecemeal.

Mr. TURNER. We are subject to the wishes of the Commission as to the order of the argument. If we open the argument and two of our legal representatives speak on it, certainly the other side will be very well informed of the position of the United States by the time the final argument is made. It is strictly conformable to the practice before the courts that the parties opening should have the concluding argument.

Mr. KING. I take it that the purpose of the Commission is to get what information it can to enable the Commission to reach the proper conclusion. I think the proper way to present the case is for counsel to alternate. I assume that Senator Walsh will be able to cover the whole case, and that little will remain for me to add to what he has said. But when counsel on the other side address the Commission there may be some things that it may be necessary to reply to. It therefore strikes me that the proper procedure is for counsel to alternate.

Mr. TILLEY. If the proposal is that Mr. King shall follow Senator Walsh, then alternation is not so bad, but we do not want alternation on the principle of the other side having three counsel and we having only two. If the two on the American side will go first, alternation will be satisfactory.

Mr. MAGRATH. Before we are through with Senator Walsh possibly it will be time to adjourn, and then the Commission can take up this matter of procedure.

ARGUMENT OF HON. THOMAS J. WALSH, UNITED STATES SENATOR FROM MONTANA.

Senator WALSH. Gentlemen, I am indebted to your courtesy for holding your proceedings in abeyance until this afternoon that I might appear before you in this matter, which is of such momentous concern to the people of my State. I am gratified to recall at this time that the question of the jurisdiction of the Commission, which was raised in previous presentations of the matter, has been removed, as I understand, by a letter recently addressed to the Commission by the Secretary of State. It may be recalled by those Commissioners who sat at the last hearing that I then expressed my want of concurrence in the objection that was raised to the jurisdiction of the Commission. It occurred to me that there could be no serious question on that score, and I found no difficulty whatever in convincing the Secretary of State of the soundness of that position. Indeed, he disclaimed any knowledge of the question and any responsibility for its having been raised. It is particularly gratifying at this time because the necessity for a speedy determination of this very important question grows more and more imperative. Indeed, the conditions which have prevailed in the Northwest during the last three years have increased its importance and the need for a speedy decision. Those have been years of extreme drought, covering all the region affected both in the State of Montana and the adjacent Provinces of Saskatchewan and Alberta. Last year was a period of extraordinary drought, perhaps without record in the history of our State, and brought home to our people more than ever the great

importance and value of water for purposes of irrigation. As it now is, enterprise in the way of development of new lands and preparing them for irrigation is, to a certain degree at least, at a standstill. In the neighborhood of Chinook, for instance, it is contemplated to establish an irrigation district embracing a large area of the land in that region to be watered by the water from the Milk River, both from its natural flow as well as the augmentation from storage works already constructed. That work contemplates the expenditure of a very large amount of money for the leveling of the land and the other preliminaries to the appropriate and economic use of water for irrigation, but until those interested know exactly or as nearly as they can know exactly what water is available, evidently enterprise is halted. I hope, therefore, that the matter may be taken up by the Commission while it is fresh and a conclusion arrived at, if one is possible.

Inasmuch as there are two members of the Commission who were not here before, I shall proceed to consider the matter as one of first impression. The rivers in controversy are the Milk River and the St. Mary River, both of them rising in the State of Montana. They are indicated on the map here, which, unfortunately, is so small as not to be of very much advantage. Both these rivers have their source in the Rocky Mountains, near their summits, in the neighborhood of the Glacier National Park. The St. Mary River flows almost directly north, emptying the two St. Mary Lakes, crossing the boundary line, and eventually finds its way into the Belly River, from there into Saskatchewan, and from Saskatchewan to Lake Winnipeg. The Milk River has its source in the same region. Indeed, the headwaters of the two streams may be said to mingle. The Milk River flows in a northeasterly direction across the Canadian boundary and through the Canadian Provinces for a distance of 100 miles or thereabouts, when it turns to the south and again comes into the State of Montana, emptying into the Missouri River in the eastern portion of the State. The Government of the United States is prosecuting a great work of reclamation which contemplates the use of the waters, or of a portion of the waters, of both these streams, and has constructed a canal 17 miles long, connecting the St. Mary with the Milk River, so that through it the waters of the St. Mary may be thrown into the Milk and carried through Canadian territory down into the region through which the lower Milk courses, where the water is to be used. Prior, however, to the initiation of that work, enterprising Canadians had taken out a ditch just above the international line, from the St. Mary River for the irrigation of a large tract of land in that locality, and when the Government of the United States entered upon the work of creating a great storage basin in the St. Mary River with the evident purpose of taking that water from the St. Mary and throwing it into the Milk River, and carrying it down to the eastern part of the State for use there, the Canadians naturally protested.

Again, settlers in the State of Montana had settled along tributaries of the Milk River in the eastern part of the State and in the central portion of the State in the neighborhood of Havre, and had taken out irrigation ditches. Other settlers on the Canadian side took out ditches claimed to be inferior in right if there were no international

boundary line there, or at least being limited in time, and were proceeding to take the water from these tributaries to the detriment and depredation of the settlers on the American side, who claimed to be entitled to have that water come down uninterrupted in its flow. So the controversy arose upon both sides of the line, the Canadians protesting against storage of the St. Mary upon the American side and the American settlers protesting against the diversion of the tributaries of the Milk River on the other side. That resulted in the execution of the treaty which is the subject of the inquiry. The treaty of 1909 touches quite a number of subjects. The controversy concerning the Milk River and the St. Mary is dealt with in Article VI of the treaty which reads as follows:

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

The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of waters diverted from the St. Mary River. The provisions of Article II of this treaty shall apply to any injury resulting to property in Canada from the conveyance of such waters through the Milk River.

The measurement and apportionment of the water to be used by each country shall from time to time be made jointly by the properly constituted reclamation officers of the United States and the properly constituted irrigation officers of His Majesty under the direction of the International Joint Commission.

That is what presents this controversy. The duty of measuring and apportioning the water in accordance with the terms of this treaty devolves upon this commission. In the effort to discharge their duty the question arises concerning the construction of the treaty which it becomes necessary that the Commission should solve before it can go further.

It is contended on the part of the Canadians, as I interpret their claim, either that the water must be measured at the mouths of these rivers, respectively—the Milk River away down in the eastern part of Montana, and the St. Mary where it has its confluence with the Belly River—or that by some other process the amount of water in each of these rivers, exclusive of their tributaries, is to be determined, and then the amount of water in each and every single and separate tributary of the two rivers is to be measured and the aggregate arrived at in that way, and then of that each is to have one-half.

The American contention, on the other hand, is that the treaty contemplated simply the division and distribution of those waters which may be used in either country, and must be measured simply at the points of diversion in each country, or else at the international boundary line. The contention made by the Canadian Government in that behalf is perhaps accurately expressed in the brief presented by my learned friend, Col. MacInnes, from which I quote. On introductory page lx, after quoting as follows from Article VI:

The high contracting parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries.

He goes on and asks:

What is the meaning of the above language in connection with the measurement of the total amount to be apportioned between the two countries? Ascertain this total by measurement of all the waters involved, and it will be found that there is no substantial difficulty in apportioning to each country its share of such total at suitable points, and in the measurement of the constituent parts of such share at the places where the same are received.

The language is both general and clear. There is no exception of, or limitation to, any part of either river. There is no exception of, or limitation to, any tributary of either river.

Why, therefore, should there be any difficulty? The difficulty arises from the fact that a contention has been raised on behalf of the United States that the only waters to be measured, for this or any other purpose, are the waters in the two rivers and in the tributaries thereof which flow across the international boundary, to the exclusion of the waters in the other portions of the rivers and their tributaries, and to the exclusion of the waters in any other tributaries thereof.

The result of such a contention would largely decrease the amount of Canada's share, because it would decrease the amount of the total to be apportioned; and on the other hand, the United States would have a claim to such a share of the waters of the St. Mary River as would seriously affect valid Canadian rights on that river and the development of the irrigable areas in Canada, and would be contrary to the express terms of the treaty and to the governing idea of "beneficial use." No support of this contention on behalf of the United States can be found within the four corners of the article itself, upon which the direction to be given by your honorable commission must be based. The contention is, therefore, self-answered.

As to that, I shall address myself direct, but I want now to invite your attention again to this paragraph:

Why therefore should there be any difficulty? The difficulty arises from the fact that a contention has been raised on behalf of the United States that the only waters to be measured, for this or any other purpose, are the waters in the two rivers and in the tributaries thereof which flow across the international boundary.

In one of his many criticisms of the construction given by the Supreme Court of the United States to the Constitution and the powers of Congress under the Constitution, Jefferson once referred to Gen. Marshall's "twistifications." Now, that is not a "twistification," but it approaches to one. It contemplates that the matter had been entirely settled, or at least accepted, and then in some way or other the Government of the United States suddenly introduced this kind of contention. I have not been able to find in the record anything that would support that idea. Indeed, Mr. Commissioners, the fact about the matter is, we shall show later, that both parties to the controversy proceeded for years after this treaty was made, in apparent complete acceptance of the view of the matter which we are now presenting. So that the contention, at least as we view the matter—new in its character and novel—was raised by the Canadian Government and authorities, not by those of the United States. I shall advert to that later; but no effort was made at any time to establish measuring stations at the mouths of either of these rivers, or along any of the branches or tributaries of any of them, except those which crossed the international boundary line and except at or near the international crossings, and at the diversion works on the St. Mary River. As I shall contend later, that was a practical construction of this matter given to the treaty by both parties to it.

Again, this brief says:

No support of this contention on behalf of the United States can be found within the four corners of the article itself, upon which the direction to be given by your honorable commission must be based.

The language is both general and clear. There is no exception of, or limitation to, any part of either river. There is no exception of, or limitation to, any tributary of either river.

Now, if the commission please, we can not assent to that at all. On the contrary, our contention is that the language of the treaty is perfectly plain and perfectly plain in support of our contention; and that you do not need to go beyond the four corners of that treaty to arrive at the conclusion which we insist is the correct one in the interpretation of the treaty. I read:

There is no exception of, or limitation to, any tributary of either river.

But that is not the case, for the treaty reads:

The high contracting parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan).

Not all tributaries of these rivers, but only those tributaries in Montana and Alberta and Saskatchewan. Of course, the contention as stated here clearly conveys the idea that the treaty reads as though this qualifying language were not in it at all; as though it read:

The high contracting parties agree that the St. Mary and Milk Rivers and their tributaries are to be treated as one stream for the purposes of irrigation and power.

We contend that the very plain meaning of this is that it is only those tributaries which at one and the same time are in Montana and in Alberta or Saskatchewan, and the waters of the river that at the same time may be diverted and utilized either in Montana or in Alberta and Saskatchewan. Otherwise, this important language has no meaning whatever. Every lawyer member of the Commission, as well, I am sure, as those who are not of our profession, will appreciate the importance of the rule of construction that every word in a treaty, every phrase in a treaty, is to be given some meaning, some significance. The contention, I submit in all candor, made by the Canadian Government in that regard is just what the construction would necessarily be if this qualifying language were not there at all.

Now, it will be observed by a reference to the map that there are a vast number of tributaries of the Milk River, and no inconsiderable number of the tributaries of the Belly River, which are not at all international in their character. That is particularly the case with the Milk River. Here is the international boundary line [indicating on the map] and the great region occupied by the Sweet Grass Hills in Teton County in my State; these streams, flowing down here, are not of an international character at all. The great region of the Bear Paw Mountains, to which I point now, and all the regions south of the Milk River—here are tributaries which contribute a large amount of water, but are not international in character, and in relation to which no controversy has ever arisen. It is contended that all these rivers must be taken into consideration and that you are to ascertain the amount of water in the Milk River away down here, the mouth in the eastern part of the State, and by some means or other you are to go back to the international boundary line, divide that by two, and give to the Canadians one-half of the total amount

as found down here at the mouth. I shall advert to that contention later, because it is such an unreasonable contention, one impossible of application, that it must be dismissed without reference to any other considerations whatever.

Now, a treaty is a contract between two nations, and bears a very close analogy, if it is not in every important particular identical, with a contract between two individuals. The rules of construction, at least, are quite similar, if they are not generally applicable. Of course, we are obliged to ascertain, if we can, what the parties to this treaty meant; what the intention was; what they intended to do; how they had it in their minds that this water could be divided and apportioned. We must endeavor at all times to get at the intention that they desired to express. In arriving at the intention which they had in their minds, the language which they used becomes, of course, of first importance, so it is contended upon the part of the Canadian Government that it is perfectly plain that it means what they say; and we contend that it is perfectly plain that it means what we say, as I have pointed out, that it is not all the rivers, or all the tributaries, but only those that are in Montana, on the one hand, and in Alberta or Saskatchewan, on the other, that are referred to.

Now, the language here is rather peculiar. You see, there are two "ands" there: "In the State on Montana 'and' the Provinces of Alberta 'and' Saskatchewan." I believe there is no tributary—at least none has been directed to my attention—which is at one and the same time in Montana and in both the Provinces. But there are many of the tributaries which are at one and the same time in Montana and in one or other of the Provinces. When the treaty was in process of drafting, this expression was used, as I shall show you a little later on: In a large number of the drafts, at least three or four, the word "Saskatchewan" was omitted and it read: "In the State of Montana and the Province of Alberta." When they were about to frame the final draft, evidently the attention of some of the Canadian authorities was called to the fact that some of the tributaries came from Saskatchewan into Montana, and they simply put in the words "and Saskatchewan"; so that the construction is not materially changed. I have no doubt that the negotiators intended to refer to those tributaries which are at one and the same time in Montana and also in either Alberta or Saskatchewan. That is, it should be "in Montana and Saskatchewan," or "in Montana and Alberta." But if that contention, Mr. Commissioners, is not clear from the language of the treaty itself, I assert, as I did when last before the Commission, that if we enter upon a consideration of the negotiations which led up to this treaty as it finally took form, and follow the operation of the minds of those who were the authors of it, as the proceedings progressed from day to day and from month to month, it seems to me the conclusion is entirely irresistible that they had not in mind and did not intend to provide for the distribution of these waters upon any basis except an equal division of the waters that flowed across the international boundary line—that is to say, the waters that were available for irrigation upon either side of the international boundary line.

But it may be said that a tribunal or a court may never resort to extraneous circumstances, and particularly to prior negotiations lead-

ing up to a treaty or a contract, unless there is some ambiguity or uncertainty about the contract, or about the language of the contract, which would be explained by attendant circumstances. But if that were the rule, Mr. Commissioners, I think I have already pointed out to you what everyone must admit is a clear ambiguity in the language of this treaty. At least, we say that it means this thing, and counsel upon the other side says it means quite a different thing. They say they give no consideration whatever to the language: "In the State of Montana and the Provinces of Alberta and Saskatchewan." Possibly they contend that that is mere language of identification, not language of qualification. If so, then there is ambiguity or obscurity about the treaty which would permit under any rule the introduction of the prior negotiations.

Mr. POWELL. May I interrupt you, Senator Walsh? I wish to call your attention to a particular change of verbiage. You referred to the change which was made by the addition of the words "and Saskatchewan." There is an additional change—you may not deem it important, and I do not say that I attach much significance to it either. The language in the old one—meaning by "old one" the preceding copy or draft—was "St. Mary and Milk Rivers in the State of Montana and the Province of Alberta, and their tributaries." "Tributaries" is unlimited. Then, in the adopted copy, the word "tributaries" comes in for any limitation there is in to the rivers themselves, as well.

Senator WALSH. I recall that very well.

Mr. POWELL. I merely direct your attention to that; you may not attach any importance to it.

Senator WALSH. Well, I did not consider it of importance in connection with the idea which I am endeavoring now to put forward.

Mr. POWELL. You may at some later stage.

Senator WALSH. It is often the case, Mr. Commissioners, that a contract which seems perfectly plain on its face becomes one of doubt and ambiguity when attention is paid to the circumstances under which it has been negotiated; and then the negotiations become exceedingly important for the purpose of illustration. I was at one time the president of a company which carried on agriculture on a very large scale and sheep grazing in the State of Montana. We raised something like 100,000 bushels of oats annually, and we had our thrashing done at, we will say, 8 cents a bushel. Now, the law of Montana expressly provides that 32 pounds of oats shall be a bushel; but our oats weighed exceedingly heavy, even going as high as 42 pounds to the bushel of measure, and rarely amounting to less than 40 pounds. So, after a long course of dealing with the thrashers, the measure box was set to tip up at 40 pounds to the bushel; whenever 40 pounds came in it dumped; that was a bushel, and we were obliged to pay 8 cents for the service to that extent. Well now, the high cost of living, we will assume, comes along, and the thrasher writes us a letter in which he says that he is in such a situation that he can not thrash this year at a lower rate than 12 cents a bushel, and we accept his proposition. Then he proceeds to bill us upon the basis of 32 pounds to the bushel, and very naturally we protest. We direct attention to the long course of dealings between us under which 40 pounds of our oats was to constitute a bushel; and un-

doubtedly the contract between us would be construed in the light of our past transactions. Likewise, under the statute of our State, a ton is fixed at 2,000 pounds, but I have been buying my coal for many years on the basis of the long ton, 2,240 pounds. If, therefore, the man who has been furnishing my coal seeks to charge me on the basis of 2,000 pounds to the ton, obviously I point to preceding negotiations for the purpose of indicating that a ton in this particular case shall be 2,240 pounds, not 2,000 pounds.

Mr. POWELL. And there has been an even more striking case in that of the hundredweight, which is 112 pounds.

Senator WALSH. Quite so. So that it often becomes necessary to resort to the attendant circumstances and prior negotiations with the parties, and the negotiations leading up to the particular contract for the purpose of interpreting what the parties meant, even though the language itself may, on its face, have no obscurity or ambiguity whatever. But I believe, if your Honors please, that in the presentation of this matter, upon the authorities of the decisions of the Supreme Court of the United States, as well as upon English authorities, the negotiations that led up to the treaty are, I think, clearly appropriate for the consideration of the Commission. I do not understand that there is any serious dispute as to that position.

As I attach special importance to these negotiations in arriving at a just conclusion as to what the treaty means, at the risk of being somewhat tedious to the older members of the Commission, I shall take the liberty to refer at some considerable length to them.

I have referred to the origin of the controversy which is before us, but the origin really antedated the period of which I spoke. With very commendable foresight, the Canadian authorities, even before any controversy took practical form, suggested to the authorities at Washington the advisability of some arrangement concerning these waters which passed from one country to the other, in anticipation of difficulties that might arise. In the month of January, 1896, an order was passed by the governor in council and transmitted through the proper diplomatic channels to the authorities at Washington. This order, which I quote from page 56 of the proceedings of May 24–28, 1915, recited:

> On a report dated 13th December, 1895; from the minister of the interior stating that a resolution was passed by the International Irrigation Congress of the United States at its meeting at Albuquerque, N. Mex., in September, 1895, asking "for the appointment of an international commission to act in conjunction with the authorities of Mexico and Canada in adjudicating the conflicting rights which have arisen, or may hereafter arise, on streams of an international character."
>
> Streams of an international character.
>
> The minister observes that a glance at the map attached hereto of the Province of Manitoba and of the Northwest Territories will show that in the western portion of the American Continent, situated adjacent to the 49th parallel, within which water can be applied to land by irrigation processes, quite a number of important streams arise within the boundaries of Canada and flow south to the United States, and vice versa, and he (the minister) is satisfied that it would be in the highest and best interests of both countries that in respect of such streams the suggestion of the irrigation convention should be acted upon.
>
> The minister therefore recommends that Her Majesty's ambassador at Washington be requested to inform the Government of the United States that the Government will be glad to cooperate, by the appointment of an international commission or otherwise, as may be agreed upon, with the authorities of Mexico and the United States, with the object of regulating the use, for purposes of irrigation, of the waters of streams which have their origin in one of the countries named and subsequently flow through the territory of another.

The minister further recommends that Her Majesty's ambassador at Washington be requested to ascertain at as early date as possible the views of the Government of the United States in regard to this matter, so that if requisite an appropriation and any necessary legislation to give effect to the arrangement arrived at may be obtained at the forthcoming session of the Parliament of Canada.

Mr. POWELL. What is the date of that?

Senator WALSH. January 8, 1896. The order concludes:

The committee advise that your excellency be moved to forward a certified copy of this minute to Her Majesty's ambassador at Washington.

Now, as this is the initial communication with respect to the matter, and you will observe that it is not attempting to concern itself with any water or with any streams whatever except those that are international in character, that rise in one country and flow across the boundary line into the other, I shall undertake to show you by following this correspondence from its beginning to its termination, that no other idea ever entered the mind of anyone who was ever concerned in this transaction.

The reply of Sir Julian Pauncefote to the Governor General is found on page 57; I read from it only the following:

Mr. Olney does not lack interest in this important subject, yet from the information in the department's possession he can only regret his inability, agreeably to your courteous request, to give expression to the views of his Government upon the subject at the present time.

Mr. POWELL. What is the date of that, please?

Senator WALSH. March 27, 1896; it is the reply to the communication of January 8. The matter then apparently remained in abeyance until the 27th of October, 1902, when another order in council was transmitted, a copy of which appears at page 58. This order is rather lengthy. It recites the physical conditions, and that kind of thing, with which I need not trouble the Commission at this time, and it concludes as follows:

The committee advise that the Governor General be moved to forward a copy of this minute to His Majesty's ambassador at Washington with a request that he will communicate to the Government of the United States the objections of Canada to the proposed irrigation works, and will express the hope that the flow of the St. Mary River into Canada shall not be interfered with.

The substance of this I indicated to you before; it was in the nature of a protest against the diversion by the United States of the waters of the St. Mary River. You will observe that this was in 1902, the year when our reclamation act was passed. But even prior to the passage of our reclamation act—I think as early as 1900—the Geological Survey had made some surveys and entered upon some work looking to the development of this irrigation project.

Mr. POWELL. That order, you say, deals exclusively with international streams?

Senator WALSH. There is no part of this order in council, which I have noted, Mr. Commissioner, which speaks of international streams. This, I may say, is confined practically to a protest against the diversion of the waters of the St. Mary River at the complaint of the settlers under the project of the Canadian Northwest Co., which was prosecuting the work on the other side of the boundary line.

Mr. POWELL. Then, instead of dealing with international streams exclusively, it deals exclusively with particular international streams?

Senator WALSH. Practically so; yes, sir.

Mr. CLARK. The St. Mary River?

Senator WALSH. The St. Mary River. The reply of the American Government to this communication was made through one of the representatives of the Canadian Government at Washington, Mr. Herbert. His reply is to be found on page 60. He says:

I have received your note No. 45 of the 29th ultimo relative to the proposed diversion of the waters of the St. Mary River in the State of Montana, eastward into the Milk River, in which you quote the opinion of the Director of the United States Geological Survey to the effect that the contemplated works are of such a nature as to be inoffensive to any Canadian interests.

I feel some regret at the contents of this communication, especially in view of the consideration which was shown in the analogous case of the complaint of certain inhabitants of Idaho * * *.

That is of comparatively little significance. But the subject receives further consideration in a letter from Mr. Hay, Secretary of State, dated February 19, which is found on pages 60 and 61. In so far as it refers simply to the particular contention, it is of very little significance here. The condition is again considered in a memorandum which was apparently attached to a letter from Mr. Hay of February 19, 1903, but the general subject was considered in a dispatch from Mr. Hay to the British Minister, under date of December 30, 1904, which will be found at page 62. To this I desire to invite your special attention, because it again canvasses the rights and wrongs, merits and demerits of the contentions with reference to the St. Mary River. But the thing that I wish to call particular attention to is that in this letter Mr. Hay apparently meets the desires twice expressed by the Canadian Government, for a meeting for the purpose of adjusting the entire controversy. The letter concludes:

Owing to the critical situation of the settlers in the Milk River Valley, in the State of Montana, and the desire of the Canadian Northwest Irrigation Co. to utilize its canal as soon as possible, an early understanding is important. I have therefore the honor to suggest a conference between the representatives of the Government of the United States and representatives of the Canadian Government for the purpose of reaching an agreement in respect to the disposition of the waters of the Milk and St. Mary Rivers.

I invite your attention to the next document introduced which is a report of the privy council, of June 7, 1905, found on page 63, and which seems to me to be of some particular importance. I read:

The committee of the privy council have had under consideration a dispatch dated January 2, 1905, from His Majesty's ambassador at Washington, transmitting a copy of a letter from the Secretary of State of the United States relative to a diversion of water from Milk River.

The committee have also had under consideration a dispatch, dated January 9, 1905, from His Majesty's ambassador at Washington, transmitting a copy of a letter from Mr. Charles D. Walcott, Director of the United States Reclamation Service, expressing the desire to obtain data respecting the flow of the Milk River and of the St. Mary River and the allotment of such waters by the Dominion authorities.

The minister of the interior, to whom the said dispatches were referred, observes with respect to the conditions existing in the State of Montana and the districts of Alberta and Assiniboia along the Milk River, to which the honorable the Secretary of State refers, it is manifestly in the interests of both countries that the waters of the St. Mary and Milk Rivers should be conserved for the beneficial use of the owners of agricultural and ranch lands through which these rivers flow, and that the Canadian Government should join in an arrangement with the United States Government for the purpose of attaining this end, due regard being had to the protection of vested rights in conformity with the laws concerning the right to use of water as recognized in both countries.

That brought from Secretary Root a communication which becomes of more than usual importance. It is dated June 15, 1907, and is to be found on page 65 of the record. I read:

EXCELLENCY: With a view to bringing to a determination the questions so long discussed relating to the use of the waters of the St. Mary River and the Milk River, which flow across the forty-ninth parallel boundary between the United States and Canada, I beg to offer the following suggestions for a basis of a treaty for the equitable apportionment of those waters.

Those are the waters with which Mr. Root proposed to deal: That is to say, the waters of the St. Mary and Milk Rivers which flow across the forty-ninth parallel boundary between the United States and Canada. With those that were entirely in the one country or entirely in the other he obviously had no purpose whatever to deal. He says:

I beg to offer the following suggestions for a basis of a treaty for the equitable apportionment of those waters:

It is hereby agreed between the Governments of the United States and Great Britain that the waters of the Milk River and the St. Mary River and their tributaries shall be apportioned in perpetuity for use in the two countries according to the following stipulations and agreements:

1. That for the purposes of this agreement the St. Mary River and the Milk River and their tributaries, which are now separate and independent river systems, shall be treated as though they were the waterways of a single drainage system.

Now, there you find the genesis of the provision in the treaty to the effect that they are to be considered as one system:

2. That the water available for irrigation from these two river systems throughout the period from March 1 to September 30 of each year, both dates included, shall be apportioned to each of the two countries from day to day in equal amounts.

From day to day the water available in the streams—that is, those which cross the forty-ninth parallel—are to be divided equally during the irrigation period from March 1 to September 30.

3. That the failure of either country to fully utilize the right hereby agreed upon to one-half of the available water during the period specified in paragraph 2 shall not be regarded as adding to or diminishing the rights of the other country.

4. That during the period of each year not specified in paragraph 2 the United States may divert or hold back in storage reservoirs any portion of the natural flow of St. Mary River, and Canada may divert any portion of the natural flow of Milk River, in neither case to interfere with existing rights.

5. That the apportionment of water hereby agreed upon during the period specified in paragraph 2 shall be determined in the following manner: The share to which the United States is entitled shall be the total of the following items:

I do not follow that part of the letter, because it was objected to by the Canadians. But the point I want to invite your attention to is that Mr. Root's proposal was to divide the waters equally. He proposed a plan by which the water should be divided equally, and the Canadian minister acceded to that principle, but insisted that the way Mr. Root proposed to divide the water equally would not bring about that result.

I want to call your attention, however, to paragraph 11 of this letter, because it became somewhat important afterwards:

11. The term "natural flow," as used herein, is to be understood as the flow of the river system in question which would pass the point or points specified if no artificial structure had been placed in the stream channel and if no water had been diverted from or turned into it. Such natural flow shall be determined by the commission provided for in paragraph 14.

Now, this is answered by an order in council which is found at page 67, under date of March 2, 1908; I have indicated the character of that. There is a paragraph on page 68 to which I desire to call attention:

That the Dominion of Canada is desirous of reaching a settlement of the matter and would suggest that, in order to arrive at a fair and reasonable arrangement, the Government of the United States should appoint a representative to confer with a representative to be appointed by the Government of the Dominion to consider a basis of agreement which may be submitted to the respective Governments.

It is quite apparent that the attempt to transact this business at long range, by communications through the privy council which went to the ambassador to Washington, and so on, was not satisfactory, and it was proposed that each Government appoint a representative, and that these representatives should confer and endeavor to arrive at a solution of the difficult problems in that way. That brought out a letter from the Secretary of State, to Mr. Bryce, ambassador, which will be found at page 77 of the record, as follows:

APRIL 9, 1908.

EXCELLENCY: Referring to your note of the 10th ultimo, by which you convey to this department the suggestion of the Canadian Government that the United States Government appoint a representative to confer with a representative to be nominated by the Canadian Government with the object of considering the basis of an agreement to be submitted to their respective Governments with respect to the question of the diversion of the waters of the Milk and St. Mary Rivers, I have the honor to inform you that Mr. F. H. Newell, the Director of the Reclamation Service, has been designated to meet the representative.

Mr. Bryce, apparently acting under authority of the Canadian Government, and upon their suggestion, in a letter acknowledging receipt of this under date of April 10, found on the same page, says:

I have just received a communication from the administrator of the Dominion of Canada stating that Mr. W. F. King, chief astronomer of the Dominion, has been appointed the representative of the Canadian Government for the same purpose. Mr. King is expected to arrive in Washington within a week.

Thereafter we follow the negotiations between Mr. Newell, on the one part, and Mr. King, upon the other. At that time Sir George Gibbons was associated in some way or another with the negotiations—in just exactly what capacity I am not fully advised; I suppose as legal advisor and counselor to Mr. King. Anyway, there is introduced into the record, found at page 81, under date of April 27, 1908, a proposition made by Sir George Gibbons as a basis of the treaty. I read from the bottom of the page referred to, as follows:

It is recognized that the proposal——

Mr. POWELL. That is Mr. King's proposition, is it not?

Senator WALSH. Yes; so it is. I quote from the preceding paragraph:

In view of the large area of arid lands situated in the basins of St. Mary and Milk Rivers, on both sides of the international boundary line, for the development of which irrigation is a vital necessity, it is thought that an agreement whereby all available water shall be utilized for the conversion of the present desert wastes to the fertility of irrigated fields to the advantage of both countries, is in the very highest degree desirable. Such agreement, it is believed, to secure acceptance by the people of both countries, and to fulfill its purpose of obviating all possible future contentions, can best be based upon the principle of equal sharing of benefits to be derived from these international rivers, due regard being had to existing rights.

So you will observe that the principle proposed by Mr. Root is entirely accepted by Mr. King, that there should be an equal sharing of the benefits of these waters.

Sir WILLIAM HEARST. Was not one a proposal that there should be an equal sharing of the waters and the other a proposal that there should be an equal share of the benefits derived therefrom? Was there not a distinction as to that?

Senator WALSH. It may be that they had these things in their minds, but it occurs to me that the general principle was——

Sir WILLIAM HEARST. I think you will see that developed in a later communication from Dr. King.

Senator WALSH. I quote further from Mr. King's letter of April 27, 1908:

> It is recognized that the proposal of the Secretary of State has been framed with the intention that these principles, which seem equitable, shall govern in the settlement of the question. This is manifested in the following provisions with others of similar tenor:
>
> 1. During the summer months the waters of the rivers are to be apportioned to each of the two countries, from day to day, in equal amounts.
>
> 2. During the winter months the United States may store the waters of St. Mary River and Canada may store those of Milk River.
>
> 3. That vested interests in both countries shall be protected.

Then, he objects to that and urges that there is more water in the St. Mary, for storage in the winter time, than there is in the Milk River, and that the details proposed by Mr. Root would not work out the result which would be in conformity with the principle which he announces. In other words, he did not object to the general principle; he objected to the plan under which that result was to be achieved.

Then, under date of May 1, 1908, Mr. King, who apparently was in Washington at that time, addressed a communication to Mr. Newell, which is to be found at page 83. In his letter he sets out his contentions with respect to these matters, and submits a proposition which will be found in the letter at page 84. He says:

> I accordingly submit for your consideration the following proposal:
>
> That the United States shall be entitled to all the water of St. Mary River at the dam site of St. Mary Reservoir, for storage during the months of January, February, March, November, and December in each year.
>
> That Canada shall be entitled to divert from the natural flow of St. Mary River 1,400 cubic feet per second during the remaining months.
>
> That the excess flow of St. Mary River during the last-mentioned period above 1,400 second-feet shall be divided equally between the two countries.
>
> That the United States shall be entitled to all the water of Milk River during the months of January, February, March, August, September, October, November, and December of each year.
>
> That Canada shall be entitled to divert from the natural flow of Milk River to the present capacity of the Canadian Milk River Canal, agreed upon as being 330 second-feet, during the months of April, May, June, and July in each year, subject to the rights of appropriation from the Milk River within the territory of the United States, as existing at the date of the Canadian Company's appropriation on Milk River (Oct. 23, 1902), and now being judicially determined by the courts of Montana.
>
> That the natural flow in the Milk River during the months of April, May, June, and July in each year in excess of the amount of 330 second-feet, together with the amount required as above by the appropriations in the lower valley, shall be divided equally between the two countries.

I invite your attention particularly to this proposition made by Mr. King, because there was an effort made to divide the water by giving one or the other party the larger share of the water during

certain months; the Americans to have the larger share of the Milk River during the irrigation season, and the Canadians to have the larger share of the St. Mary River during the irrigation season; the Americans to have the larger share of the St. Mary during the winter, or during the storage months, and the Canadians to have the larger share of the Milk River during the winter season, the storage months. But, as you will find later, that proposal was abandoned as impracticable; they were not able to agree upon how the division was to be made. Of course, each country wanted the water in the irrigation season rather than in the storage season.

Then passed several communications of no particular importance, as I view the matter, when Mr. Newell submitted a rather complete statement of the entire controversy, and some observations in relation to the thing. That is found on page 85. I shall not take time to read it all; much of it is historical in character. I ask you, however, to follow me in what he says at page 88, "Plan of 1905."

The principal feature of the plan of November 11, 1905 (sent to Hon. James Bryce June 15, 1907), is the equal division of available waters. To define or regulate this distribution certain rules are suggested; these are subsidiary to the general scheme of equal share. This is regarded as extremely liberal, as nearly all the waters arise in the United States. In return for protection of an equal share of the flow the United States suggests that Canada give safe conduct down Milk River for the share of stored water falling to the United States. Unfortunately, the privy council minute of March 2, 1908, seems to indicate that Canada is not satisfied with this proposition based on equality. It is not believed that any proposal to give Canada more than half the water can be entertained, although the details as to how this half may be ascertained are open to discussion.

You will observe what was in Mr. Newell's mind, that the idea of awarding Canada, under the terms of the treaty, anything more than one-half of the water available was not to be entertained at all. He goes on:

The fact that the Dominion Government took upon itself the determination as to how the waters should be used without consulting the United States and that it has attempted to dispose of the waters of Milk River which rise in the United States and pass through a part of Canada, has aroused a very deep feeling. This is steadily aggravated by the fact that Canada is permitting the tributaries of Milk River to be diverted, namely, West Fork or Willow Creek, North Fork or Battle Creek, Frenchman Creek or White Water, and Rock Creek, in spite of the fact that these waters have been appropriated under the laws of Montana and already put to beneficial use.

Mr. CLARK. These streams all cross the boundary line?

Senator WALSH. These are all streams that cross the boundary line.

Mr. TURNER. You will notice that in the very first paragraph of his memorandum, Mr. Newell speaks of these as international waters.

Senator WALSH. He says:

The following notes have been prepared to review the fundamentals and to facilitate discussion leading to a clearer understanding of the problems presented by the international features of the St. Mary and Milk Rivers in northern Montana and southern Alberta.

Well, Mr. Newell concludes his communication by submitting a counter proposal, which is found at the bottom of page 90.

Sir WILLIAM HEARST. Are there any other tributaries than those mentioned, and which you have just read to us, that the United States claim should be taken into consideration?

Senator WALSH. The United States claims that every tributary, large and small, sir, which crosses——

Sir WILLIAM HEARST. But are there any others of importance than those which have been mentioned?

Senator WALSH. I do not believe there are any of very great importance.

Sir WILLIAM HEARST. From a reading of the record, I could not find any others. That is what I wanted to be clear about.

Senator WALSH. Here is the North Fork [indicating on map]. Here is Frenchman River and here is Cottonwood Creek; I think that is not mentioned. This is Battle Creek; that crosses the line. Lodge Creek is not mentioned there; it crosses the line; Lodge Creek is not of very considerable importance.

Sir WILLIAM HEARST. Are these all in Saskatchewan, or are they in Alberta?

Senator WALSH. Lodge Creek is in Alberta and Frenchman Creek and Cottonwood Creek and the North Fork are in Saskatchewan.

Mr. Newell makes this counter proposal.

Referring back to proposal No. 2, it is assumed that the Canadian St. Mary Canal has now a capacity of, say, 385 second-feet of water, which it is putting to beneficial use. Calling this 400 second-feet, this may be considered a prior appropriation which is now earned. Let this amount be conceded, and after this is assured let the United States have an equal amount. Then Canada take, say, 200 or 400 second-feet more, and the United States an equal amount, and so on until the available flow is absorbed, by recognizing the rights first of Canada and then of the United States to an equal amount. This will protect the prior rights in Canada in the same way that proposal 5 protects those on Milk River in the United States.

Thus we see the start of the proposal to give to Canada priority in the St. Mary's water and to the United States a priority in the water of the Milk River.

Mr. POWELL. That idea is broached before, but in different language. That is meant by "vested rights."

Senator WALSH. "Do not disturb vested rights." That was found also in Mr. Root's communication.

Now, I call your attention to the reply of Mr. King to that, which will be found on page 91, especially to the concluding portion of it. He says:

The principle of equal sharing of benefits, with compensation by quantity of water, suggested by the undersigned, doubtless has a disadvantage in depending for its application upon agreement as to details.

That refers to the attempt to divide the waters by months, so as to have the benefits shared equally in that way. Then he goes on:

A principle which is free from this objection and is, moreover, a simple one, is that of equal division of water on the boundary streams (each country providing for its existing interests out of its share of the water)-

That is, dividing the thing equally, and you will observe that he says, "the boundary streams."

Now, "boundary streams" really means, I suppose, those streams which form the boundary, like the Niagara River, but undoubtedly the words "boundary streams" as used here must mean the streams which cross the boundary line. These were the streams that Mr. King had in mind. He had not in mind any other streams; he had not in mind any other tributaries at all, because his language is perfectly plain with respect to that. I quote further from page 92:

Mr. Newell appears to prefer this principle, though he does not state definitely that he accepts it as a guiding one, and some of his suggested amendments to the proposal

of May 1 do not accurately accord with it. A similar objection lies against the draft treaty, which purported to be based upon the principle of equal division, but in its details did not well provide for carrying it out in practice.

Mr. MACINNES. Surely that paragraph which you have just read, "A principle which is free from this objection," is shown to be an alternative to the proposition contained in the paragraph—which I am not sure that you read—beginning with the words, "The central idea."

Senator WALSH. Well, that is the statement which he makes, "a principle which is free from this objection." There is no trouble about details now at all; just a flat proposition to divide the water equally—whatever water there is available in the boundary streams.

Sir WILLIAM HEARST. Is that not an entirely new principle which he is suggesting? He refers to "a principle which is free from this objection"—free from the objections to the proposals which they had been discussing before.

Senator WALSH. It had been proposed to utilize the waters by dividing them so that the storage season should have one division, and the irrigation season another—and a division should be made upon a different line. Now, there is introduced into the record another important document, being a draft by Mr. Campbell.

Mr. CLARK. Who is Mr. Campbell?

Senator WALSH. That has never been made entirely clear.

Mr. MAGRATH. He was an official of the Canadian Irrigation Department.

Senator WALSH. He submitted the following draft, which is found on page 93:

In all such streams which cross the international boundary, the waters of which are used for irrigation, each country shall be entitled to the use of half the total natural flow as ascertained by measurement at the point or points where such streams cross the international boundary.

Now, you can not get away from that position. Mr. Campbell was not introducing any new idea about this matter. As I shall show you later on, he was just endeavoring to concentrate and to codify the ideas that had been advanced from time to time in relation to this matter and to put them in the form of a draft. He really was not advancing any new ideas of his own; he was not proposing something that nobody had ever thought of before, and that had not been a matter of discussion. He was simply following along the accepted lines, and, wherever diversities of mind had existed, to settle these by a draft made in this way. He was merely expressing what all had expressed before, without the particularity which he deemed it advisable to observe, in order that controversy might be obviated.

Sir WILLIAM HEARST. You contend, then, that the previous negotiations referred not to the St. Mary and Milk Rivers but to all streams?

Senator WALSH. Of course, the St. Mary and Milk Rivers were the only ones that were in mind.

Sir WILLIAM HEARST. But is there not a clear change of proposition here to deal with all streams that cross the international boundary anywhere?

Senator WALSH. Although Mr. Campbell does use general language, I should say that the Milk River and the St. Mary River were the subject of the negotiations. Although the language might have been general, it was restricted by that.

Sir WILLIAM HEARST. Your contention is that "all streams" simply means the St. Mary River and the Milk River?

Senator WALSH. Yes, sir; and their tributaries.

Mr. POWELL. "Tributaries" is there by necessary implication.

Senator WALSH. Certainly. A tributary is a stream, and the stream crosses the international boundary line.

Mr. POWELL. Then it is put beyond all question by the definition of natural flow which follows the paragraph that you have read:

"Natural flow" means the flow of each river system from all its sources which would pass the point or points indicated herein.

Senator WALSH. I wanted to call attention to that, because it is not original with Mr. Campbell; he takes it from the draft originally made by Mr. Root. He adopts the very language of Mr. Root's draft, in which "natural flow" is defined. Let us go back to that. I read from Mr. Root's draft on page 65:

The term "natural flow" as used herein is to be understood as the flow of the river system in question which would pass the point or points specified if no artificial structure had been placed in the stream channel and if no water had been diverted from or turned into it. Such natural flow shall be determined by the commission provided for in paragraph 14.

The point I am making is that Mr. Campbell has just picked up the various suggestions in the drafts that have gone before and has endeavored to put them in a form which would be acceptable.

I read further from Mr. Campbell's draft:

"Natural flow" means the flow of each river system from all its sources which would pass the point or points indicated herein if no artificial obstruction had been placed in the stream or any of its tributaries or sources and if no water had been diverted from or added to the flow before reaching the point or points indicated.

(2) The determination of the natural flow, the measurement of the water to be shared, the method of delivery or distribution of the share of each country, the regulation of the carriage of stored water, and any and all other matters relating to the distribution of water used for irrigation from streams which cross the international boundary shall, in so far as they affect the interests of both countries, be subject to the control and regulation of the commission.

Now, I do not find in the record, if your honors please, any protest on the part of the Canadian authorities that they would not stand for that at all or that that was not in entire conformity with their ideas of what should be done. It is accepted as in entire conformity with the negotiations as they have so far progressed.

Mr. MACINNES. That is, Mr. Campbell's letter?

Senator WALSH. Yes.

Mr. MACINNES. There is nothing whatever said in that letter as to prior appropriations.

Senator WALSH. I did not mean to say that Mr. Campbell's draft included every suggestion that had ever been made. I am contending that he picked up propositions which had theretofore been advanced and put together those which he thought ought to go together to make up an agreement. He was not advancing any new and independent and theretofore unthought of ideas; he was simply following out the lines which had been theretofore pursued.

Then, paragraph 5 of Mr. Campbell's draft says:

5. The failure of either country to fully exercise the right agreed upon to have the total natural flow of streams which cross the international boundary or the use by either country of more than its share shall not add to or diminish the right of either country.

That is also from Mr. Root's draft. On the very same day Mr. Newell made a draft, which is found on the same page:

DECEMBER 29, 1908.

That the waters of each stream flowing across the international boundary shall be divided equally in quantity as nearly as practicable between the two countries; that is to say, the waters of St. Mary River and its tributaries crossing the international boundary shall be measured as they cross the boundary and an equal amount apportioned to each country, due allowance being made for the quantity stored above the point of measurement in reservoir or reservoirs constructed by the United States; also the waters of the north and south branches of Milk River shall be measured where they cross from the United States into Canada, and the main Milk River and its tributaries measured where they cross from Canada into the United States, allowance being made for any water diverted or stored in either country before reaching the points of measurement.

Mr. POWELL. That draft of Campbell's has always been a great source of trouble to me. It is headed "Draft by R. H. Campbell," but I have been in doubt whether it is not simply taken by Campbell from Root's views. You see, if that were a proposition coming from the Canadian side, it almost looks as if the United States should have jumped at it, because it does just exactly what they had been advocating.

Sir WILLIAM HEARST. Oh, no; it provides for no prior appropriations, the very thing the United States were insisting on.

Mr. CLARK. Were we not informed that certified copies of the Canadian records had been furnished to the Commission?

Mr. POWELL. Yes.

Mr. CLARK. Would that not appear in those?

Mr. POWELL. I am speaking of it from the Canadian aspect.

Mr. CLARK. I was wondering whether we could not identify that in some way from the records.

Mr. POWELL. Canada is the gainer by the prior appropriations, because she would have three-quarters of the waters of these streams as a prior appropriation. I have always been of the opinion that this proposal is simply a kind of embodiment or compend of Mr. Root's views, with some modifications. Otherwise, if I had been in Mr. Newell's position, I would have jumped at that proposition.

Mr. MACINNES. Mr. Campbell's memorandum of December 29 is an elaboration, as it would seem clear from the records, of the alternative principles suggested in the latter communication of Mr. King on the preceding page, beginning:

A principle which is free from this objection, and is, moreover, a simple one, is that of equal division of water on the boundary streams—

as distinct from the propositions which he had been discussing with Mr. Newell, which are set out in the previous paragraph on the same page:

The central idea of the proposal of May 1, 1908, was a balancing of benefits and concessions while making provision for existing appropriations.

It goes on to say:

To this was added the right to the United States to use the channel of Milk River through Canada for the passage of their share of the water of St. Mary River.

Now, not having been able to agree on that, Dr. King suggested a clear-cut proposal with nothing else attached to it as to prior appropriations, and as to any right to use the channel, etc., and that is

embodied at greater length in Mr. Campbell's document, which does not, I submit, correspond with Mr. Root's document at all, but with the simple proposal suggested by Dr. King at the end of his letter.

Senator WALSH. That part of it seems to be not at all improbable, Mr. King having stated the general principle which in his judgment ought to control. Mr. Campbell, his solicitor, makes this draft, picking up the ideas which theretofore had not met with any particular opposition, and making the distribution equal as provided in the first section. But my point is that Mr. King did not protest against the act of his solicitor in confining the waters exclusively to those which crossed the international boundary line.

Sir WILLIAM HEARST. No; because Dr. King had suggested it.

Senator WALSH. Had suggested it himself. You will observe that he says:

> A principle which is free from this objection and is, moreover, a simple one is that of equal division of water on the boundary streams.

Mr. CLARK. "Each country providing for its existing interests out of its share of the water."

Senator WALSH. Each taking half.

Sir WILLIAM HEARST. That was in the proposal by Dr. King?

Mr. CLARK. Yes.

Senator WALSH. Now, to return to Mr. Newell's draft; I have read the first paragraph.

Mr. POWELL. Was that really a proposition from King or was it merely an observation? I have regarded that remark as an observation made by King that if you are going into this complicated arrangement, you would bring about the result in a much simpler way by merely dividing the water. Because, if you take that as a proposition from King, it gives away the Canadian contention there.

Mr. MACINNES. Oh, no.

Mr. DAVIS. In the next paragraph Mr. King says that Mr. Newell appears to prefer this principle.

Mr. POWELL. What is bothering me is this, that the proposition here made is more advantageous to Canada than what has worked out eventually. Whoever accepted that on behalf of the United States would be hoisting himself with his own petard.

Sir WILLIAM HEARST. But last year Canada did not get a drop of water out of the Milk River. It would have under this proposal.

Mr. POWELL. But there was no water there to get.

Senator WALSH. Mr. Newell evidently did prefer the principle, because he adopted exactly the same thing in his draft of December 29.

Sir WILLIAM HEARST. Oh, no; he comes back to prior appropriations, which Dr. King and Mr. Campbell wanted to get away from.

Senator WALSH. I am speaking of the draft of December 29, in which he says:

> That the waters of each stream flowing across the international boundary shall be divided equally in quantity as nearly as practicable between the two countries; that is to say, the waters of St. Mary River and its tributaries crossing the international boundary shall be measured as they cross the boundary and an equal amount apportioned to each country, due allowance being made for the quantity stored above the point of measurement in reservoir or reservoirs constructed by the United States; also the waters of the north and south branches of Milk River shall be measured where they cross from the United States into Canada, and the main Milk River and its tributaries measured where they cross from Canada into the United States, allowances being made for any water diverted or stored in either country before reaching the points of measurement.

However, that is a matter of no particular significance, because there is no controversy concerning priority at all; the controversy is touching the waters which they had in mind.

Sir WILLIAM HEARST. But there is a clear change in Mr. Newell's suggestion from the two to which we have just been addressing ourselves.

Senator WALSH. In what respect?

Sir WILLIAM HEARST. In that he specifically requires prior appropriations, whereas the one you have just been reading, from Mr. Campbell, says that each country is to take care of its priorities out of its own share.

Senator WALSH. You mean, "allowance being made for any water diverted or stored in either country before reaching the points of measurement"?

Sir WILLIAM HEARST. At page 94, Mr. Newell says:

A priority to the right to the use of a portion of the water of St. Mary River shall be recognized.

Senator WALSH. I was about to read that.

Sir WILLIAM HEARST. He is coming back to an insistence upon priorities.

Senator WALSH. I read:

A priority to the right to the use of a portion of the water of St. Mary River shall be recognized as appertaining to Canada to the amount of 400 second-feet, the amount now put to beneficial use: and thus, in the event of the natural flow of St. Mary River at the international boundary being less than double this amount—namely, 800 second-feet—then the United States shall waive for the time being its claim to the full equality of the natural flow during the irrigation season, as above defined, and shall permit a full flow of 400 second-feet to pass the boundary, providing this is furnished by the stream in its natural condition; that is to say, water shall not be allowed to increase in any reservoir or reservoirs constructed by the United States, but the entire natural flow shall be allowed to pass without storage or diversion through the reservoirs without accumulation therein until the stream yields at the international boundary 400 second-feet, but the United States does not assume any obligation to maintain this priority of 400 second-feet by means of water previously stored.

On the Milk River also, there shall be recognized as existing a priority in the United States to an extent of 359 second-feet of the natural flow of Milk River, and this amount of the natural flow shall be allowed to pass from Canada into the United States without diminution of the natural flow of the stream during the irrigating season, when the river and its tributaries yields this quantity or a less amount. Canada assumes no obligation to supply any natural deficiency in Milk River to maintain 359 second-feet, but shall divert no water when the flow falls below this amount.

After the priorities above described have been provided for, each country shall be permitted to divert water in excess of the priorities to an amount not exceeding one-half of the natural flow of the streams.

Then follows the draft from Mr. Gibbons, with his letter of December 31, at the bottom of page 94:

It is agreed that for the use of irrigation the St. Mary and Milk Rivers (in the State of Montana and the Province of Alberta) and their tributaries are to be treated as one stream, and the total amount that can be diverted from the two for such purposes is to be distributed so that each country shall have the right to one-half of the whole, but in the distribution more may be taken from one stream and less from the other by each country, so as to afford a more beneficial use to each.

Now, we find the language "in the State of Montana and the Province of Alberta." Two things are to be noted: First, that Saskatchewan is not included in that descriptive or qualifying language, and, second, that that qualifying language comes after the

word "rivers," not after the word "tributaries," as it is in the completed draft.

Mr. CLARK. Might not another object of that be to identify the St. Mary River in this particular locality, as distinguished from St. Mary River in other localities?

Senator WALSH. There would seem to be no occasion for that at all, because if that were the case, it would read, "St. Mary River in the State of Montana." There may be some other St. Mary River, but there is no other Milk River. Clearly, it is not language of identification; it is language of qualification. This draft says:

> It is agreed that for the use of irrigation the St. Mary and Milk Rivers (in the State of Montana and the Province of Alberta) and their tributaries are to be treated as one stream, and the total amount that can be diverted from the two for such purpose is to be distributed so that each country shall have the right to one-half of the whole, but in the distribution more may be taken from one stream and less from the other by each country, so as to afford a more beneficial use to each.

Mr. Gibbons does not describe these waters in his draft as streams that cross the boundary. He does not go into details with respect to their being measured where the streams cross the boundary. Who is there that can doubt for a single moment that the streams that Gibbons was talking about and the division which he contemplated making were the same streams, the same divisions, that were contemplated, both in the draft of Mr. Campbell and the draft of Mr. Newell?

Sir WILLIAM HEARST. Senator Walsh, if that draft had become the treaty, you would still be making the argument that you are making to-day?

Senator WALSH. Exactly. Even if the qualifying language "in the State of Montana and the Provinces of Alberta and Saskatchewan" were not in here at all, then the construction of the treaty would be restricted and confined by the very matter that was under consideration and by the course of the negotiations between the parties.

Finally, we come to the draft by Mr. Gibbons, at the bottom of page 96, submitted sometime between January 1 and January 9, 1909:

> ARTICLE VI. It is agreed that for the use of irrigation the St. Mary and Milk Rivers (in the State of Montana and the Province of Alberta) and their tributaries are to be treated as one stream, and the total amount that can be diverted from the two for such purpose is to be distributed so that each country shall have the right to one-half of the whole, but in the distribution more may be taken from one stream and less from the other by each country so as to afford a more beneficial use to each.
>
> It is agreed that there exists on the part of Canada the right to a prior appropriation of 360 second-feet of the flow of St. Mary River during the irrigation season between the 1st of April and the 31st of October, inclusive, annually, and that there exists a similar right on the part of the United States to a prior appropriation of 360 second-feet of the flow of Milk River during the said irrigation season.

Then there are paragraphs referring to the use of the channel of the Milk River, and to the measurement of the water to be used by each country.

Now, another proposition comes from Mr. Anderson: "Original draft, C. P. A.," undoubtedly refers to a draft of Mr. Anderson, solicitor for the United States. I read from page 97:

> ARTICLE VI. It is agreed that each country shall have the exclusive right to one-half of the natural flow of the St. Mary and Milk Rivers and their tributaries, the amount thereof to be determined at the points of storage and diversion and at the boundary by measurements made jointly by the properly constituted reclamation

and irrigation officers on either side of the boundary; and the channel of Milk River in Canada may be used at the convenience of the United States for the conveyance, without interference—

Again we find this specific language introduced, the last is a telegram which suggests some changes in the entire treaty, none of which are important except those affecting Article VI. The telegram is from Mr. Gibbons to Mr. Anderson and appears at page 97. I shall read that part of it which relates to Article VI:

ARTICLE VI. Say "Provinces of Alberta and Saskatchewan—"

That change was made.

change name of the commission, leaving out the words "of the United States and Canada"; instead of "other rivers," say "the St. Mary River."

Mr. CLARK. I noticed from a reading of the record that quite a bit was said about the insertion of the word "Saskatchewan." It occurs to me that an explanation of that might be that these river systems had only been considered as far east as the point where the Milk River crosses into the United States. That far the Province of Saskatchewan entered into it in nowise. It was thereafter thought of that there were certain large tributaries coming down from the north through Saskatchewan, which also should be made the subject matter of this treaty.

Senator WALSH. It is not unlikely that their minds were directed to the main river, and that the tributaries perhaps had been in a way lost sight of, until the matter occurred to somebody.

Mr. CLARK. That simply occurs to me as a possible reason.

Senator WALSH. That is not at all unlikely. So I submit that during the entire course of these negotiations the idea now advanced by the Canadian Government was never even intimated upon either side. No one was contemplating the division of any waters whatever except those waters which cross the international boundary line, and no measurements anywhere were to be taken except at the international crossings.

Then, I repeat what was said before, that when the parties went to work to execute the treaty, they themselves gave to it a particular construction by proceeding to establish measuring stations at the international crossings, at the diversion and storage points, and nowhere else. No one ever thought of going down and measuring those tributaries which flow up north from the Bear Paw Mountains. Nobody ever thought of establishing a measuring station upon Peoples Creek, which rises in the Bear Paw Mountain district and flows into the Fort Belknap Indian Reservation, where there are large areas that are irrigated. Nobody had in mind the idea of establishing a measuring station down at the mouth of the Milk River. They did not proceed in that way at all, because they did not understand that the treaty required anything of the kind or permitted anything of the kind, or that the Commission had any power to establish stations at these points to determine anything about the value of water in that section. The practical construction given to a contract by the parties who are required to put it into execution is always regarded by the courts as a most persuasive consideration in determining what was the intention of the parties at the time the contract was entered into.

Mr. POWELL. That is on the ground of contemporaneous construction?

Senator WALSH. Contemporaneous construction; yes.

Mr. POWELL. In Mr. Gibbons's draft reference is made to the "right to a prior appropriation of 360 second-feet of the flow of St. Mary River during the irrigation season." Now, as a matter of fact, Senator, it is very rarely indeed that there are 360 feet there to get hold of during the irrigation season. The amount is away down below that.

Senator WALSH. That is quite true. I think that in any ordinary season 360 second-feet would more than exhaust the capacity of the river.

Mr. MAGRATH. What would be the object, Senator Walsh, of Mr. Gibbons's request for the inclusion of the Saskatchewan tributaries, if he felt that the waters that were under consideration were only those which crossed the boundary? I can not see what advantage would accrue to Canada by wiring to Washington to include "Saskatchewan tributaries."

Senator WALSH. My idea about it was that possibly it was thought that unless the Saskatchewan tributaries were included it might be contended that they fell without the scope of the treaty. In that event controversies would still go on between the appropriators in respect of those Saskatchewan tributaries in Canada and appropriators in the United States. The matter would then have to become the subject of another and separate treaty. Mr. Gibbons wanted that to be settled at the same time and included in the same arrangement.

Mr. MAGRATH. I would imagine that the telegram would come from the other side, because the contention would amount to giving up an interest in Canadian waters for the benefit of Montana users.

Senator WALSH. It would be giving up, of course, waters which rise in Canada and allowing them to go down to Montana users, but if the Saskatchewan tributaries were left out of the treaty they would still be the subject of negotiations. He recognized at once that if mention of them was left out of the treaty and the Saskatchewan settlers endeavored to divert all of the water of the Saskatchewan tributaries, of course the settlers in Montana would protest and the same course would have to be gone over again and another treaty negotiated adjusting the disposition of these waters, but probably on practically the same lines as this. That is my idea of what moved him to include the Province of Saskatchewan.

Mr. POWELL. This, too, may have been a controlling feature with him: Canada was on record as a supporter of this position: That in the case of water taking its rise in one country and flowing into another, the lower riparian State has the right to the flow in its natural condition, without diminution of its quantity or injury to quality. We had planted ourselves in that position as a matter of international law. If, therefore, the reference was left out altogether, the United States might claim the whole of the water that flowed down these streams. Of course this is all speculation as to what he had in mind.

Sir WILLIAM HEARST. Your view, then, is that the United States was not interested in having these tributaries included?

Senator WALSH. Undoubtedly it was. You will recall that settlers in Montana on these tributaries coming from Canada had protested

against the diversion of the waters of these tributaries in Canada, and that was one of the very things which brought about this treaty.

Sir WILLIAM HEARST. But they would not have been included but for this telegram——

Senator WALSH. The tributaries coming from Alberta would have been.

Sir WILLIAM HEARST. But the main ones were from Saskatchewan.

Senator WALSH. Well, I do not know whether the main ones were. Frenchman Creek is the largest.

Mr. POWELL. The United States' contention, as set forth by Senator Carter and followed by your jurists, was this: The United States had the right by virtue of sovereignty to control such participation in these waters as took place on its own territory. Canada, on the other hand, said in effect to the United States: "When you get together all the tributaries that flow north, we get the benefit of that decision reversed." In other words, the United States would be forced to base its claim on Canada's contention, and Canada, reserving to itself the right to use the waters of these tributaries for the purposes of irrigation, would have to adopt the United States' contention. In view of that, possibly they were attempting to settle the whole controversy by the one document.

Senator WALSH. I have very diligently searched the records for the purpose of ascertaining what part the representatives from our State had in the negotiations, but I have never been able to find any record of any such participation.

Mr. POWELL. I do not know whether Mr. Carter had any precedent, but that was his view.

Senator WALSH. I have hitherto been unable to ascertain what part they took in the negotiations.

Finally, I submit to the Commission that it is utterly impossible, upon any basis of justice, or even of reason, to do in this matter what is asked by the Canadian authorities, namely, to go down to the mouth of the Milk River, ascertain the total amount of water that is flowing in the river at the mouth, divide that by 2, and then come back to the international boundary line and give Canada one-half of the amount which is found at the mouth. Why, Canada would get it all; at all times she would get it all. There would not be anything for us. She would even invade our storage waters to get that result.

Mr. Commissioners, nothing of the kind is permissible at all. When you are talking about irrigation and about dividing the waters of these streams, you are talking about dividing the waters of the streams at the point at which they are available for purposes of irrigation, not somewhere else. If I were here in the city of Ottawa, endeavoring to promote an irrigation project in my State, to take out the waters of the Missouri River for the purpose of irrigating a large tract of land in that State and some one asked me how much water there is in the Missouri River, and I should tell him the amount of water there is in the Missouri River at St. Louis, for the purpose of irrigating lands in the State of Montana, I would be subject to arrest for obtaining money under false pretenses. Of course when he asked me how much water there was in the Missouri River he meant how much water is there in the Missouri River at the point at which you propose to divert. And so, if your honors please, when it is provided that the water of these streams is to be divided equally it means the

water in the streams at the place at which you purpose diverting the waters. You may not go away down the stream, determine the amount of water there, and then divide that by 2 and give to both parties the amount there found, because that is impossible. There is not, of course, any such quantity of water there.

Learned counsel for the Canadian Government submitted a brief in which he has endeavored to compute the amount of water in the Milk River. At page 48 of his brief he states that the Milk River at the eastern crossing carries 100,000 acre-feet——

Mr. POWELL. What does that mean in second-feet?

Senator WALSH. I can not say, but I suppose that means all the water——

Mr. DAVIS. It depends on the length of time involved.

Mr. POWELL. Well, say during the irrigation season.

Mr. DAVIS. I could compute it in my head in a few minutes. Two acre-feet every 24 hours, running for 100 days, would mean 200 acre-feet.

Mr. POWELL. Divide 100,000 acre-feet by 200 and you get——

Mr. DAVIS. Five hundred second-feet. That would be 1,000 acre-feet per day. One hundred days is about the length of the irrigation season in Montana.

Senator WALSH. That means, I take it, that during the entire season there flows by the Milk River crossing enough water to cover 100,000 acres during the irrigation season to the depth of 1 foot.

Now, in the same computation we are advised that the Milk River and tributaries, below the eastern crossing up to Hinsdale, or Vandalia, flows 350,000 acre-feet. That makes 450,000 acre-feet altogether in the river, one-half of which is 225,000 acre-feet which Canada would be entitled to at the eastern crossing, whereas the entire amount that flows through the whole year around amounts to only 100,000 acre-feet. So that the proposal is that we give Canada everything that flows past the eastern crossing the whole year around and give her, in addition, 75,000 acre-feet that we store in the storage basin at St. Marys. That is what you are asked to do, on the basis of the figures that are given here. Of course, you are not going to do it. There is no disposition, I am sure, upon the part of any commissioner to make any such distribution or to imagine for a moment that that was the purpose contemplated when this contract was made.

Mr. MAGRATH. Would you kindly repeat that? You contend that if the Canadian contention prevails you will get absolutely no water in the Milk River at the eastern crossing. And what did you say further?

Senator WALSH. Here are the figures. The Milk River flows at the eastern crossing 100,000 acre-feet. According to the brief filed by counsel for the Government of Canada, the Milk River and tributaries below the eastern crossing up to Hinsdale, or Vandalia, flow 350,000 acre-feet annually. So that the flow of the entire river—that which accumulates in its upper stretches and that which accumulates in its lower stretch—amounts to 450,000 acre-feet, and the contention is that Canada is entitled to one-half of that, 225,000 acre-feet, in her territory, which is at the eastern crossing. In other words, you may take out of the river at the eastern crossing 225,000 acre-feet, while the natural flow is only 100,000 acre-feet, so that you

take out 125,000 acre-feet of the stored water, in order to make up your entire quota at the eastern crossing.

Sir WILLIAM HEARST. That is not the result, Senator Walsh, as I understand it, from reading the reports of engineers for the last two years.

Senator WALSH. Well, the computation is here. I do not know what it is based upon.

Sir WILLIAM HEARST. I understand you make the statement that the effect of the Canadian contention would be that the United States would get nothing from the river and would still be indebted to Canada?

Senator WALSH. On the basis of Mr. MacInnes's figures.

Mr. MACINNES. They were prepared, of course, by the engineers, Mr. Commissioner.

Senator WALSH. It does not make any difference whether you accept these figure or not; you can see that the result must necessarily be so every year. That is, if you ascertain the amount of water there is at the mouth of the Milk River, being the entire accumulation of all these tributaries, divide that in two, then go away up the stream 200 miles and attempt to divert one-half the amount that you have down at the mouth, you are going to exhaust that stream. There is no question about that; it does not make any difference whether the season is dry or wet. The specific figures I merely use for the purpose of illustration, but anybody can see that under that contention Canada gets the entire water of the Milk River.

Mr. POWELL. You would have the 500 second-feet prior appropriation.

Sir WILLIAM HEARST. I understood that the United States, in the practical working out of the thing, got every drop of water from the Milk River and some from the St. Mary.

Mr. MACINNES. Exactly.

Sir WILLIAM HEARST. I may be wrong as to that.

Senator WALSH. The United States has, of course, a priority to the extent of three-quarters of the stream up to the 500 feet. But I was going to say in conclusion, if you please, Mr. Commissioners, that wherever you measure the stream, there, of course, the water must be taken out. If you are to measure the water at the mouth of the Milk River, and if there are any means whatever by which Canada can get her water there, then she is entitled to one-half of that water. That would be reasonable enough. The point I make is that wherever you compute the amount of water in the stream, that is the place where diversion must occur. Of course, it never was contemplated that Canada should go down here within American territory for the purpose of diverting her waters. How can you contend that you can go to the mouth of the Milk River for the purpose of computing the amount of water there is there, and then go back 200 miles up the stream for the purpose of diverting it into Canadian territory? I repeat, if you measure the water at any point in the stream, it is at that point that you must make the diversion. If, under the terms of the treaty, you can not make the diversion at that point, it follows, of necessity, that that is not the point at which the measurement must be made.

Mr. POWELL. Just at that point, are you not confusing—I am only asking the question—two things, one the theoretical marshaling of the water, which is entirely independent of where you make the diversion, and the other the physical diversion that you make? It is not necessary, is it, that you make the physical diversion at any one particular point?

Senator WALSH. Perhaps, stated in another way, it might be said that it is a mere method of computation as to the amount of the water which you can divert.

Mr. POWELL. Exactly; that is the other view.

Senator WALSH. But it amounts to the same thing, because we are forbidden to take computations down at the mouth of the river, with a view to determining the amount that could be, or that should be, diverted 200 miles up the river. That would be entirely unreasonable. That anybody should think of going there for the purpose of computation is utterly beside the question. You might just as well say we will determine the amount of water there is at the mouth of the Marias River and then divide that by two, in order to arrive at the amount of water to be diverted into Canadian territory. There is no reason why one should be taken as a basis of computation more than the other. I submit, then, that with regard to the plain language of the treaty, you can consider only those streams and tributaries that are at one and the same time in the State of Montana and in either Saskatchewan and Alberta. In other words, the language of the treaty itself is the basis of our contention with respect to the matter.

Secondly, having regard to the negotiations of the parties, no other conclusion can justly or reasonably be arrived at than that the parties intended to divide only the water that flowed across the international boundary line, and that those were to be divided equally in amount as they flowed across the international boundary line, priorities alone excepted. Thirdly, the parties themselves gave a practical construction to the treaty by establishing measuring stations at the places at which they were constructed, and fourth, it is utterly impossible to carry out the contention that is urged here, in fact it would be unreasonable—indeed absurd—to attempt to do so.

Mr. POWELL. You are speaking of contemporaneous exposition or construction. Here is a note on the treaty, made, I think, immediately after it was passed, by Mr. King, the astronomer from Canada, in which he puts forward this very view, rather detracting from your principle of contemporaneous construction.

Senator WALSH. I failed to note that, Mr. Commissioner.

Mr. POWELL. That is in the record, is it not—Mr. King's memorandum on the treaty?

Mr. TURNER. I myself failed to note it.

Sir WILLIAM HEARST. It is in the official documents; it is not in the record.

Mr. POWELL. I know I read it somewhere.

Senator WALSH. I have no recollection of having seen it.

I thank you, Mr. Commissioners, most cordially.

(The Commission adjourned at 5 p. m., to meet to-morrow morning at 10 o'clock.)

OTTAWA, *May 4, 1920.*

The Commission resumed this morning at 10 a. m.

Mr. MAGRATH. Now, gentlemen, we will proceed with the reargument of the St. Mary and Milk Rivers case.

Mr. GARDNER. Mr. Chairman, in order to remove any misapprehension that may exist with respect to the reargument of this case, I want to say that this meeting is being held entirely on the initiative of the Commission, and that no other agency or influence has had anything whatever to do with the matter. I think the attorney for the United States will bear me out in saying that he knew nothing about any contemplated hearing until he was notified that a date had been fixed.

Mr. TURNER. That is so.

Mr. MAGRATH. I am quite satisfied that the Canadian members are not under the impression that this hearing is the outcome of any representations made by the Government of the United States. The first intimation we had of this meeting was at Buffalo, when a member of the United States section stated that he understood there was to be a reargument of this case. Then the matter came forward as I explained yesterday.

Mr. TURNER. The first suggestion of this hearing was at a meeting of the Commission in New York, when an order was made that as soon as the personnel of the Commission was completed this case and the application from the New York & Ontario Power Co. would be taken up at the first meeting in Ottawa. I presumed, therefore, that the matter would be set down for hearing in this city.

Mr. MAGRATH. As the question has been opened up, I may say that the first intimation I had of this reargument was at Buffalo in March last, when a statement was made that a request had been received from the settlers in the Lower Milk River Valley suggesting that as there were two new members of the Commission, it would be desirable to have the case reargued. I do not think any reargument was considered at any previous meeting because the case had already been argued twice. However, that is a matter of no moment now, as the Commission is pleased to have the question thoroughly thrashed out.

Mr. King, will you proceed.

Mr. KING. The statement I refer to is by Mr. William Howard Taft, ex-President of the United States, and as it coincides with the views which I have expressed heretofore, I would like to have it entered in the record.

Mr. TURNER. If you can make that part of your argument, I presume it may go in.

Mr. MACINNES. I submit that that would depend on whether it is material which is in the nature of argument, or whether it is something in the nature of evidence. Of course, in the latter case it would require an answer, and should have been dealt with when this case was being heard, and not during argument.

Mr. KING. Mr. Chairman, all I have to say in reply is that this article was printed before I made my argument at the previous hearing, but I had not read it. It coincides with my views on the authority of the United States to enter into a treaty which might conflict with the Constitution. That is to say, I take the position now, and I took it before, that in interpreting a treaty entered into by the United

States we must take into consideration the fact that the Government would not enter into any treaty that is an open violation of the Constitution. Mr. Taft, in a lecture to the Columbia University, laid down certain principles to the effect that the Government of the United States could not enter into a treaty that could not be revised by a majority of Congress. In other words, he laid down the principle that Congress could enact a law which would abrogate or amend a treaty, and the fact that Congress has that power should be taken into consideration in determining what the United States intended to do when it entered into a treaty with the Government of Canada. Therefore, I want to cite that as I would cite a decision of the Supreme Court of the United States, and I refer to it for that purpose only.

Mr. MAGRATH. Go ahead, then, Mr. King.

ARGUMENT BY MR. WILL R. KING, COUNSEL FOR THE RECLAMATION SERVICE OF THE UNITED STATES.

Mr. KING. I think Senator Walsh covered this subject fully, and that it is unnecessary for me to add anything to his argument.

When we take into consideration the treaty-making rights of the United States, we must also consider that it can not be presumed that the Government would perform an act which it has no power to perform under the Constitution. Senator Walsh stated the facts to this honorable Commission, and he presented them as to a jury. But when we get back to the real proposition, we must take into consideration the authority upon which the Government of the United States may act.

Mr. MAGRATH. Excuse me a moment, Judge, in view of what you have said, I see no reason why you should not read the document.

Mr. KING. Now, having the same high regard for Mr. Taft as Mr. Commissioner Powell has for Alexander Hamilton, I want to read what Mr. Taft had to say on the fundamental principles upon which we are now to consider this treaty. This article appeared in the Literary Digest of last month, and proceeds as follows:

> Under our Constitution the treaty-making power is much more important than under the constitution of any other country, according to Mr. Taft, who points out that in so far as its provisions are to operate a treaty of the United States is "a law in the United States exactly as a statute of Congress is a law in the United States," and he proceeds:
>
> "A treaty operates both as a binding contract with a foreign nation and as municipal law. As a contract binding upon both parties, it can not be made to lose its obligation by a refusal of either country to perform it. It is thus broken, but the party injured by the breach has in international law a right to damages from the party breaking it. If Congress passes a statute inconsistent with the treaty, while it breaks the treaty it repeals it as municipal law. It does not relieve the Nation from its moral and international obligation to make good the breach by damages or otherwise, but it does change the law which binds the officers, citizens, and others within the governmental jurisdiction of the United States to comply not with the treaty, but with the law which abrogated it. This was the effect of the decision of the Supreme Court in the Chinese cases. Under our treaty with China certain classes of Chinese were entitled to come into the country. Congress desired to exclude many of the classes thus entitled and passed a law doing so. The law broke the treaty, but the immigration officers, the courts, and all persons within the territorial jurisdiction of the United States were obliged to conform to the act of Congress, and to exclude those Chinese who had the right to come in under the treaty, but were forbidden to do so by the subsequent law."

That is to say, it requires two-thirds of the Senate and the President to make a treaty, but a majority of both Houses of Congress

can repeal that treaty so far as it is inconsistent with the Constitution. I remember when I argued this matter two and a half years ago the members of this Commission were much surprised at my statement that we could make a treaty by two-thirds of the Senate, and yet we could repeal it by an act of Congress.

Now then, what has that to do with this case? And I see that question in the expressions of some honorable members of this Commission. It has this to do with this treaty: That we can make a treaty between our two Governments, and yet the next day Congress can repeal that treaty. That goes to the question of what was intended by the treaty-making power of the Government of the United States. It may be asked: What does intent have to do with the case? I answer, that it goes to the interpretation of this treaty; in other words, we have to ascertain what was intended by this treaty.

I do not want to again go into the facts that were discussed so thoroughly by Senator Walsh when he covered that question, for I am assuming that this honorable tribunal appreciated what he said yesterday when discussing those facts. I am trying to deal with the fundamental principles which govern the treaty-making body that made this treaty.

Now, what power had that treaty-making body? A stream can not rise higher than its source. Viscount Bryce, in his well-known work on the American Commonwealth, discusses the Constitution of the United States as distinguished from the British constitution. And I want to impress upon your honors that Viscount Bryce is one of our greatest living authorities on the subject. He states:

> In England and in many other modern States there is no difference in the authority between one statute and another. All are made by the legislature; all can be changed by the legislature. What are called in England constitutional statutes, such as Magna Charta, the Bill of Rights, the Act of Settlement, the Acts of Union with Scotland and Ireland, are merely ordinary laws which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower the duty on tobacco. The habit has grown up of speaking of the British constitution as if it were a fixed and definite thing. But there is in England no such thing as a constitution apart from the rest of the law; there is merely a mass of law, consisting partly of statutes and partly of decided cases, and accepted usages, in conformity with which the government of the country is carried on from day to day, but which is being constantly modified by fresh statutes and cases. The same thing existed in ancient Rome, and everywhere in Europe a century ago. It is, so to speak, the "natural," and used to be the normal condition of things in all countries, free or despotic.
>
> The condition of America is wholly different. There the name "Constitution" designates the particular instrument adopted in 1788, amended in some points since, which is the foundation of the National Government. This Constitution was ratified and made binding not by Congress, but by the people acting through conventions assembled in the thirteen States which then composed the Confederation. It created a legislature of two Houses; but that legislature, which we call Congress, has no power to alter it in the smallest particular. That which the people have enacted, the people only can alter or repeal.

Viscount Bryce there demonstrates that our system of making laws is entirely different from that of England. And I would like to call the attention of this honorable Commission to that fact, for the reason that I want to impress upon your honors something which can not be ignored; that the United States has a different system of law making from that of any other country in the world. Canada or Great Britain can amend their laws from day to day; but we can not

amend the Constitution of the United States without conforming to the requirements of that Constitution.

I will give a concrete illustration. It might be said: We can elect three Senators for any State. But that can not be done, unless we amend the Constitution by a three-fourths vote of our State legislatures. And, conversely, we can not deprive any State of its representation of two Senators without the consent of that State. We can not take away the representation which a State is entitled to under the Constitution, even though we get the consent of 47 States of the Union.

It may be asked: What bearing has that upon this question? In my view it has this bearing, that we must keep in mind that the treaty-making power of the United States Government is not intended to violate any provision of the Constitution. Under that treaty-making power we can not, for instance, transfer any State to Canada, nor can we transfer to Canada the right of any citizen of the United States. I see from the expression of the various honorable members of this Commission, that they think otherwise; but they are wrong.

As Senator Walsh said yesterday, you can not take the property of Montana and transfer it to Canada. It follows that since the treaty-making power is presumed to comply with the Constitution, and is not presumed to perpetrate any fraud upon its own Government, that in interpreting this treaty your honors have to consider certain things. You will have to take into consideration that the Government of the United States never intended to give to Canada any of the property of the State of Montana, because our Government never intended to violate the Constitution. I hope I have made myself clear.

I might elaborate that argument by stating that our Government could not say: We will take the water of these tributaries below the line and divide it with Canada. They could no more do that than attempt to divide the water of the Gulf of Mexico with Canada. And it would be equally as preposterous as for them to attempt to divide with this country the waters of the Atlantic Ocean. The very absurdity of such attempts demonstrates the fallacy of the contention of counsel representing the Government of Canada.

Now, Mr. Chairman, pardon me when I say that I can not quite understand why the United States Government should be required on this occasion to state its proposition in advance of the contention of our Canadian friends. I do not in any way question the good intentions of everyone concerned, but, as I say, I can not quite understand the position. The contention of Canada, carried to its logical conclusion, amounts to taking the waters of the Gulf of Mexico and of the Atlantic Ocean, measuring their volume by acre-feet, and saying, we will divide it equally between the United States and Canada. I do not think such an argument was intended to be put forward, but that is what it amounts to. If we are going to argue this case as a purely technical literal proposition, and say that the tributaries of these two streams shall be divided equally between the two countries, then, gentlemen, let us proceed on that basis. What does it mean? It simply means that the United States will not get any water, with the result that the area to be irrigated would remain perpetually dry.

Taking the ordinary rules of construction, will any man argue that such a condition of affairs was intended by the treaty between the two countries? I say no. As Senator Walsh demonstrated yesterday, that was never the intention of either party to the treaty. It will be contended by counsel for the Government of Canada that the treaty must be taken and construed as a whole. Well, if we construe the treaty according to the rules of construction, what do we find? The only conclusion that can be reached is that the treaty is nothing more nor less than a contract. It must be construed so that every word shall be given some meaning. In other words, we must construe that treaty so that it means something, not that it means nothing.

What was the purpose for which the treaty was entered into?

Mr. POWELL. Before you take up that branch, Judge King, allow me to put a question. Does not your argument, when pushed to its logical conclusion, go further than you intend? If the United States, according to your view, owns the water absolutely in the St. Mary River, would not the whole treaty, so far as the St. Mary and Milk Rivers are concerned, be absolutely unconstitutional?

Mr. KING. I do not quite catch your point.

Mr. POWELL. If the United States, by virtue of its being the source of the St. Mary River, owned the water in that river, what right would the United States have to hand one-half of that river over to Canada, if your argument be correct? What distinction is there in principle between the Milk River below and the St. Mary River above?

Mr. KING. Well, your honor, as I said yesterday, I was asking Senator Walsh on the quiet as to what was the international law on the point. Assume that we could dig a canal and take all the water, what is the international law on that subject? His answer was something like this: International law is nothing more than justice and equity. So that when you come to figure that out it is a matter of justice and equity between nations. Senator Walsh criticized me somewhat, and probably justly, for some insinuation in my former argument where I intimated that we might take all the water regardless of the wishes of Canada. But I did not mean that. I meant that so far as international law is concerned we could take all the water of the St. Mary River and divert it to the Gulf of Mexico; but, as a matter of international law, we must admit that equity would prevent us from taking such action. We could spend $10,000,000 to $20,000,000, as Mr. Roosevelt suggested, and divert that water to our side of the line; but, of course, we will not do so, and it was never intended that we should do so. I do not know whether I have answered the question put to me by the honorable commissioner.

Mr. POWELL. The United States, by the Ashburton or Webster treaty, took away a certain portion of the Aroostook territory from the State of Maine.

Mr. KING. Mr. Commissioner Gardner consented to that.

Mr. POWELL. He was not in active politics at the time.

Mr. GARDNER. I was settling an international controversy that was unsettled.

Mr. KING. If it had not been for men of the type of Commissioner Gardner we would not have been able to do it.

When we get down to the real meat of the coconut it is a question of equity between nations.

Mr. POWELL. All right.

Mr. KING. And when we get down to that we are on the basis of international law, as Senator Walsh advised me yesterday.

I am afraid I am wandering away from the subject. Getting back to my argument, what I wanted to make clear was that we must keep in mind what we can do under our Constitution, and that is a matter of what was intended to be done by the treaty-making power of this country. If under our Constitution we can not make a treaty with you to take away the water rights of the citizens of the State of Montana, then it should be very clear that it was never intended we would do so.

I want to make one further remark in this connection. So far as the Reclamation Service of the United States is concerned, which service I assume to represent, there is quite a distinction between representing that service and the private rights of the citizens in Montana. Since we can not take away the property of the citizens of that State and give it to Canada, it must be assumed that the treaty-making power never intended to give that property away.

But take the Reclamation Service of the United States. What does it do in the performance of its functions? In our sovereign capacity we can not take away the property of one person and give it to another. We merely represent the citizens on the south side of the divide. We go into Montana, or Wyoming, or any other State, and we simply say, we are going to build you a reclamation service. We do not pretend to take away the property of anyone; we simply say, we are acting as a quasi agent, and we will build you this service, for which you will pay the bill. That is all there is to it.

By the way, let me divert from my argument for a minute and say something upon which the Senator from Montana and I do not quite agree. We disagree, of course, good naturedly. I do not quite agree with a member of the Commission, who I see is listening very attentively to me; I do not quite agree with a good many people. The fact is, the more people that disagree with me the better I like it, because then I think they have some respect for me. I do not agree that the State of Montana, the State of Wyoming, or any other State owns the waters that fall on the watersheds. That matter is now pending before the Supreme Court of the United States. But it does not make any difference whether we agree or not, we reach the same conclusion in this case. However, for fear of being misunderstood, I desire to mention that.

As I say, I do not agree that the State of Montana owns the waters that fall on its watersheds, nor do I agree that the State of Wyoming owns the waters that fall on its watershed. Representative Mondell argued at one time that Wyoming owned all the waters that fell on its watershed, and some flippant young person remarked: "Then, if that is the case, the citizens of Wyoming are liable for damages in not being able to control their waters, because they go down into Nebraska and wash away the farms."

To me it is the most absurd proposition imaginable to assert that State lines cut any figure. But if I were representing certain local water associations I can quite appreciate that I might submit such an

argument. Of course, I would be an advocate instead of a judge. I do not want to be understood now as saying that I think that is the law. The point reminds me of the attitude of a darkey soldier down on the border line of Mexico two or three years ago. On being asked if he was going to invade Mexico, he replied, "We will simply invade nothing." "Well, are you going to cross the line?" he was next asked. "No," he answered decisively, "we will just take up the line and keep it in front of us all the time."

But to get back to the point. Suppose that all the States west of the Mississippi were merged into one State, and we forgot the present border lines, would those border lines cut any figure? The Supreme Court of the United States has that question under consideration at the present time, and I hope they will decide it some time during my lifetime.

The main point I wish to impress on this honorable commission is that the Government of the United States in making a treaty is presumed to act along reasonable lines; it is presumed to pursue a course that does not violate the Constitution. That being so, the Government of the United States in entering into this treaty must say that it did not intend to violate the Constitution.

In that connection I take it that the contention of counsel for the Canadian Government will rely largely upon Article VI of the Constitution, which reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

In that connection I want to emphasize what Senator Walsh said yesterday, that in construing that article you should construe it as you would any contract. You should construe it, as has been urged by some of the most eminent writers on the subject, so that every expression shall be made effective. To do that, you construe the entire Constitution; you do not construe merely one paragraph or one article or word.

Every word must be given its full effect. Are you going to say, gentlemen, "We will just take the word 'tributaries,' whether those tributaries are in Montana or Saskatchewan, whether they are here or there." It was strongly emphasized in the argument that the expression occurs in the treaty, "The tributaries in the United States and Saskatchewan." That word "and" can not be changed into "or." They must be the tributaries that flow into the United States and into Canada, for unless they do both they are not the tributaries that were considered by this treaty. When you construe the treaty in that light, and when you follow the ordinary rules of construction, you must say that "and" means in both countries.

Now, gentlemen, I feel that I have taken up a great deal of time. As I intimated at the opening, I rather think that I ought to have had permission to follow one of the Canadian representatives, but in any event I will abide by the result, and therefore I will close my argument by expressing my thanks to you for the kind attention with which you have listened to me, gentlemen.

ARGUMENT BY HON. GEORGE TURNER, COUNSEL FOR THE UNITED STATES GOVERNMENT.

Mr. TURNER. Mr. Chairman and gentlemen of the Commission, I am here as the legal representative of the United States to assist the Commission, if I can, in the task of construing Article VI of the treaty of 1909.

I regret very much having the necessity, at the outset, of disagreeing with my friend and associate counsel in this case, the Senator from Montana. He made a statement in opening that the United States had withdrawn the protest made to the Commission by Secretary Lansing. In that he was in error. The United States merely explained that protest—explained that it was not intended to prevent the commission from proceeding as an administrative body to determine what waters were brought within the purview of its duties under Article VI, but rather that it was intended as a caveat against the power and authority of the Commission upon a hearing instituted by the commission itself to make a decision which would be binding upon the two countries as a res judicata.

The Senator also said that he was glad that the protest had been withdrawn because he thought it was unfounded. Now, I have thought over the matter and I have come to the conclusion that the protest was a proper one for two purposes: First, for the purpose of preventing a misunderstanding between the two countries arising out of the argument of counsel in the process of construing Article VI; and also as a necessary caveat against having it said in future, if perchance the occasion should arise for any controversy about it, that the United States had concluded itself by coming here and arguing the matter without filing a caveat.

I want to offer some observations in support of the protest of Secretary Lansing, and if my remarks on the subject proceed to some length, I shall find justification for it in the character of this commission as an instrument of peace and amity, and good understanding between two great kindred peoples, and in the imperative necessity, if the influence of the Commission for good is not to be impaired, of having it understood that each of the countries in its dealings with the other, by and through the Commission, is proceeding at all times in the best of good faith and with a just regard for the interests of the other country as provided for in the stipulations of the treaty of 1909. Now, the fact that the duties of the Commission under Article VI relate to the apportionment and division of certain prescribed waters imposes the necessity upon the Commission of fixing and determining the particular waters described. That involves a process of construing Article VI, and that involves the application of legal principles, and also the application of trained and disciplined reason and judgment. But notwithstanding that, I think the protest of Secretary Lansing, understood as I have explained it, is defensible both from the standpoint of propriety and from the standpoint of legal sufficiency.

It will be admitted on the other side, I have no doubt, that outside of the task of construing Article VI, the duties of the Commission with reference to the apportionment and division of the waters are strictly administrative. Now, in construing Article VI, the

Commission is simply reading its mandate, and in doing that, inasmuch as this is not a hearing upon issues framed, and inasmuch as the appearance of counsel here is a mere matter of courtesy on the part of the Commission, I say that in construing this mandate, as well as in the performance of its duties, which the construction of the mandate points out to the Commission, it is acting in a ministerial capacity. It is, I believe, familiar law in the United States, in England, and in Canada as well, that an administrative officer or body shall be kept within the bounds of his mandate by the writ of mandamus and in proper cases by injunctions. Inasmuch as both those processes are attacking the action of a commission collaterally, it can not be that in reading its mandate, however difficult that may be, it is proceeding in a judicial capacity; because it is equally familiar law in all three countries that we can only attack a judicial decision directly—that is, by appeal, writ of error, or, in case of inferior judicial tribunals and boards exercising a quasi-judicial power, by the writ of certiorari. The sheriff of a county every time he levies a writ of execution must construe the writ and the law back of the writ to determine whether he is justified in levying the writ; yet he will be compelled to proceed by mandamus if he makes a mistake in his construction, and may be enjoined in equity if he is proceeding when he ought not to be proceeding under the writ. Every time a taxing officer is required to act he must construe the law to determine what property is brought within the purview of his duties as a taxing officer; yet he also, in the performance of that duty, is amenable to the writ of mandate if he misconstrues the authority conferred upon him by the law.

The same thing is true of a public disbursing officer; he must construe the law authorizing the disbursement every time he is called upon to make it; yet if he declines to make it he will be compelled by the courts to make it, if he ought to make it, and if he is proceeding to make the disbursement when he ought not, he will be restrained by a court of equity. I imagine it will not be contended that in these cases the officer is proceeding from first to last in other than an administrative capacity. Many other illustrations of the principle might be brought forward if it were necessary. In short, an administrative officer or body is compelled to construe to itself and for itself what it is that the law requires it to do; that is an absolutely necessary prerequisite to any action whatever upon its part. Now, if the statute prescribing its duties is plain and clear and obvious and perspicuous, all it has to do is to read the statutes and proceed accordingly. In that case nobody would say that it was proceeding at any time other than in an administrative capacity. But if the statute be doubtful and obscure and of difficult interpretation, does that change the situation at all? Manifestly not, it seems to me. It can not be that the determination of the question of what is judicial and what administrative is to be made to depend upon the difficulty of the ratiocinative process gone through with in each particular case. Therefore, while it is sometimes difficult for an administrative body to construe its mandate, the test is not whether a greater or less degree of reasoning is required in the process, but the process having been perfected, whether the duties that are devolved as a result of that are or are not administrative in character.

An administrative officer is presumed to be able to read his title clear. But that is not a conclusive presumption, because, as I have said, if he reads his title darkly and wrongly he will be controlled by the courts and will be liable in all sorts of ways to the process of the courts. An individual injured by his action may have his action for damages, and the public, to the extent that it is interested, may have a mandamus to compel action, if action is erroneously delayed, or to stay action when action is erroneously taken.

Now, this Commission is an international body. There are no courts in either country with power to control or revise its action. That, however, does not change the character of its action under Article VI. That is still administrative, and since there is no power in the courts to intervene, it must be left to each country to dissent or agree, as it may or may not conceive that the action taken is or is not in conformity to law. Therefore when the United States became aware of the fact that the Commission was proceeding upon its own motion to consider whether it ought not to include, for the purpose of the apportionment and division of the waters of the Milk and St. Mary Rivers and their tributaries, certain intrastate waters having their rise and flow wholly within the State of Montana, it was an act of courtesy to the Commission and an act of good will and good feeling toward the Canadian Government that it let it be known in the outset that it did not consider these waters as coming within the purview of the treaty or as committed to the Commission for apportionment and division, and that it could not consent to be bound if the Commission took a contrary view of the subject.

We would have an entirely different situation if the Commission were considering this matter under a submission made to it by both of the countries under Article X of the treaty. Under such a submission both countries consent to be bound, and the decision of the Commission, when made, would be re judicata between the two countries.

But to continue for a moment longer. If it be assumed that the Commission is proceeding here strictly in a judicial capacity, I do not think the situation is materially changed, so far as the propriety of the protest of Secretary Lansing is concerned. There is one thing that every court must do in every case brought before it, and that is to determine whether the subject matter of the litigation has been committed to it by law for determination. These questions are sometimes close and difficult, but if the court makes a mistake its determination is a mere "Brutum fulmen." The litigant cast in the action need not consider himself bound and may contest the judgment which is recovered in such an action whenever and wherever it is attempted to be enforced. He may have an injunction against a levy of execution to satisfy the judgment, or he may let his property go to sale under the execution and recover it back from the purchaser on the ground that the judgment of the court is absolutely null and void and binds nobody. The jurisdiction of this Commission is found in the treaty which created it. If it exceeds its jurisdiction, if it draws to itself a subject matter not in truth and in fact committed to it by the treaty, its decision upon it is no more binding than a similar decision made by a court concerning a matter not committed to it for determination. To state a case in point: Suppose the

Commission should find in the St. Mary River or Milk River an island so situated that it was doubtful to which one of the two countries it belonged and should go on and adjudicate that it belonged to one country or the other. Would that have any binding effect upon either country? Manifestly not, because that is not a subject matter committed to the Commission for determination.

To take a case more nearly in point: Suppose there was a stream crossing the international boundary in the vicinity of the waters here in controversy, and which, by reason of some more convenient catch-basin did not connect with either one of these rivers. Suppose the Commission from some mistaken view of its duty under the treaty should conclude that these waters were committed to it for apportionment and division, and should go on and attempt to divide them accordingly; would its act in that case bind either one of the countries? Manifestly not, because that particular stream would be neither the St. Mary River, nor the Milk River, nor a tributary of either one of these rivers. This last illustration is on all fours, as I conceive it, with the case at bar. If, as the United States contends, these intrastate tributaries lying wholly in the State of Montana, are not within the true intent and purpose of this treaty, then they are not within the purview of the treaty and are not committed to this Commission for division and apportionment. If the Commission should take a contrary view, upon the contention of the United States it would draw to itself a subject matter not committed to it for determination by the treaty. That is not to say, however, that the Commission shall not go on and consider and determine the matter. It must do so, as I said in the first instance, just as the courts must determine upon all these questions submitted to them by the laws under which they act, but it does so subject to the limitation which is applied to the courts, that if it makes a mistake its action is not binding upon either one of the two countries.

This matter of protesting the jurisdiction is not unknown to these international tribunals. Possibly the most conspicuous instance of it was that of the protest made by Great Britain in the Geneva arbitration, which was a submission to an arbitration tribunal sitting at Geneva, Switzerland, of the question of the responsibility of Great Britain for the escape of the Confederate cruisers during the Civil War, and, if responsibility was found against Great Britain, of the assessment of damage to be paid to the United States therefor. When the case of the United States was delivered to Great Britain it was discovered that the United States had claimed not only the necessarily direct damages for the loss of vessels at the hands of these Confederate cruisers, but also several hundred million dollars for indirect damages in the prolongation of the war and in the necessary accession of the Navy in order to combat the efforts of these Confederate cruisers. Great Britain filed her protest that the indirect damages were not within the submission made to the Commission, and she declared in that protest that she would not proceed with the arbitration unless the United States filed a disclaimer to any right to these indirect damages. The arbitration only proceeded after the United States had filed the disclaimer which Great Britain insisted on.

Now, I proceed without further preliminary remarks——

Mr. POWELL. May I sum up your argument, Senator? If I correctly express your position, you concede that this Commission has thrown upon it the duty to determine just what waters they are to divide, but while that is thrown upon the Commission, its adjudication, if I may use the term, is not final?

Mr. TURNER. Not final as between the two countries.

Mr. POWELL. As between the two countries?

Mr. TURNER. Yes, sir.

Mr. POWELL. Just as a court of limited jurisdiction can have its judgment attacked in a collateral suit on the ground of want of jurisdiction?

Mr. TURNER. Yes, sir.

Mr. POWELL. I think that would cover the whole case, would it not?

Mr. TURNER. Yes; I think so.

Mr. POWELL. A case particularly applicable, I think, would be the case of a submission to an arbitration; if the arbitrators go beyond the scope of the submission, their decision pro tanto, is bad.

Mr. TURNER. That principle has been applied, I believe, in all international arbitrations.

Mr. POWELL. And arbitrations as well that are not international.

Mr. TURNER. It has not been infrequent that arbitration tribunals have mistaken the extent of the authority conferred upon them, and have run foul of that principle.

I now proceed to the merits of this case. Learned counsel for the Dominion of Canada took the position in his argument at St. Paul, and also in the argument at Detroit, that a treaty or statute or contract which was clear and definite in its terms was not susceptible of construction; that extraneous evidence could not be received to explain its terms; that it must be enforced according to the strict sense found within the four corners of the instrument. To the first branch of that proposition, correctly understood, I do not take any objection. That which does not need interpretation can not be interpreted, which simply means that you can not fritter away the plain, manifest meaning of words by far-fetched, fanciful reasonings and deductions. Indeed, it has been doubted in England whether this rule amounts to anything more than a counsel of caution against indulgence in these far-fetched and fanciful conclusions. In the case re Jodrell, 44 Chancery Division, page 590, Lord Justice Bowen doubted whether this rule that was appealed to in that case was really a canon of construction. He said he thought it was more a counsel of caution. That was the case of the construction of a will in which the testator had named various relatives and given them bequests, and some of them were relatives on the legitimate side, and some of them were illegitimate relatives. Then he devised the rest and residue of his estate to his wife for life, with a clause that at her death the property of this life estate of his wife should be divided equally among his relatives, theretofore mentioned, and the proposition was taken that the people with the bar sinister were not relatives in the sense of law. Numerous English authorities are recited sustaining that proposition. The question was whether or not this term "relative" was to be construed strictly, or whether it was to be construed liberally to include those who were relatives by blood as well as those who were relatives in law. Lord Justice Bowen said, in summing up:

It seems to me that the only weight one can give to such language—

That is the language about following the plain meaning of the instrument—

is to treat it not so much as a canon of construction as a counsel of caution, to warn you in dealing with such cases not to give way to guesses or mere speculation as to the possibilities of an intention, but to act only on such evidence as can lead a reasonable man to a distinct conclusion. But I protest that as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the true construction is, and what the true intention expressed by the testator is, then your journey is performed.

But whether it be considered a canon of construction or a counsel of caution, I agree that you must not in construing an instrument, the meaning of which is plain and manifest, undertake to depart from its terms by mere guesses, or far-fetched reasoning, or fanciful conclusions. To his second proposition, that you are ever confined in any case to the literal sense found within the four corners of any instrument, I have to dissent, and insist on the contrary that the subject matter, the surrounding circumstances, the intention and purpose of the parties, if it can be gathered from the instrument and the surrounding circumstances and the subject matter, may be looked to by the court called upon to administer such an instrument even where there is no obscurity in the language; that the court may enlarge or limit the meaning of words when that is necessary to be done in order to effectuate the true intent and purpose of the parties to the instrument.

My learned friend referred to a particular section of Vattel, in making the contention in his former argument. If you take Vattel, and even any of the other authors on international law, and read what they say upon this subject of the interpretation of treaties, you will find that this particular canon upon which counsel relies is given but a very small scope. For instance, take the opening discussion by Vattel on the interpretation of treaties, and you see from the principles laid down that this canon must have a very limited meaning. Reading from page 244, section 262, of Vattel on the Law of Nations:

If the ideas of men were always distinct and perfectly determinate—if, for the expression of those ideas, they had none but proper words, no terms but such as were clear, precise, and susceptible only of one sense—there would never be any difficulty in discovering their meaning in the words by which they intended to express it; nothing more would be necessary than to understand the language. But, even on this supposition, the art of interpretation would still not be useless. In concessions, conventions, and treaties, in all contracts, as well as in the laws, it is impossible to foresee and point out all the particular cases that may arise; we decree, we ordain, we agree upon certain things, and express them in general terms; and, though all the expressions of a treaty should be perfectly clear, plain, and determinate, the true interpretation would still consist in making, in all the particular cases that present themselves, a just application of what has been decreed in a general manner. But this is not all—conjectures vary, and produce new kinds of cases, that can not be brought within the terms of the treaty or the law, except by inferences drawn from the general views of the contracting parties, or of the legislature. Between different clauses, there will be found contradictions and inconsistencies, real or apparent; and the question is, to reconcile such clauses and point out the path to be pursued. But the case is much worse if we consider that fraud seeks to take advantage even of the imperfection of language, and "that men designedly throw obscurity and ambiguity into their treaties, in order to be provided with a pretence for eluding them upon occasion."

You can see from this statement of Vattel concerning the manner in which these difficulties arise in the interpretation of treaties, that

this canon of construction can not have a very wide application, and I call attention particularly to that part which deals with the impossibility of the writers of treaties being able to anticipate all the contingencies to which their words may apply. Consequently, as the author says, they frequently use general words which apply to situations they never had in mind at the time the treaty was written.

Vattel lays down the general rule of interpretation here, and I want to read it to the Commission—probably I might assume that the Commission knows this—but I wish to apply what this distinguished author says to the particular facts of this case a little later. At section 217 the author says (pp. 247–248):

> Let us now enter into the particular rules on which the interpretation ought to be formed, in order to be just and fair. Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed—whenever we meet with any obscurity in it we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly. This is the general rule for all interpretations. It particularly serves to ascertain the meaning of particular expressions whose signification is not sufficiently determinate. Pursuant to this rule, we should take those expressions in their utmost latitude, when it seems probable that the person speaking had in contemplation everything which, in that extensive sense, they are capable of designating; and, on the other hand, we ought to restrict their meaning, if the author appears to have confined his idea to what they comprehend in their more limited signification. Let us suppose that a husband has bequeathed to his wife all his money. It is required to know whether this expression means only his ready money, or whether it extends also to that which is lent out, and is due on notes and other securities. If the wife is poor—if she was beloved of her husband—if the amount of the ready money be inconsiderable, and the value of the other property greatly superior to that of the money both in specie and in paper—there is every reason to presume that the husband meant to bequeath to her as well the money due him as that actually contained in his coffers. On the other hand, if the woman be rich—and if the amount of the ready specie be very considerable, and the money due greatly exceeds in value all the other property—the probability is that the husband meant to bequeath to his wife his ready money only.
>
> By the same rule, we are to interpret a clause in the utmost latitude that the strict and appropriate meaning of the words will admit, if it appears that the author had in view everything which that strict and appropriate meaning comprehends; but we must interpret it in a more limited sense when it appears probable that the author of the clause did not mean to extend it to everything which the strict propriety of the terms might be made to include. As, for instance, a father, who has an only son, bequeaths to the daughter of his friend all his jewels. He has a sword enriched with diamonds, given him by a sovereign prince. In this case it is certainly very improbable that the testator had any intention of making over that honorable badge of distinction to a family of aliens. That sword, therefore, together with the jewels with which it is ornamented, must be excepted from the legacy, and the meaning of the words restricted to his other jewels.

I read this for the purpose of showing that the mind of the legal tribunal does not stop when it looks at the four corners of an instrument; it is then as active as ever to bring into play all the implications which are apparent, to see whether the words used were used in a literal sense, or were used in another sense, and these implications are perfectly proper to be looked to in cases of that kind. Proceeding further, Vattel says: The headnote is: "We ought to reject every interpretation that leads to an absurdity."

> Every interpretation that leads to an absurdity ought to be rejected; or, in other words, we should not give to any piece a meaning from which any absurd consequences would follow, but just interpret it in such a manner as to avoid absurdity.

I have here Baron Phillimore's work on international law, Volume II, third edition, in which he discusses the construction of treaties—not so fully as Vattel, but he has a section on the particular idea that

was last advanced by Vattel. I shall read section 81, page 109. Phillimore classifies the different kinds of interpretation as authentic, usual, grammatical, logical, and historical. The authentic is where you refer to some exposition of the treaty by the two nations themselves. The usual is where they have put a contemporaneous construction upon the treaty by their joint action. The grammatical is simply a dissertation on the philological meaning of the words. The logical is bringing into play all the logical inferences growing out of the situation and circumstances, as applicable to the language of the treaty and construing it in connection therewith. And the historical is a resort to the history of the negotiations to fix what the parties meant. He closes, under the head of both logical and historical construction, with a discussion of impropriety in the use of language, language which expresses more or less than the parties intended to express. I read from section 81:

> Under the second branch of logical interpretation, we have to consider cases of doubt arising from the impropriety of the expression employed; that is to say, cases in which the expression does convey a meaning, and abstractly considered, an unambiguous meaning, but one which, when the circumstances are considered, evidently does not convey the meaning intended by the author or authors of the instrument in which it occurs.
>
> In such cases, is the word or the intention to prevail? It must be answered, that as the only function of the word is to express the intention, to sacrifice the latter to the former is to prefer the means to the end. The Roman jurists justly said of laws, "Non hoc est, verbum earum tenere, sed vim ac potestatem;" and not less justly of contracts, "In conventionibus contrahentium voluntatem potius, quam verba spectari placuit."
>
> Cases of this character exhibit a much less varied form than those in which the doubt arises from the uncertainty of the expression.
>
> The impropriety of the words to express the meaning arises, when the words convey more or less than the meaning of the person using them. In the former case the impropriety of the expression is rectified by a narrowing or restrictive interpretation (interpretatio restrictiva), in the latter by a widening or extensive interpretation (interpretatio extensiva).
>
> The object of both kinds of interpretation is identical, namely, to bring the expression in unison with the thought; and the necessity and justification of both is founded upon the hypothesis, that the thought is as demonstrably clear as the expression is evidently improper. Although, therefore, this kind of interpretation has been ranged under the class designated as logical, it manifestly is also of an historical character, necessitating a recurrence to the record of the facts which preceded or accompanied the formation of the treaty; and here again we must have recourse to the general rules of interpretation which have been already laid down

He refers there, of course, to the rule that you must not depart from the plain manifest rule, unless there are grounds plainly showing in the transaction to justify it.

Mr. POWELL. I call your attention to Hall, who is the most authoritative text-book writer on international law of modern times. Hall lays down a very distinct and definite series of propositions relating to the subject.

Mr. TURNER. I have read Hall on the subject, and I do not understand that Hall takes any different position from the other authors. His language as to following the plain meaning of the treaty is to be understood just as the language of Vattel and Baron Phillimore is to be understood. In fact, if your honor has read the full discussion in Hall, you will remember that he referred to the treaty between France and England providing for the demolition of the fort at Dunkirk, which commanded the English Channel. The

French King while demolishing Dunkirk was proceeding to build another and more extensive fortification at 2 leagues distance, which would have commanded the Channel better than the Dunkirk fortifications. England protested that the spirit of the treaty was that there should be no fortifications commanding the English Channel and that that was what they had agreed to demolish Dunkirk for, and that therefore the spirit of the treaty rather than the literal words must prevail. And Hall says that that view was coincided in by both Kings upon the principle that where the situation requires it the natural sense of the words rather than the literal sense has to be taken, when both senses do not agree.

Mr. POWELL. That is, if there are two constructions of a treaty, one of which leads to an absurdity, that construction must be taken which does not lead to absurdity.

Mr. TURNER. Yes, sir; you are presumed to take the natural and reasonable meaning of the words, rather than the literal meaning, where one can see that it would lead to conclusions that were never intended.

There was not any evidence in that case of the Dunkirk fortifications—just an implication. Because they had agreed to demolish the Dunkirk fortifications, the implication was that that was done in order that France might not be able thereafter to command the English Channel. That is just the character of the implications which we insist are to be drawn in this case in order to give this treaty a reasonable meaning, and one within the purpose which must be reasonably imputed to the two countries.

I have here a list of cases in England and the United States upon this subject. I shall not read them, but I should be glad to hand them to the Commission.

Mr. POWELL. Have you the case of Stradling *v.* Morgan (1 Plowden, 199)? This was a case decided in the sixteenth century, I believe.

Mr. TURNER. I direct the attention of the Commission to the language of the Supreme Court of the United States in the case of McKee *v.* United States (164 U. S. 29). These rules of construction apply to the interpretation of statutes, as well as of contracts, and treaties. We go back to the terms of the civil law for all our rules of construction, which are equally applicable to contracts, treaties, and statutes, with one exception: That in treaties and contracts you must look for the intention of both parties, whereas in the case of statutes, you have to look only for the intention of the legislatures. In the case which I have mentioned, the Supreme Court of the United States says:

> It is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject matter to which it relates, and to restrain its operation within narrower limits than its words import if the court is satisfied that the literal meaning of the language would extend to cases which the legislature never designed to embrace in it.

I cite also the case of River Wear Commissioners *v.* Adamson, Law Reports (1 Q. B. Division, 546), where it was said:

> It accords with Lord Coke's rule and a rational sense of what is suitable to ascertain what were the circumstances with reference to which the words of the statute were used and what was the object appearing from those circumstances which the legislature had in view.

of them, in the irrigation of their lands; therefore, that each country was vitally interested in securing to itself its fair share of the waters. Now, manifestly, without attempting at this time to assume anything extraneous, the two rivers which were to be divided by this treaty were international waters, in the sense that I have suggested; and, manifestly, the purpose of the two countries was to divide these waters evenly between themselves. That is not only a necessary implication; the treaty itself provides for the equal division of these waters. Then there is added the word "tributaries" to the description of the waters to be divided. Now, what was the reason for the addition of the word "tributaries"? Vattel, in another section of his work, says that when you can find a reason for the use of a word or expression you have a certain key to the meaning of the word or expression. Now, it seems to me, that the reason for the inclusion of this word "tributaries" is very plain. The negotiators saw, on looking over a map of these rivers and their tributaries, that one country, unless restrained by the treaty, might seriously impair the flow of one of these rivers by monopolizing to itself the tributaries of that river arising within its own borders and flowing into that river within its own borders, and might thereby prevent the other country from having its half of these waters as the treaty contemplated that it should have—its half of their natural flow. They saw also that there were tributaries arising in the other country and flowing across the border before joining the main stream—themselves international streams—which the other country might wholly monopolize unless restrained by the wording of the treaty. Therefore, instead of writing the waters to be divided as "the waters of the St. Mary and Milk Rivers," the drafters of the treaty wrote it "the waters of the St. Mary and Milk Rivers and their tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan."

Now, I say, that is the only plausible reason that can be found for attaching the word "tributaries" to the description of the waters to be divided. I defy any man to lay this treaty down upon a map in which the waters of these two rivers and their tributaries are delineated and find any other logical reason for the inclusion of the tributaries in the description of the waters to be divided. There we have the reason for the inclusion of these tributaries, and the word must be circumscribed within the reason. The reason was to prevent the diversion of these tributary waters from the principal streams, which might have been done by the two countries but for the restraining words. With this reason in mind, it is wholly and utterly impossible to apply the word "tributaries" to these tributaries away down in southern Montana which have no common character at all, which Canada never claimed, and which it would be utterly impossible for Canada to make any use of if she had ever claimed them. But our friends on the other side reject this logical conclusion and say that this word "tributaries," inserted in the treaty by the makers of the treaty for the reason which I have indicated, must be read literally on this old canon of construction which they pick up out of Vattel. If that contention be permitted to prevail, there will be brought into this treaty, for the division of international water, waters that have no international character, waters that belong wholly to the United

And in Queen *v.* Clarence (L. R. 22, Q. B., 23), Lord Coleridge said:

> If apparent logical construction leads to results which it is impossible to believe those who framed it contemplated, and from which one's own judgment recoils, there is good reason for believing that such cases can not be within the true construction of the statute.

Now, I want to go forward and consider whether the consequences that would flow from the acceptance of the Canadian contention are admissible consequences within the rule as laid down by international writers and by the courts. In doing that, I want to avoid, for the time being, the historical evidences in the case and to consider the matter purely by the light of the subject matter, the surrounding circumstances, and the wording of the treaty.

Senator Walsh yesterday pointed out in considerable detail, so as to prevent me from having the necessity of following him in that respect, the particular waters that were involved here. I may say, in short, that there are two rivers which cross the international boundary from one country to the other, and their tributaries, and that in the main they are waters that may be said to be international or quasi international. Now, I agree with what Col. MacInnes said in his arguments, that it is not accurate to call these waters international waters, because international law has never given such waters an international status. I believe that within the strict law of nations the United States might have monopolized all these waters without committing any offense against international law, if it had been deaf to the claims of a generous international comity. Yet inasmuch as the waters flow from one country to the other and can be made valuable to both countries, a just comity and a decent regard for the offices of good neighborhood require that they be dealt with from the standpoint of the respective interests of the two countries. In that sense it is not inappropriate to call them "international waters" and in what I have to say on the subject I shall refer to them hereafter as international waters.

Now, there are a few inferences that we can draw as we go along. One of them is that neither country was interested in, or can be presumed to have expected to get, any waters flowing wholly in the other country; neither could have expected to get any benefit from waters flowing wholly in the other country. They must both be presumed to have been interested in waters that were common to them, and which, by reason of that fact, possessed this quasi-international character, and were capable and suceptible of actual physical division between them if each was permitted to have its share of the natural flow.

Another implication which I think the Commission ought to consider is that inasmuch as the waters rise in the United States and might have been monopolized by the United States, without committing any offense against international law, this treaty was based on a generous comity between the countries; therefore, neither nation can be presumed to have intended to get, or to have thought that it was going to get, any more than its fair share of the waters.

Another fact which we see growing out of the subject matter, is that the countries on either side of the international boundary in the vicinity of these waters is such that either country might ultimately use all the waters of these streams, if permitted to have all

States, waters that Canada has no claim to either under the rules of international law or under any generous principle of comity; waters which, in fact, Canada never made any claim to and which it is impossible for Canada to make any beneficial use of if it ever had made any such claim and that claim had been admitted and allowed by the United States. I say that any such result is preposterous and absurd and at once opens up every avenue of construction permissible under any of the canons of construction laid down by the courts and by international writers.

The one-sidedness and great inequality in the bargain made between the United States and England with reference to these waters, if the Canadian contention prevail, is brought out vividly when we consider the extent of these Montana tributaries which it is thus sought to bring within the purview of the treaty under the canon of construction to which counsel on the other side refers.

Mr. POWELL. Senator Turner, I cite this case of Stradling *v.* Morgan, to which I have referred. I would like gentlemen on the other side to discuss it, and while you are on your feet you also might as well do so, if you think fit. This case was decided in the sixteenth century; it has for the last 25 years been before the House of Lords, and the decision there has met with unqualified approval. To my mind this decision is the most philosophical discussion of this point I have found, and I have had to delve into this matter a great deal. It says:

> From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some principles, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to good reason and good discretion.

Mr. TURNER. It seems to me to be an excellent statement; it is entirely in consonance with what I have read in books on international law and with the cases which I have cited.

Mr. POWELL. The only comment I have ever seen on this—and I have been through all the English cases; at one time I had to prepare a brief of 100 pages on this very question—emphasizes the point that if the words of the legislature were so plain that you could not get over them, absurd as they might be, you had to abide by them.

Mr. TURNER. Well, I do not understand that that is the general doctrine.

Mr. POWELL. That is the general English doctrine.

Mr. TURNER. No matter how plain the words are, if I understand the doctrine, if they lead to an absurd or impossible consequence, considered humanly, then you may resort to any of the canons of construction for the purpose of seeing in what sense the words were used.

Mr. POWELL. The strongest expression of that doctrine in modern law is given by Lord Esher in the case of Plumstead Board of Works *v.* Spackman (English Law Reports, Q. B. Div., 13). The legisla-

ture, in literal terms, had said that a man was to pull down a house on his own property and pay the cost of tearing it down in the public interest, though he had violated no law. Lord Esher said that in a case of that kind it is the duty of the court to strive with all the intellect that he has and all the force of his soul to put a construction upon the act which does not lead to such an absurd and improper and unjust conclusion. But if the words of the act leave no room for escape as to their meaning, we must abide by them.

Mr. TURNER. Now, sir, I want to show the Commission from the evidence in the case here what these tributaries are which it is sought to bring within the purview of the treaty and to charge to the United States as a part of its share of these international waters. I refer first to Mr. King's table, put in at the Detroit hearing, as to the extent of these intrastate tributaries of the Milk River. I quote from page 61:

All United States run-off into Milk River wholly in Montana:			
Above Havre		105,000	
Lost River		2,900	
			102,100
Havre to Malta, 151,600–86,600			65,000
Malta to Hinsdale		298,100	
Cottonwood Coulee	7,700		
Frenchman River	48,900		
Rock Creek headwaters	4,700	61,360	
			236,740
Below Hinsdale			72,400
Total			476,240

Making six intra state Montana tributaries that flow into the Milk River, with a total run-off of 476,240 feet. Now, Mr. Commissioners, it will be seen when we look at the testimony in the case that this estimate is well within bounds. Mr. Peters, at the St. Paul hearing, page 163, says:

The totals for the St. Mary are 735,000 at Kimball. The total at the mouth would be 807,000 acre-feet. The total of the flow of the Milk River at its eastern crossing, plus the flow of the northern tributaries at their respective crossings, is from 310,000 acre-feet to 330,000 acre-feet. In giving the flow of the Milk River I gave it as from 120,000 to 140,000 acre-feet.

That is a little larger than the amount given by Mr. King as the flow of the Milk River.

Mr. CLARK. Senator, I do not understand that. At the St. Paul hearing, page 163, Mr. Peters says that the total flow of the Milk River at eastern crossing, plus the flow of the northern tributaries at their respective crossings, is from 310,000 to 330,000 acre-feet. That means from the northern tributaries east from the crossing, as I understand it?

Mr. TURNER. Yes, sir.

Mr. CLARK: Then he says:

In giving the flow of the Milk River I gave it as from 120,000 to 140,000 acre-feet.

Now, I do not reconcile those two statements.

Mr. TURNER. He gives the flow of the tributaries as 189,000 acre-feet, and the total flow of the river and those tributaries as 330,000, which would make about 140,000 feet as the flow of the Milk River.

Sir WILLIAM HEARST. He means, Senator Clark, I think, that the total flow of the Milk River and its tributaries, crossing the international boundary, is from 310,000 to 330,000 acre-feet; but if the Milk River proper is——

Mr. TURNER. I quote from Mr. Peters' testimony, page 168, of the St. Paul hearing:

I would like to complete the estimates I was giving of these stream flows, by adding that to get our estimate of the annual flow of Milk River at its mouth there should be added the canal diversions, estimated at 38,000 acre-feet, making the total average annual flow of the Milk River at its mouth 732,000 acre-feet. I would further add that our estimate of the amount of water available for irrigation in St. Mary River has been based on estimates at Kimball and amounts to 735,000 acre-feet. I would add also that our estimate of the amount of water available for irrigation on the Milk River has been based on the measurements made at Hinsdale and amounts to 660,000 acre-feet.

Now, if there be 735,000 acre-feet flowing at the mouth of the Milk River and there is to be deducted from it the flow of the northern tributaries crossing the boundary and the natural flow of 89,900 feet of the Milk River proper at the crossings, that would leave in the neighborhood of the amount of water claimed by Mr. King in this table—450,000 acre-feet.

But, may it please the Commission, Mr. Peters' estimate did not, nor did the estimate of Mr. King in this table, take into consideration the innumerable tributaries flowing from the Little Rocky Mountains, the Bear Paw Mountains, and the Sweet Grass Hills, which had been taken out by locators and diverted, and which never reached the Milk River and so were never measured among the waters of the Milk River, yet which, within the meaning of this term, if the contention of Canada prevails, are tributaries of the Milk River to be considered in this division. Now, Mr. Newell says about these tributaries, at page 207 of the St. Paul hearing:

It should be understood that the run-off at Hinsdale is considered to represent the whole discharge recorded of the river from the area in Canada and the United States, and does not include the amount diverted at higher points.

And further:

Above Dodson, the water requirements under valid rights initiated prior to November 2, 1903, on the following-named creeks tributary to Milk River exceed the probable mean annual run-off: Mud, Savoy, Wayne, Thirty Mile, Foggy, Upper Beaver, Box Elder, Clear, and Snake. The remaining tributaries above Dodson afford a surplus over the requirements under such prior rights at flood periods for a few days only.

We get from Mr. Newell the sources, then, of these uncounted tributaries. But we get an idea of the extent from what Mr. Sands said about them. At page 213, Mr. Sands said:

At that time the treaty, I believe, was under consideration. I have also been over very many of the tributaries and know considerable about the irrigation of the small ditches throughout this entire territory. I would say that it would be impossible to determine what is the flow of these streams, because these streams rise very suddenly and fall very suddenly. Very many of them are only dry coulees. The water flows for only a few hours, so it would be practically impossible to determine what the flow is. This is one reason why we supposed that no account would be taken of the flow of water in any of the tributary streams in the Milk River that did not flow through Canada. This would be, as I said, so practically impossible that we never conceived that there could be any idea of attempting to measure the streams in the United States or determine what their flow was. It has been suggested that you could measure the streams at their mouths, but to determine what their flow is you would have to know what is taken out above, for in time the tributary streams could take all the water that flows in.

Now, I turn to page 214:

Therefore, if the interpretation of the treaty as contended for by my Canadian friend should be accepted, it would require the determination of the quantity of water that flows through these small tributary ditches, hundreds of them. It would be impossible.

He says, "hundreds of them." Mr. Newell said in his testimony that there were 2,320 of these locations upon the reaches of the watershed of the Bear Paw Mountains, the Little Rockies, and the Sweet Grass Hills. Mr. Bien, at a later date, fixed the amount of water diverted in these little streams at, I believe, 573 second-feet, which Mr. Powell rather hastily figured out, along with the other waters of the Milk River, at 1,500,000 acre-feet.

Mr. MACINNES. Where is any statement of that kind made by Mr. Newell to be found?

Mr. TURNER. I could not turn to it at the moment, but it is here somewhere; he fixed the number of the locations by private settlers on these lands at 2,320, I think. If it is desired, I will endeavor to find the statement and give the page to my learned friend when I have an opportunity to do so.

Now, let me go a little further with Mr. Sands's testimony, page 217:

I know there are appropriations which are dependent quite largely from streams flowing from the south. It is suggested by one witness, I do not know but that even one of our own witnesses said, that the streams from the north and south are practically the same. Well, gentlemen, from my own knowledge, I know they are not. The streams from the south flow from the Bear Paw Mountains, which is quite a distinct chain of mountains, north into the Milk River. The Little Rockies are also a very pronounced and rugged mountain chain, but they are not so long as the Bear Paws. The Sweet Grass Hills compare well with the Cypress Hills in Canada, but the waters from the Bear Paw Mountains constitute a very large portion of the water that flows into the Milk River, much larger than anything that comes in from the north, and the streams are very much steadier as the mountains have snow upon them until quite late in the season. The rainfall seems to be much heavier, especially in the Bear Paw Mountains, and there are many living streams from that source, whereas the streams from the north are nearly all intermittent and usually dry up when the weather gets dry late in the summer.

And again at pages 258 and 259:

And in the fifth place I state that it is apparent from the testimony which has been adduced here that if the construction contended for by the Canadians is true, we will have to turn the Milk River and run it up hill and back to Canada.

Mr. MIGNAULT. I do not think the commission would attempt to do that.

Mr. SANDS. And yet that seems to be the contention of the Canadians. I will take that proposition first.

The testimony here shows that the Milk River and the St. Mary deliver at their mouth practically the same amount of water, without taking into consideration the streams which flow from the Bear Paw Mountains, the Little Rocky Mountains, and all that territory south of the Milk River in the United States. That was the testimony of Mr. Peters and of the witnesses, that the two streams were practically the same, when they considered the amount that is measured at the mouth and the amount that is taken out along the Milk River. I believe it includes a small amount taken out by two ditches in Battle Creek which deliver water on the Milk River lands. Now, understand me, the testimony here shows that if there is a very large area south of the Milk River, that its tributaries have been appropriated years ago, and I want to say that this is the most highly developed portion of northeastern Montana to-day; that is, the land that slopes from the Bear Paw Mountains to the north. The Bear Paw Mountains is a string of mountains 60 miles long, and from it flow streams that run the year round in almost every season. They are big streams, and by reason of the fact that the rainfall in the mountain regions is very much heavier than to the north, where there are no mountains, the water that comes from the Bear Paw Mountains is almost one-half of the water that flows into the Milk River in its natural condition. I have been there and I know what I am talking about. There are flowing from the

Upper Bear Paw Mountains, commencing on the west, the Big Sandy, Box Elder, which is a branch of Big Sandy, the Beaver Creek, which alone, in my estimation, flows as much water as either Battle Creek or Frenchman in its natural condition. We have two Box Elders flowing into the Bear Paw Mountains. There is Clerk Creek, on which there is a high state of development, and there are thousands of acres irrigated from that stream. It is so highly developed by reservoirs and irrigation ditches that there is seldom at present any of the waters of that stream that reach the Milk River, but in its natural condition a very large volume of water flowed into the Milk River, even better than Lodge Creek and perhaps equal to Battle Creek, because it flowed a steady stream. Such being the condition, these waters having been eliminated from the figures submitted by the engineers here, it would appear that Milk River is a stream at least once and a half as large as the St. Mary, and that in order to make an equal division of the waters we must furnish the Canadians with large volumes of water from the Milk River, a larger volume than could possibly flow past the canals in Canada from the Milk River. I stated the fact that if a division must be made on the basis here stated the Canadians would take all of the waters that flow down the Milk River, all of the waters that flow across the international boundary line, as borne out by the paper which has been submitted here by the engineers. If you go over it you will see that we would have to deliver back to Canada from the Milk River a portion of the waters of the Milk River and have none of the waters of the St. Mary.

Mr. Peters says that the average flow, taking the data they have of the Milk River, is 735,000 acre-feet per annum. The annual flow of the St. Mary River is 807,000 acre-feet per annum in the average. There is a slight difference in favor of the St. Mary River there. Concede that much. This takes into consideration 38,000 acres of waters which had been diverted prior to reaching the mouth of the Milk River. That is included in the 735,000, but that is all that is included. They do not include the waters of the Bear Paw slope, which I say to you will exceed a good deal more than one-quarter, or nearly one-half, of the waters that would naturally flow into the Milk River, and which have not been taken into consideration at all. Therefore, it is clearly apparent—don't you catch my point, Mr. Mignault—it is clearly apparent from the figures taken that the Milk River is much the larger stream, I say one and a half times, and I think I say it advisedly, the size of St. Mary. If that is the case, there would be no purpose in the United States taking the waters of the St. Mary and bringing them over into the Milk River, because they would have to be delivered back in order to make an equal division.

Now, Mr. Sands is familiar with all the country about which he is talking here, and his statement stands upon the same basis as the statement of any other gentlemen in this case. Besides, it does not require any testimony for this Commission to understand the situation in that country. It is a matter of which the courts may take judicial notice, and of which the Commission must take judicial notice; the Commission must inform itself, in any way that it pleases, of every physical and geographical fact bearing upon the case.

The Commission took recess for luncheon until 2.30 p. m.

AFTER RECESS.

Mr. TURNER. Col. MacInnes asked as to the page on which I found the statement of Mr. Newell that there were 2,332 water rights negotiated on the watershed of the Little Rocky Mountains, the Fort Belknap Mountains, and the Sweet Grass Hills. You will find that statement made on pages 194 and 195 of the St. Paul hearing, but it is not quite what I said it to be. Mr. Newell states there are that number south of the international boundary in Montana, but from the statement of Mr. Sands I should judge that the greater part of them were on the Bear Paw Mountains, and the watershed of the Bear Paw, and the Sweet Grass Hills. When the noon recess occurred, I was finishing the statement of Mr. Sands on the subject of the amount of the water. At page 260 Mr. Sands continues:

That provision of the treaty is absolutely nugatory if you take into consideration the physical facts which have been presented to you.

Mr. MACINNES. Read further; read Mr. Powell's question.
Mr. TURNER (reading):

Mr. POWELL. Your contention is plain if the facts bear it out.
Mr. SANDS. The hydrographs and the testimony here bear me out.
Mr. POWELL. That will be for us to look into.
Mr. MIGNAULT. So far as the facts are concerned, I am not yet convinced.
Mr. GLENN. You say that these gentlemen did not take into consideration the water you are speaking of south of the line, what you call the Bear Paw water?
Mr. SANDS. Yes; the rivers from the Bear Paw Range.
Mr. GLENN. And you say if you take these waters, which they did not take into consideration, plus the waters in the Milk River that they did take into consideration, the two combined would be more than the amount of water in the St. Mary River?
Mr. SANDS. Yes, sir; by nearly one-half. If you look at the map, that will be more apparent. It was stated by Mr. Newell that the basin of the Milk River is bounded by the Sweet Grass Hills on the south, then by the Bear Paw Range, then by the Little Rockies. It is bounded on the north only by the Cypress Hills. The Cypress Hills do not compare in size with the Sweet Grass Hills, and mostly all of the flow from the Sweet Grass Hills flows over into the Marias River, or into the Milk River, exclusively on American soil. Coming next to the Bear Paw, the mountains there are as high as 6,500 feet. It is a large mountain range, and from that large streams flow into the Milk River in the United States, and from that there is the highest state of development in that section of the State. These lands have been developed as early as 1890. They were the first lands developed. They were developed even before those in the Milk River Valley, and all of these streams have ditches and numerous reservoirs are built there.
Mr. POWELL. What acreage is there?
Mr. SANDS. I should say it far exceeds the area in the Milk River Valley.
Mr. POWELL. Fifty thousand acres?
Mr. SANDS. It would exceed 100,000. I think there are 150,000 acres of land in the Bear Paw and Little Rockies, all in American territory and all south of Milk River.
Neither did these figures take into consideration the flow of streams from the north, other than the one stream mentioned, namely, the Battle Creek. They did not take into consideration the irrigation from the West Fork of Lodge Creek, as you call it. The Lodge Creek irrigation in the United States is very large. They did not take into consideration the irrigation from Parallel Creek, which is large; they did not take into consideration large streams along the way. So I tell you frankly, I do not believe if you measure the Milk River that the figures there given are more than two-thirds of the entire flow.
Mr. MAGRATH. What, in your opinion, is the acreage that is irrigated on these streams in Montana, which flow from the north into the Milk River?
Mr. SANDS. The North Chinook Irrigation Association is probably one of the largest and I think they have approximately 6,000 acres. Then there are numerous small irrigation projects.

I suggested this morning, and I believe on legal grounds it is well founded, that it is the duty of this Commission to find any possible fact existing as a physical fact in connection with these waters. It is their duty to do so whether anyone has said anything about it or not. If a suggestion is made by anyone which the Commission can know to be in accordance with the facts, they should act upon it.

I now call attention to Mr. Bien's statement which is to be found at page 299 of the St. Paul record. Mr. MacInnes was speaking and the following occurred:

Mr. GLENN. Mr. Sands made the statement this morning that the Milk River and the Bear Paw River combined would exceed all the water in the St. Mary River.
Mr. MACINNES. I have been informed by Mr. Burley that that is not correct; that, as a matter of fact, the figures which the Canadian engineers present as being the lower Milk River Valley waters are larger, according to the United States Reclamation Service.
Mr. BIEN. I think that could be made clear by a brief statement. Mr. Sands stated that these tributaries in the Bear Paw country were not measured, and that very little of that water ever came to Milk River. Consequently, it does not show in our records as being measured, because the water has never been in the Milk River to be measured. That is where he took issue with me this morning. I was not aware that so much water

had been used on these tributaries. We have in the record the statement of Mr. Newell, which is the result of an examination of each of these tributaries, examining the ditches now constructed and in use and the lands which are under irrigation. I have here a summary of that, which shows that the total valid appropriation from the streams in that Bear Paw country, very little water of which goes into the Milk River, is 797 second-feet. We can not put that in as measurement, but I simply quote it in connection with Mr. Sands's statement that a very large proportion of the water falling within the Milk River drainage basin in the United States, and south of the main river, has not been measured and has not been accounted for in any of the figures that have been presented.

Mr. POWELL. The total you make is about one million and a half?

I presume the reference there is to 1,500,000 acre-feet.

It may be safely said in view of this that the Montana tributaries flow at least 500,000 acre-feet beyond any question.

Now, what is the total flow of the two rivers and their tributaries outside of that? The St. Mary River, at the boundary, according to Mr. Stevens, flows 720,000 acre-feet; the Milk River, at the eastern crossing, according to Mr. Stevens, flows 89,900 second-feet. And the Canadian tributaries of the Milk River, according to Mr. Peters' statement, page 163 of the St. Paul record, amount to 189,000 acre-feet, making a total of 998,900 acre-feet.

Now, sir, it will be seen that these Montana tributaries flow one-third of the waters of the international tributaries and the Montana tributaries combined, and if you throw all these waters into a hodge-podge and divide them evenly, Canada will get three-fourths of the international water, and the United States will get one-fourth, leaving it to make up the other 500,000 feet, to which it is entitled, out of these various Montana waters, waters to which Canada has never made any claim, and which it would be impossible for Canada to use beneficially, even if any claim of that kind had ever been made and recognized.

We get perhaps a more vivid view of the effect of this proposed construction of the treaty by our Canadian friends when we consider the nature of these two rivers and their river systems. The St. Mary River, which furnishes the bulk of the water for Canada, is a stream that is fed from the glaciers of the Rocky Mountains. The flow is steady, regular, and dependable, commencing with a minimum at the advent of spring and increasing gradually to a maximum in the middle of summer, and then decreasing gradually during the fall months until the advent of winter again brings its minimum flow. The waters are easily controlled for the purposes of irrigation, and all of them, except the extreme peak of the waters, during the maximum flow in the middle of summer, may be applied beneficially to the lands in Canada.

The Milk River on the other hand and all of its tributaries, both those flowing from Canadian source and those flowing from Montana source, if they are to be included, are flood streams receiving their flow from the rainfall on the low hills and plains which form this watershed. These floods flow off rapidly, are of extraordinary amount when they do flow, and because of their rapidity of flood, according to the testimony of Mr. Newell, it is impossible to impound more than a very small quantity of the flood water, of the Milk River and its drainage basin.

It is impossible to put these flood waters to any beneficial use. They are of no benefit to either country unless it be to Canada in

having these useless waters rising and flowing wholly in the United States computed as part of the waters that are to be divided between the two countries, thereby largely increasing the dependable flow of waters which Canada is to receive under this treaty. Now, gentlemen of the Commission, when you consider the peculiar character and idiosyncracies of these two rivers and their tributary systems, it will be seen that the United States has practically contracted itself out of court, so far as the dependable waters of these two streams are concerned, if the contention of Canada be permitted to prevail. It will not do to say that the waters which the United States may collect at the source of the St. Mary during the winter and early spring months, and the waters which it may divert from the big flow during the summer flow, will give it a dependable and reliable supply of water for irrigation. We know from the testimony in the case, showing the irrigable area of lands in Canada that can be watered by these streams and the possibility of storage there, that the time will come when Canada will demand every drop of water to which she is entitled under this treaty, and that, as we have seen, will be three-quarters of all the international waters and at least four-fifths of all the dependable waters of these two streams. When we consider that the negotiators of this treaty had at their elbow trained experts who had been familiar with these streams and their tributaries and all their idiosyncrasies for years, I ask the Commission is it explicable on any theory of reason and common sense that the negotiators of the United States agreed to the treaty which learned counsel for the Dominion of Canada is here insisting that they agreed to?

I have made these comparisons solely on the basis of the waters that actually reach the Milk River, but the thing is perfectly staggering when we consider the waters that are properly tributary to the Milk River, but which are diverted and never reach the Milk River, and which, as Mr. Sands very graphically said, would have to be repaid to Canada, if the contention of Canada prevails, even at the expense of making them flow uphill. There are some legal propositions, gentlemen, that are apparently fair on their face, which, when pushed to their logical sequence, produce results so startling and extraordinary as to shock the conscience of a judicial tribunal. I will not say that learned counsel for Canada have knowingly and intentionally put forward a proposition of that kind, but I say that that is the effect of their proposition. Having put it forth, they have not made a claim for these other waters flowing from the watersheds of the Little Rockies and the Bear Paw and the Sweet Grass Hills, which otherwise they would have made a claim for because that would explode their contention. I said in the beginning that the results were so extraordinary as to permit any course of construction which was at all permissible under the canons of construction laid down by the writers on international law and by the courts; and I think I have sustained that proposition when we consider what these waters are which it is contended are to be brought within the equation under the construction of our Canadian friends, and that that justifies the elaborate examination of the history of the negotiations made by Senator Walsh yesterday. I shall not undertake to repeat that examination in my own remarks. It is unnecessary, in the first place, and I could not hope to present it as graphically and as forcibly as it was presented by Senator Walsh.

It is true, as stated by him, that never from the commencement of negotiations down to the time when the papers disappear into the council chamber of Mr. Root and Mr. Bryce was there a suggestion from any quarter that any waters were to be brought within the equation to be covered by that treaty, except the waters flowing from one country to the other, and which, by reason of that possessed a value to each of the countries and might be used beneficially by each of the countries.

Senator Walsh made the same argument at Detroit, and I read the argument of my friend, Col. MacInnes, very carefully to see how he had countered these irrefragable evidences furnished by the history of the negotiations. I may say that while I admired the ability and ingenuity with which he presented the case of Canada, almost going to the extent of making the worse appear the better case, I thought his argument was very deficient in the attempt to meet the historical evidences, and I venture to say that his argument on this occasion will necessarily betray the same deficiency with respect to that particular matter, because it is impossible to answer the evidences of the negotiation of this treaty from beginning to end without seeing that the negotiators never had these Montana tributaries in mind.

Now, how did learned counsel counter the tremendous and overwhelming effect of these historical evidences? He said that there was much bargaining back and forth as to the quantity of water that Canada should get out of the negotiations, and as to the basis of the apportionment, and that a deadlock occurred between the negotiators on these two points, and at the last moment the negotiators threw over all the understandings before that had, and made a treaty providing for the division of these waters on a new basis. This is not the exact language of Col. MacInnes, but it is the substance of what he said. Lest it be thought that I am misquoting him, I want to read what he did say on that occasion. I shall refer to what he said on pages 125, 126, 129, 131, and 132, although I am not going to read all these pages. Referring to the prior drafts which had been put in, Mr. Tawney said (125):

> Well, the use of these prior drafts in any case, as it is stated by Senator Walsh and others, is only for the purpose of showing that in the previous consideration of the matter nothing excepting the two main rivers and their tributaries that cross the boundary or were international waters was even considered. In other words, that the tributary waters entirely within the State of Montana and belonging either to the State or to its inhabitants were not even referred to or mentioned in any previous drafts. That, as I understand Senator Walsh's argument, is the only sense in which the previous drafts were referred to.
>
> Col. MACINNES. Yes; and on that discussion my point is that they came to a block.
>
> Mr. TAWNEY. Not as to those waters.
>
> Col. MACINNES. Yes; that is just what they did; they came to a block as to the amount of water Canada could get out of these negotiations, and Canada said: "We quite agree; we appreciate your wanting to protect your prior appropriations, and so on, but still we must have more water."

Then on page 129:

> Mr. POWELL. Senator Walsh says that these imaginary conversations took place all through without the Milk River ever entering into them at all. He says that the agreement was expressed more broadly in the treaty than it appears anywhere in the negotiations.
>
> Col. MACINNES. Well, yes; when they wanted to put it into narrow language they were practically unable to do it in a satisfactory way, as they showed by their previous drafts.

Col. MACINNES. I think "practically unable" should read "perfectly able."

Mr. TURNER. I should think the sense was "practically unable," but my friend knows what he meant to say. To continue the quotation from Col. MacInnes:

When they wished to give a narrow interpretation, the interpretation which my learned friends pretend should be given, they were quite unable to express themselves as one would expect, but when they came to express the true meaning of the parties as the agreement was, it was found necessary to put it in broad language.

Mr. POWELL. And you say thay abandoned the narrow meaning evidently for some purpose?

Col. MACINNES. Yes; for some purpose. And one sees, by looking at these drafts, that they were arguing back and forth, and Canada was not satisfied. The only project she set up was that if it were international there would be no prior appropriation, which was rejected by the United States. And then, both parties having come to a block, they came together and reached the solution, and here we have it in the treaty.

Again, on page 131:

Mr. GLENN. Taking all these former drafts and the correspondence, etc., in every single instance they speak of streams crossing the boundary and of boundary waters; but at the last moment in Washington, in the treaty itself, those expressions do not appear, and Canada gets more than half the waters. Is that your contention, Col. MacInnes?

Col. MACINNES. Yes; to this extent, that Canada gets in the result a larger amount.

Mr. GLENN. Now, can you point out to me any document or any testimony in this case which brought about that sudden change of mind on the part of these two Governments just before they made this treaty?

Col. MACINNES. Yes, Gov. Glenn, I can; I have pointed out that they absolutely could not agree.

Mr. GLENN. Why, the last proposition made by Sir George Gibbons himself did not refer to those tributaries.

Col. MACINNES. That is true; but you see that the Governments could not agree on that ground.

Mr. GLENN. Well, look at page 93 of the transcript.

Col. MACINNES. Yes; that is Mr. Newell. Mr. Campbell having made the suggestion that we might have equal divisions of streams crossing the boundaries, but an allowance being made for prior appropriations.

Mr. GLENN. Well, can you show me where the change came in and why?

Col. MACINNES. Well, as I said a moment ago, on the 29th of December they were putting forward these two different proposals, one proposing a division of the waters that crossed the boundary and leaving out any prior appropriations. Then Mr. Newell comes back and suggests a division of the waters crossing the boundary, but says there must be prior appropriations. So you see they are at a deadlock.

Now, may it please the Commission, while the record of the prior negotiations discloses some divergency of views, as to the basis of the division of these waters owing to the fact that there were commitments in each country for which each thought it ought to have a prior right in the waters, and the insistence of Canada on that point, as you will see from the negotiations, was stronger than that of the United States, this divergency of view had entirely disappeared when the papers were whipped into shape by Secretary Root and Mr. Bryce and their assistants, Mr. Anderson and Sir George Gibbons. When the papers came to them, there had been entire concurrence between the negotiators on an equal division of these waters considered strictly in their character as international waters, and I propose to show the Commission that that fact is absolutely true. At page 88 of the St. Paul proceedings, referring to the somewhat extravagant claims of water made by Mr. King in his first memorandum of April, 1908, Mr. Newell made these declarations concerning the division of these waters.

Mr. Newell is talking strictly here about the international waters, because he refers to the decision facilitating an entire understanding of the problem presented by the international features of the St. Mary and Milk Rivers. On page 88 he says:

The principal feature of the plan of November 11, 1905 (sent to Hon. James Bryce June 15, 1907), is the equal division of available waters. To define or regulate this distribution, certain rules are suggested; these are subsidiary to the general scheme of equal share. This is regarded as extremely liberal, as nearly all the waters arise in the United States. In return for protection of an equal share of the flow the United States suggests that Canada give safe conduct down Milk River for the share of stored water falling to the United States. Unfortunately, the privy council minute of March 2, 1908, seems to indicate that Canada is not satisfied with this proposition based on equality. It is not believed that any proposal to give Canada more than half the water can be entertained, although the details as to how this half may be ascertained are open to discussion.

Mr. King in his memorandum of December 23, 1908, in reply to this memorandum of Mr. Newell, agrees with Mr. Newell on the principle of an equal division of these waters. In the last paragraph but five of his memorandum on page 92 of the St. Paul proceedings, Mr. King says:

It seems desirable, in the first place, to agree upon a general principle of division of the water. The wide variance between the proposals of the parties to the present discussion seems to show the disadvantage of dealing with complicated details without a definite fundamental principle to guide.

The principle of equal sharing of benefits, with compensation by quantity of water, suggested by the undersigned, doubtless has a disadvantage in depending for its application upon agreement as to details.

That is, as to assigning a specific quantity of the waters of each of the streams to one particular country. He goes on:

A principle which is free from this objection and is, moreover, a simple one, is that of equal division of water on the boundary streams (each country providing for its existing interests out of its share of the water).

Here we have on December 23, 1908, only 19 days before this treaty was signed, concurrence between Mr. Newell and Mr. King on the principle of an equal division of the waters of these streams, which Mr. King calls boundary streams. Now, on December 29, 1908, Mr. Campbell had succeeded Mr. King as the Canadian representative at Washington—I understand that that was the character; I may be mistaken—in which he made his proposal. For some reason he came there and succeeded Mr. King, and we see from his proposal of that date, only 13 days before the signing of the treaty, that the understanding still persisted with the negotiators on the part of the Dominion that the waters to be divided were the international waters, and that the division was to be absolutely equal between the two countries. Let us see what he did propose. His proposal is found on page 93 of the St. Paul hearing and is dated December 29, 1908:

In all the streams which cross the international boundary, the waters of which are used for irrigation, each country shall be entitled to the use of half the natural flow as ascertained by measurement at the point or points where such streams cross the international boundary. "Natural flow" means the flow of each river system from all its sources which would pass the point or points indicated herein if no artificial obstruction had been placed in the stream, or any of its tributaries or sources, and if no water had been diverted from or added to the flow before reaching the point or points indicated.

There are five paragraphs in this proposal of Mr. Campbell, and each one of them specifically refers to the waters which cross the

international boundary between the two countries. Mr. Newell's rejoinder on the same dates shows his understanding to the same effect. These are simply the different drafts to secure, evidently, the principles which had been agreed upon of equal division of the waters of these international streams. He says:

That the waters of each stream flowing across the international boundary shall be divided equally in quantity as nearly as practicable between the two countries; that is to say, the waters of St. Mary River and its tributaries crossing the international boundary shall be measured as they cross the boundary and an equal amount apportioned to each country, due allowance being made for the quantity stored above the point of measurement in reservoir or reservoirs constructed by the United States; also the waters of the north and south branches of Milk River shall be measured where they cross from the United States into Canada, and the main Milk River and its tributaries measured where they cross from Canada into the United States, allowance being made for any water diverted or stored in either country before reaching the points of measurement.

Here, again, only 13 days before the treaty was signed, we have concurrence between the representatives of the two countries that the waters to be divided were the waters that cross the boundary line and that the division between the two countries was to be equal. Now, somewhere between the 1st and the 9th day of January, the latter being the date that the treaty was signed, Mr. Chandler P. Anderson and Mr. Gibbons, as he then was, now Sir George Gibbons, appeared upon the scene. They were neither of them hydraulic engineers, nor is it probable that either one of them had any very extensive acquaintance with the waters which form the subject matter of this treaty. Mr. Anderson was the counsellor of the State Department at Washington and Mr. George Gibbons was a statesman high in the councils of the then Canadian Government. Undoubtedly they were called in to assist Mr. Root and Mr. Bryce in formulating the entire treaty of 1909, of which Article VI forms but a part. It was not their duty to negotiate; that had already been concluded. It was their duty to write down and to reproduce, as nearly as the imperfections of language would permit, the understanding already arrived at. Each of them prepared a tentative draft, and these two drafts are found on pages 96 and 97 of the St. Paul hearing.

Mr. Gibbons's draft:

ARTICLE VI. It is agreed that for the use for irrigation the St. Mary and Milk Rivers (in the State of Montana and the Province of Alberta) and their tributaries are to be treated as one stream, and the total amount that can be diverted from the two for such purpose is to be distributed so that each country shall have the right to one-half of the whole, but in the distribution more may be taken from one stream and less from the other by each country so as to afford a more beneficial use to each.

Sir George Gibbons in this draft makes it very general and drops out the qualification concerning the character of the waters which had always been found in all prior drafts and in all the communications up to this time. But not so the draft of Mr. Anderson. His draft proceeds:

ARTICLE VI. It is agreed that each country shall have the exclusive right to one-half of the natural flow of the St. Mary and Milk Rivers and their tributaries, the amount thereof to be determined at the points of storage and diversion and at the boundary by measurements made jointly by the properly-constituted reclamation and irrigation officers on either side of the boundary; and the channel of Milk River in Canada may be used at the convenience of the United States for the conveyance, without interference, while passing through Canadian territory, of the waters of either river stored in the United States and constituting any part of its one-half share.

This draft of Mr. Anderson's bears internal evidence that he understood that there had been at that time no change in the character of the waters about which the two countries were negotiating. His provision for measurement at points of storage and diversion and at the boundary bear very clear evidence of that fact. The points of storage referred to by him were those contemplated by the two countries, that of the United States to be at the source of the St. Mary River and that of Canada at such convenient points as would permit them to divert waters both from the St. Mary and the Milk Rivers. The points on the boundary were necessarily those points where the two streams crossed the boundary from one country to the other, and the points of diversion were those points where the United States had constructed or was in process of constructing, or had contemplated, a diversion canal from the waters of the St. Mary River, and that point on the Milk River where Canada had already constructed a diversion canal.

The suggestion of counsel on the other side that the points of diversion referred to by Mr. Anderson had reference to the thousands of private locations and diversions made by locators in Canada and Montana is absolutely untenable. It would take an army of men to make these measurements at the thousands of points where water had been diverted by private appropriators, and it would be impossible to get the reports of the measurements made at the different points at a sufficiently early date to coordinate them in order to make the division of the waters which the treaty contemplates shall be made from day to day. We see, then, that there was not any understanding on the part of Mr. Anderson that there had been any change of view concerning the waters to be divided or the quantity thereof. It may be asked why did not Sir George Gibbons's draft show the same thing? I answer that Sir George may not have been acquainted with the peculiar character of all the tributaries of these streams, and may not have understood the importance of the use of qualifying words in connection with the word "tributaries." Or, if that suggestion had been made to him, he might very well have answered in entire good faith that qualifying words were not necessary in view of the history of the negotiations, which showed so conclusively that the parties had nothing in mind but the waters flowing from one country to the other. Either one of these hypotheses is sufficient to account for the very general manner in which he presented his draft.

Now, sirs, in view of this it will be seen that the contention of counsel that Canada was making a strenuous and determined effort at this time for more water, so strenuous and determined that the parties came to a deadlock or, in the very graphic language of Col. MacInnes, to a block, and that as a result of that block the negotiators concluded at the last moment to make an entirely different treaty, providing for the inclusion of these Montana waters, thereby increasing the share of Canada of the international waters, is not borne out by the facts of this case. After the concession of Mr. King, in his communication of December 23, 1908, Canada never at any time, in any of these negotiations, claimed more than one-half of these international waters. It is true that the earlier negotiations disclosed that she did offer bases for a division of the waters which, if accepted by the United States, would have given her the lion's share

of the waters, but that was on the theory put forward by her strenuously from the beginning that there were private prior appropriations in Canada prior to any existing in the United States, which she was entitled to have recognized and provided for. So we see that even from the very earliest period this doctrine of private prior appropriations, which Col. MacInnes said intervened at the last moment to block these negotiations, was the peculiar insistence of the Dominion of Canada in these negotiations. The United States never insisted upon a recognition of prior private appropriations, Canada did put forward that contention in nearly all of her communications. Thus, in the order in council of June, 1905, at page 64, we find her insisting that there ought to be a recognition of these private prior appropriations. The order in council says:

> The minister of the interior, to whom the said dispatches were referred, observes with respect to the conditions existing in the State of Montana and the districts of Alberta and Assiniboia along the Milk River, to which the honorable the Secretary of State refers, it is manifestly in the interests of both countries that the waters of the St. Mary and Milk Rivers should be conserved for the beneficial use of the owners of agricultural and ranch lands through which these rivers flow, and that the Canadian Government should join in an arrangement with the United States Government for the purpose of attaining this end, due regard being had to the protection of vested rights in conformity with the laws concerning the right to use water as recognized in both countries.
>
> The minister therefore submits that as the United States Reclamation Service has been devoting much consideration to this matter, His Majesty's ambassador at Washington should be asked to invite the United States Government to suggest such a plan for the settlement of all questions in reference to the waters of the St. Mary and Milk Rivers as would be acceptable to both countries.

Here we see the Canadian Government, through its council, very anxious for a division of these waters upon a basis that would have due regard to the protection of vested rights in conformity with the laws concerning the right to the use of water as recognized in both of the countries. Bear in mind that Col. MacInnes is getting rid of the effect of these negotiations by saying they had a deadlock on these matters at the last moment. I am trying to show that there was no deadlock, and that so far as this question of prior appropriations was concerned, Canada was insisting on it more than the United States, and that the United States never did in all these negotiations make a proposition for a division based upon the recognition of private prior appropriations.

Again, in the order in council of March 2, 1908, at pages 67 and 68—this was in reference to Mr. Root's proposition—commencing at the third paragraph I find this:

> That the Government of the Dominion was appealed to many years ago by persons interested in southern Alberta to develop that district by the construction of a canal system to divert water from St. Mary River and finally decided to take action in the matter after reaching the conclusion from the reports of its own officers and other engineers that the diversion of the St. Mary River could not be carried out in the United States as a commercial undertaking.
>
> That the Government of the Dominion accordingly commenced a canal system for the utilization of the water of St. Mary River under a policy precisely similar to that adopted by the United States under their Reclamation Act.
>
> That for various reasons the said Government, instead of constructing the canal system as a public work, entrusted it to private capital without relinquishing their administrative control under the irrigation laws of the Dominion.
>
> That the irrigation company formed for the purpose of carrying out this project laid out plans for the construction of an extensive irrigation system for the development of a large tract of land and were given a term of years by the Government to complete the canals which are essentially public in character.

That the construction of this canal system has been actively carried on and good faith kept with the Government by the company.

That in so dealing with this project the Government has innocently created vested rights under the laws of the Dominion.

That under the most favorable circumstances the diversion of the waters of the St. Mary River in the United States will seriously affect the rights so created, as well as the public rights to the use in development of public lands of the natural surplus water of streams flowing through the territory, not for the purpose of protecting similar rights in the United States, but in order to create rights not now in existence.

And in conclusion:

That for these reasons, and in order to give a fair measure of protection to the vested rights created in Canada, this country should receive considerably more water than the proposed treaty provides for apportioning to it.

Who was clamoring here for the recognition of private prior appropriations? Take Mr. King's memorandum of April 27, 1908, found on page 83, commencing at the second paragraph:

The Alberta Railway & Irrigation Co. has made an appropriation of the waters of the St. Mary River which would surely be held valid in the courts of Montana or of the United States, were the works of the company situated in Montana, or in another State of the Union.

This appropriation, made under the laws of Canada, covers the low-water flow and up to 2,000 second-feet of the high or flood stages. This appropriation was not an improvident one. Before it was made it had been ascertained that the stated quantity of water could be applied beneficially and without waste. The company have prosecuted their works under their authorization with due diligence.

While the fact that the works of the Canadian canal do not lie in the United States may involve difficulty in the establishment of the validity of the appropriation as against subsequent diversions in Montana, it would seem only fair and reasonable under the comity of nations that St. Mary River should be undisturbed to the extent of allowing Canada to supply its commitments from that stream.

Who is clamoring here about a recognition of private prior appropriations? Then take the memorandum of Mr. King dated April 27, 1908, quoting from the second paragraph on page 83:

As to the Canadian company, however, the proposal is to terminate or limit existing rights, and this, it is submitted, can not be done, under the laws on either side of the boundary line, at a date fixed without the consent of the parties interested.

As is set forth in the minute of council previously referred to, the operations of the Alberta Railway & Irrigation Co. have been in pursuance of a consistent plan dating back many years. Their project contemplates the application to a certain tract of the water which they have been authorized under the irrigation act to take. This authorization was not an improvident one, nor given without previous careful consideration. Before it was given the fact had been ascertained by surveys made by the Government and the company that the authorized quantity of water could be applied beneficially and without waste. The company have prosecuted their works under their authorization with due diligence.

In these circumstances it is believed that under the laws as to reclamation of arid lands in force in Canada, as well as in many States of the Union, including Montana, the beneficial use by the company would begin at the initiation of the project, and that the amount of water beneficially used would be determined by the courts as equal to the amount authorized, and thereby recorded against the stream.

Now, sirs, in view of all that, having disposed of the question of the equal division of the waters, what is there in the contention of learned counsel that there was a deadlock because the United States insisted upon recognizing prior appropriations?

Sir WILLIAM HEARST. In view of your contention that the United States was not much concerned about a recognition of the right of prior appropriations, whilst Canada was clamoring for it, why did not the United States at once accept Mr. Campbell's offer to divide equally the water flowing across the boundary and give up any right to the prior appropriations on the part of Canada?

Mr. TURNER. I am just coming to that, if you will pardon me. Mr. Newell's proposition, which was in response to Mr. Campbell's proposition, did not propose, as counsel seems to think, any recognition of prior appropriations. It simply provided for a prior right in each of the Governments for a certain quantity of water, that of the Dominion being 400 second-feet of the waters of the St. Mary River and that of the United States being 359 second-feet of the waters of the Milk River, after which the waters were to be divided equally between the two countries. So far from this being any proposition to recognize prior appropriations, it was a grant of a prior right to each of the two Governments en bloc, and to each of the two Governments in their governmental capacity.

Mr. POWELL. Don't you think it was just assuming the appropriation?

Mr. TURNER. No, sir. I do not think it was doing anything except giving each Government a prior right to so much water. It was to be given to each of the countries in their character as political entities and they could do whatever they pleased with it. Canada could not tell what the United States might do with that water, nor could the United States tell what Canada might do. No doubt it was with the idea that each country might have a sufficient quantity of water to provide for the commitments which existed in the two countries.

Now, sirs, to show that there is absolutely nothing in this idea that there was any deadlock in the negotiations because the United States was insisting on prior appropriation of waters, this draft of Sir George Gibbons, which followed almost immediately the draft of Mr. Newell, makes the same provision, almost in the identical language of Mr. Newell. It provides for this prior right of the two Governments in each one of these streams, and more than that, gentlemen of the Commission, the treaty which was written only four or five days afterwards, provides for the same thing exactly in the language of Mr. Newell. Now, where is this terrific deadlock which Col. MacInnes finds either as to the quantity of water the two countries should have or upon this subject of prior appropriations? There is nothing in it. It never existed. It is a highly picturesque flight of the imagination, and that is all that can be said for it. If this deadlock did exist, Sir George Gibbons did not know it. If it existed, Mr. Bryce and Mr. Root did not know it when they wrote this treaty in almost the language employed by Mr. Newell providing for these prior rights in the waters. Nor was there anything in the quantity of the water provided by Mr. Newell to create a deadlock.

Mr. MACINNES. The deadlock I refer to was not over Mr. Newell's draft of the 29th of December, but over Mr. Campbell's proposition of the 29th of December.

Mr. TURNER. There was not any deadlock there either, or Sir George Gibbons and Mr. Root and Mr. Bryce very quickly unlocked the deadlock if there was any. I say that in the quantity proposed by Mr. Newell there was nothing to cause a deadlock. On the contrary, since his proposal gave Canada 400 second-feet of the waters of the St. Mary River and the United States only 359 second-feet of the waters of the Milk River, it will be seen that under his proposal Canada was to get 41 second-feet more of these joint waters than the United States was to get.

Now, gentlemen of the Commission, I submit in all candor and in all sincerity that when these papers came into the hands of Sir George Gibbons and Mr. Anderson there had been complete concurrence as to the character of the waters which were to be divided, and as to the quantity thereof which each of the countries was to receive. More than that, there is absolutely no evidence in the record to show any recession from that understanding by either one of the countries after the papers came into their hands. So far as we know or can see, no rift in the lute had occurred to mar the perfect harmony existing between them. Now, sir, I say, that it is safer to assume that the language employed by those who finally put this treaty in shape was intended to carry out and effectuate this understanding arrived at, rather than to go off and hunt for unfounded and imaginary grounds upon which to found a theory that the draftsmen of this treaty at the last moment concluded to make a different treaty from any ever in mind by any person in either one of these two countries during the entire history of the negotiations. It is not only safer to do that, but it is more in consonance with the law. When a particular status once exists the law presumes that it continues until the contrary has been shown, and this presumption has special and peculiar application to a mental status. Whenever it has been shown that a particular purpose and intention is entertained, with reference to the performance of some contemplated act, that purpose and intention is presumed to continue and to govern the act when finally performed, unless there be satisfactory evidence that there had been a recession from it by the party who previously held it. Not only was there no recession here, and no evidence of any recession, but the evidence is very clear to the contrary.

Now, gentlemen, we have the matter up to the final arbiters, Mr. Root and Mr. Bryce. We can not enter the council chamber and listen to the interchange of views that took place between them, but we know the character of those men. We know that neither one of them can be thought for a moment to have entertained any idea of getting an advantage of the other. Undoubtedly, their purpose was to effectuate and carry out in entire good faith the understanding before that reached by the technical representatives of the two Governments. They could not imagine that misunderstanding might arise out of so simple a matter. Indeed, it seemed plainer and simpler to them than it does to us now, because their knowledge of these waters and their tributaries must have been superficial. No hint had come to them of a claim by either country to waters entirely local to the other country, and being unable to understand that any such claim might ever possibly be made by either country, the idea never entered their minds of guarding against it by qualifying words. And so, in the haste of the moment, and under the necessity of economizing in space, because this stipulation was only one of a large number of stipulations in the treaty of 1909, they wrote the broad word "tributaries" without qualification, unless, as Senator Walsh has shown, and as I shall undertake to show, there was a qualification of these tributaries in the language of the treaty. But outside of that they wrote the broad word "tributary" without qualification, and this controversy is the result. Many similar international controversies have arisen between countries before from the same cause, that is, the inability of the treaty writers to understand or

appreciate the different situations to which their broad and general words might have application. All such controversies have been determined in the past upon the broad and just principle laid down by all the writers, that treaties between nations are covenants bonæ fidei and are to be construed according to their spirit rather than their letter and such I can not permit myself to doubt will be the determination of this controversy here by this intelligent and very impartial international tribunal.

I want to pass on very briefly to another contention of learned counsel. He insisted very strenuously that there was an inconsistency between the United States claiming the northern tributaries, originating in Canada and flowing across the border before they joined the Milk River, and claiming that Canada was entitled to no rights in any tributary flowing into the Montana end of the Milk River.

Mr. POWELL. What bothers me probably more than anything else about this whole matter is this. When these negotiations drew to a close, we find this condition of affairs. It was anticipated that there would be 500 second-feet or thereabouts or three-quarters of the flow of the Milk River going to the United States. That leaves a quarter of the flow, making the total 666⅔ second-feet. It was evidently in their minds that there was not only a possibility but a probability of that being the case. Further than that, this is not during the flood season, but exclusively during the period of irrigation. How do you account for that? When there is not 200 second-feet unless you go away down stream and take the whole Milk River into account.

Mr. TURNER. I suppose that fact troubles you because it raises an implication that the parties intended to take in these Milk River tributaries. But, sir, if you look at Mr. Newell's last proposal—he was one of the technical experts in the United States—his proposal was to give this prior right in the Milk River to the United States, and his proposal proceeded strictly upon the proposition that the waters to be divided were the waters crossing the boundary. So evidently when he proposed this priority, he did not have these lower waters in Montana in consideration at all. It is utterly impossible. I am unable to account for it except upon the theory that Mr. Newell must have been mooning about that matter, and forgot there would not be any waters in the Milk River during the irrigating season. But, manifestly, his proposal was for the division of waters crossing the boundary, and it provided for this priority to the United States. These negotiators could not be supposed to know there would not be any water there, when Mr. Newell, the writer of the treaty, did not know it. So they just followed the drafts provided by him.

Mr. POWELL. It seems incomprehensible that these people did not know there was no water there.

Mr. TURNER. It is incomprehensible to me, but neither country need be very much concerned about whether a particular quantity of water they were to have was in the particular system or not. The two rivers were to be considered as one stream. If there was no water in the Milk River, the United States would be entitled to have the water in the other river, except during the irrigation season.

Mr. POWELL. That is the only season that bothers me.

Mr. TURNER. So the United States may have concluded in Mr. Newell's estimation that there would be some water in the Milk River, possibly that the United States would have stored from the spare waters of the St. Mary River enough water to make up during this irrigating season what the United States was giving up in the St. Mary River. That is the only theory on which his action is explicable, but manifestly his action did not proceed on the theory that these southern tributaries of the Milk River were to be brought within the equation, because if we look at his last proposal here of December 29, 13 days before the treaty was signed——

Mr. CLARK. When you speak of these southern tributaries in Montana, you refer to those that enter the Milk River after it crosses the boundary from Canada into the United States?

Mr. TURNER. I am referring to the Montana tributaries alone.

Mr. CLARK. You refer to those that enter the river after the river crosses into Montana from Canada?

Mr. TURNER. Yes.

Mr. CLARK. Those that rise after the stream crosses into Montana for the last time before it reaches the Missouri?

Mr. TURNER. Yes. Here is Mr. Newell's proposal:

> That the waters of each stream flowing across the international boundary shall be divided equally in quantity as nearly as practicable between the two countries.

And further on:

> Inasmuch as the water of the rivers have widely different values at different times of the year, and have especial value during the irrigating season, this latter shall be taken as including the time from April 1 to September 30. A priority to the right to the use of a portion of the water of St. Mary River shall be recognized as appertaining to Canada to the amount of 400 second-feet, the amount now put to beneficial use; and, thus, in the event of the natural flow of the St. Mary River at the international boundary being less than double this amount—namely, 800 second-feet—then the United States shall waive for the time being its claim to the full equality of the natural flow during the irrigating season as above defined, and shall permit a full flow of 400 second-feet to pass the boundary. * * *
>
> On the Milk River, also, there shall be recognized as existing a priority in the United States to an extent of 359 second-feet of the natural flow of Milk River, and this amount of the natural flow shall be allowed to pass from Canada into the United States without diminution of the natural flow of the stream during the irrigating season when the river and its tributaries yields this quantity or a less amount.

and so forth. Manifestly, when Mr. Newell provides for this priority out of the waters of the Milk River, he is talking about the Milk River before it crosses the international boundary, and he is talking about water that we now know probably will not be there for one season out of three. It is possible that Mr. Newell, for the moment, had forgotten about the idiosyncrasies of this river when he made this proposal. At any rate, Mr. Bryce and Mr. Root had this proposition before them when they made the treaty, and they assumed that the technical representative knew what he was talking about, and they provided for the same thing, except that they gave a little larger quantity. They gave 500 second-feet to each instead of 400 second-feet to Canada and 359 second-feet to the United States. It does not involve any implication whatever that anybody had in mind the drawing into the equation of these Montana tributaries.

I want to go on with this supposed inconsistency in the position of the United States in insisting on including these Canadian tributaries which cross the boundary before they join the Milk River, and in

insisting on excluding the Montana tributaries. I say that there is not any inconsistency. The Canadian tributaries were these international streams that cross the boundary and were capable of division. The Montana tributaries had no international character whatever, and they were incapable of division. There had been no previous claim on the part of anybody connected with the Canadian Government insisting upon any right in those waters.

Mr. CLARK. Would or would not the same controversies arise as between the settlers on the tributaries and on the main river?

Mr. TURNER. They did arise.

Mr. CLARK. And therefore, in your opinion, they would be subject to the same consideration?

Mr. TURNER. History shows there was complaint on the part of American settlers against the diversion of these tributaries. The history of the negotiations shows that while Canada never at any time mentioned those Montana tributaries, these Canadian tributaries were mentioned on both sides during the negotiations. They were expressly included in Mr. Root's draft treaty of June 15, 1907, found on page 66 of the record. He first provided (page 66) for the waters that were to go to the United States. Then he provided for the Canadian share in these words:

(d) All water of St. Mary River crossing the international boundary into Canada, not in excess of 2,000 cubic feet per second.

(e) All water of Milk River, and its tributaries, diverted in Canada for use in its territory, excluding any water of St. Mary River turned into Milk River by Canada and which has been measured under item (d).

So that here Secretary Root refers to these Canadian tributaries. The reply of the privy council to this proposition of Mr. Root's was on March 2, 1908, page 68. I do not read that but I note and call the attention of the Commission to it, that they did not in that reply anywhere take issue with Mr. Root's proposition that these northern tributaries in Canada be charged to Canada as a part of these waters. Mr. Newell's memorandum of October 15, 1908, expressly refers to these northern Canadian tributaries. In that memorandum on page 88, speaking of the surveys of the United States, he says:

The surveys begun in 1900 have been steadily followed up, and on March 25, 1905, the sum of $1,000,000 was allotted to begin the work now being carried on. The fact that the Dominion Government took upon itself the determination as to how the waters should be used without consulting the United States, and that it has attempted to dispose of the waters of Milk River which rise in the United States and pass through a part of Canada has aroused a very deep feeling. This is steadily aggravated by the fact that Canada is permitting the tributaries of Milk River to be diverted, namely, West Fork or Willow Creek, North Fork or Battle Creek, Frenchman Creek or White Water, and Rock Creek, in spite of the fact that these waters have been appropriated under the laws of Montana and already put to beneficial use.

These tributaries referred to by Mr. Newell are the northern Canadian tributaries which cross the boundary before they join the Milk River. Mr. King's reply of December 23, 1908, is at page 92:

As to diversions in Canada from the four tributaries of Milk River mentioned in Mr. Newell's memorandum, the authorizations have been restricted to the actual necessities of individual settlers. The authorizations, with the strict system of inspection, operate as a restraint against excessive use of water rather than the opposite.

The Canadian Government would have been ready to consider any representations made on behalf of the settlers on these creeks south of the boundary line, but none appear hitherto to have been made, and not even in the draft treaty of 1907 nor in

Mr. Newell's present memorandum is any remedy proposed on their behalf. Under clause 5 (c) of the draft treaty—

that is the Root treaty—

Canada would apparently be entitled to all the flow of these streams north of the boundary line.

Just as I stated. They were included by Mr. Root in the waters that were to be given to Canada. Now we come to Mr. Campbell's draft of December 29, 1908:

In all streams which cross the international boundary, the waters of which are used for irrigation, each country shall be entitled to the use of half the total natural flow as ascertained by measurement at the point or points where such streams cross the international boundary. "Natural flow" means the flow of each river system from all its sources which would pass the point or points indicated herein if no artificial obstruction had been placed in the stream or any of its tributaries or sources, and if no water had been diverted from or added to the flow before reaching the point or points indicated.

Mr. POWELL. That proposition would exclude the southern tributaries.

Mr. TURNER. Certainly it would, but it would include the northern tributaries. I am attempting to show that Canada has consistently from the start recognized that these northern tributaries were tributaries that entered into the equation, and therefore that there is no inconsistency in the United States insisting upon their division, and at the same time insisting that the Montana tributaries are not subjected to division. Now, the most convincing evidence is Mr. Gibbons's telegram to Mr. Anderson, found on page 97, in which he suggests adding the Province of Saskatchewan to the Province of Alberta as a description of the territories in Canada from which these tributaries come. Sir George Gibbons certainly understood that the Saskatchewan tributaries were to be divided. Otherwise, he would never have insisted upon the addition of the word "Saskatchewan" to this treaty. I notice there is more or less speculation as to why Sir George said that. Col. MacInnes in his argument at Detroit, gave a very good reason for it. There need not be any mystery why he suggested the Saskatchewan tributaries. At page 128 of the Detroit hearing, Col. MacInnes says, in reply to a question by Mr. Glenn:

Yes; I think this was the reason that Saskatchewan was added. When some one—

that is, Sir George Gibbons—

got home he looked at the map and said: "Hello, here is a geographical description where it speaks of tributaries being in the State of Montana and the Province of Alberta and I find that some of these tributaries are in Saskatchewan. The description is bad." That is all I think it was.

That speaks well for Sir George Gibbons as an honorable, upright negotiator, and also for his enlightened statemanship. He wished to see everything which in good faith ought to go into this treaty included in it, in order that the just rights of both might be protected in the treaty, and that those things which had heretofore given cause for disagreement between the two countries might all be bound up in this treaty and be thereby ended. That concludes all I desire to say on the historical aspects of this case.

I want to add a few words concerning the logical method of construing this treaty. I say that it is not necessary to go back to these

historical evidences of the negotiations to show that the contention of Canada is utterly and absolutely unfounded. If we look simply at the face of the treaty and read it, we see that it referred to the waters of two particularly described rivers and their tributaries, and that the division of those waters was to be equal between the two countries. The question now arises, What are the waters that come within that description—that is to say, "the St. Mary and the Milk Rivers and their tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan"? Now the only waters coming within that description that are capable of division are those waters that flow across the boundary, which, by reason of that fact have a quasi-international character, and which by reason of that fact both countries can make a beneficial use of if permitted to have their fair share of their natural flow. I say that the natural, necessary, and conclusive implication is that those were the waters intended by this treaty to be divided. I say that this Commission can not assume that either one of these countries had any interest in, or intended to claim any interest in, waters wholly local to the other country, and that it must assume that their interest pertained and pertained alone to those waters that were common to both of them. These are implications which the Commission is compelled to draw. They are abstract implications which are necessarily inherent in the subject matter of this transaction and in the wording of this treaty.

Now if the division be made upon a basis of the international waters which are capable of being divided, it will be seen that each country gets one-half of the waters, just as the terms of this treaty provides, but if the contention of Canada be sustained and these Montana tributaries of the Milk River be included in the waters to be divided, then, as I have heretofore shown, Canada will receive three-quarters of these international waters—and the waters which furnish the raison d'etre for this treaty, and the only waters which furnish it—while the United States will get only one-quarter of the waters. I say that any such result is contrary to the intention manifest on the face of this treaty. Where do we get any inkling on the face of this treaty of a purpose to include these Montana tributaries? Nowhere, unless it be in the unqualified use of the word "tributaries." Canada says that that word, being unqualified, must be read literally, and therefore will include the Montana tributaries as well as the international tributaries. But, gentlemen, I say that no reading of any contract or treaty is permissible which produces results so shocking in their inequality and so contrary to any purpose which may be reasonably imputed to either one of these two countries. Judicial tribunals decline to pursue any kind of construction to results so extraordinary. They stop short in such cases and, in the language of Mr. Hall, give a reasonable sense rather than a literal sense to words when the two senses do not agree. I say that the reasonable sense here is that the tributaries referred to by the treaty are those which either add to the flow of the main streams before they cross the boundary, or which themselves cross the boundary before joining the main stream and are themselves international tributaries. This reasonable sense is the logical sense. Since the treaty was about the waters of two international streams, the natural implication arising from the association of the different parts of the treaty re-

quires the word "tributaries" to be read in the same sense as international tributaries. If that which is so clearly implied on the face of this treaty were expressly written in the treaty, this implication would stand out with great distinctness. If the treaty had read "the two high contracting parties agree to divide equally between themselves the waters of two international rivers and their tributaries, to wit, the St. Mary and the Milk Rivers," then the implication would be irresistible that the tributaries referred to were the tributaries that appertained to these rivers while they were still international rivers, or tributaries that were themselves international streams and crossed the border before joining the main stream. I want to beg the pardon of the Commission for presenting two or three other views of the logical construction of this treaty.

A strong indication of the meaning of this article is found in the direction for the apportionment and division of the waters between the two countries. Apportionment means division, and I state that with great confidence, because I have looked it up in the dictionaries, and the words apportionment and division are used interchangeably in the article. The apportionment and division here directed is an actual and physical apportionment and division. It is to be made from time to time by the reclamation officers of the United States, and the properly constituted irrigation officers of the Dominion of Canada. It is to be made daily, and sometimes twice a day, because the treaty provides that where the exigencies of one country are greater than those of the other it may for the time being be supplied with the greater portion of the water. These measurements have to be made all the time. These gentlemen have to be on their job there all the time. This division provided here therefore is an actual physical division of these waters to be made from time to time. While it is to be equal in the long run, it may be unequal and disproportionate at times to meet the exigencies of the two countries. This is the reason for committing the measurement and apportionment to the reclamation and irrigation officers of the two countries. If, then, the apportionment and division is to be actual and physical, it is evident that it was intended to be confined to waters that were susceptible of actual and physical division. But that can not be said of waters that have passed from one country to another, or of waters wholly within one country. They are beyond the power of actual physical division. It is possible, of course, to charge them to one country or the other as a part of the waters to which it is entitled, but that is not what the article provides for. It provides for their actual apportionment and division, and that is only possible of waters passing from one country to the other. Waters which may be measured and apportioned, so that a certain quantity may be detained in one country, leaving another certain portion to pass down for use into the other country. If this be the meaning of the several provisions for apportionment and division, and for measurement and apportionment, and I respectfully submit that no other meaning can be attached to them, then it fixes and defines beyond doubt or cavil the waters intended to be divided. They are waters susceptible of actual physical division, and necessarily waters and waters only that cross the boundary from one country to the other.

Mr. POWELL. You think there is a necessary implication there?

Mr. TURNER. I think that is a logical implication. I think the Commission is bound to find that this is a provision for actual physical division and apportionment.

Mr. POWELL. In respect to waters which the Commission have it in their discretion to allot to Canada, if they see fit to do so?

Mr. TURNER. Yes, or the United States, as the case may be. I desire again to insist on the contention put forth by the United States at the former hearings and presented by Senator Walsh yesterday, that the words of Article VI "in the State of Montana and the Provinces of Alberta and Saskatchewan," are words of limitation rather than words of description. The St. Mary and Milk Rivers are the only two streams of those names on the American continent, whose waters may be treated as one stream and divided between the two countries. Therefore, as words of description the addition of the words "in the State of Montana and the Provinces of Alberta and Saskatchewan" were wholly unnecessary. As words of limitation they were necessary, or at least desirable, to avoid misconstruction with respect to the tributaries intended to be included.

Now, sirs, taking the words as a limitation, as I think they must be taken, they require these tributaries to be both in Montana and in the Provinces of Alberta and Saskatchewan. The use of the conjunctive particle "and," in the phrase "in the State of Montana *and* the Province of Alberta," necessarily implies, if the word is to be given its literal meaning, that the thing referred to must be in both the State of Montana and the Province of Alberta. It is true that the conjunction "*and*" is frequently given the meaning of the disjunctive "*or*" in legal construction, when the context or the surrounding circumstances indicates that the latter meaning was intended. But in order to thus transpose the meaning of the word, we must resort to construction—something that our friends on the other side say can not be permitted. We on this side, however, say that it may be permitted, and we say further that if construction be resorted to, it only confirms the contention that the words in question are words of limitation, because the limitation that they provide for is in strict conformity with what the history of the case shows was the intention of the parties.

The contention that the words are words of limitation is strengthened when we remember that in the original draft of Sir George Gibbons the words "and their tributaries" followed instead of preceded the words "in the State of Montana and the Province of Alberta," thus leaving the word "tributaries" without any qualification whatever. In the treaty as finally concluded, however, the words "and their tributaries" were moved forward so that they preceded the words "in the State of Montana and the Provinces of Alberta and Saskatchewan." Grammatical arrangement did not require this transposition, and it is impossible to suggest any good reason for it, except that it was intended that the words "in the State of Montana and the Provinces of Alberta and Saskatchewan" should limit the character of the tributaries intended to be included in the apportionment and division of the waters provided for.

Two difficulties were suggested at the former hearings to treating the words as words of limitation. First, that there are no tributaries that are at one and the same time in Montana and in the Province

of Alberta and in the Province of Saskatchewan, and therefore that the words are inapplicable considered as words of limitation. They are, however, also inapplicable for the same reason considered as words of description. The Commission will remember that the Province of Saskatchewan was inserted at the last moment on the telegraphic request of Sir George Gibbons.

It is fair to assume, I think, under these peculiar circumstances, that the Province of Saskatchewan was added, not to make an additional limitation, but to broaden the limitation already made; that is to say, to put in apposition the State of Montana on one side, and the territory, considered as a whole, of Alberta and Saskatchewan on the other. The word "or" as a connective particle would have been more appropriate in hitching on the Province of Saskatchewan, but since there are no tributaries that are at the same time in Montana and in each of the Provinces of Alberta and Saskatchewan, the disjunctive rather than the conjunctive particle must be understood. The draft as first prepared read "in the State of Montana and the Province of Alberta." Here there was no difficulty in reading the words as a limitation, namely, that the tributaries referred to must be tributaries flowing both in Montana and in Alberta. Manifestly, the hitching on of the Province of Saskatchewan at the last moment, because it was found that some of the tributaries flowed across the boundary from that Province, was not intended to change the essential purpose of the limiting words.

The second difficulty suggested grows out of the fact that there are certain tributaries arising in the United States and flowing into the St. Mary River, and also into the Milk River, before the latter rivers cross the boundary, and which therefore can not be said to flow as tributaries in both countries. This difficulty, I confess, is more serious than the one first suggested, but it seems to me that the solution suggested by Senator Walsh is sound, namely, that these tributaries were not in the minds of the treaty makers when they made the limitation, because they became added to the flow of the main stream before the latter crossed the boundary, and were considered as a part of the main stream to the natural flow of which, plus their tributaries, Canada was entitled under the designation "the St. Mary and Milk Rivers." I want to say this about the difficulty of harmonizing the different implications which arise on treaties and contracts. Sometimes it can not be done. This was a treaty about a complicated matter and it was evidently concluded by gentlemen who were not very familiar with the complications with which they had to deal. Therefore, as we find in a great many treaties, you can not harmonize absolutely every contradiction which you find growing out of the treaty. There are bound to be ragged points which you can not close up, and there are many contracts and many treaties of that character. The fact that one or more such inconsistencies exist in a treaty is no argument against trying to find the real true genuine purpose of the treaty and applying it according to that purpose and intention.

Mr. POWELL. Suppose you are dealing with cattle ranchers; suppose this big man in Calgary, Pat Burns, has three ranches, one in Montana, one in Alberta, and one in Saskatchewan? Would not the natural meaning—I am not ruling out a possible meaning—of the

expression "Pat Burns's ranches in the State of Montana and the Provinces of Alberta and Saskatchewan" be that he had a ranch in Montana alone, and a ranch in the Province of Alberta alone, and a ranch in the Province of Saskatchewan alone?

Mr. TURNER. I think that is true, sir.

Mr. POWELL. I am not suggesting that yours is not a possible meaning.

Mr. TURNER. If Pat Burns had a ranch, half of which was in Alberta and half in Saskatchewan, and that was described as a ranch in Alberta and Saskatchewan, the necessary implication would be that it must be in both those territories at the same time. So, when the original draft here referred only to Alberta there is no difficulty in applying that meaning to the description, "in the State of Montana and the Province of Alberta" and because we find these streams to exist in both those territorial subdivisions. My proposition is that the hooking on at the last moment of Saskatchewan, at the request of Sir George Gibbons, no doubt being done hurriedly, was not intended to change the sense in which the phrase "Montana and the Province of Alberta" was used, which was a limitation rather than a description.

Mr. POWELL. I am not suggesting that Senator Walsh's construction or interpretation does violence in any way to the English language, because I recognize it as a possible construction.

Sir WILLIAM HEARST. If Pat Burns owns ranches, some entirely in Saskatchewan, some entirely in Alberta, and some entirely in Montana, and some on the boundary line between Alberta and Montana, or between Saskatchewan and Montana, partly in one country and partly in another, and he devises to his son: "My ranches in the State of Montana and in the Provinces of Alberta and Saskatchewan," do I understand you to say that the son would simply take those ranches that were partly in Saskatchewan and partly in Montana and those that were partly in Alberta and partly in Montana, and not those entirely in Montana or entirely in Saskatchewan or entirely in Alberta?

Mr. TURNER. I do not understand anything of that kind. I insist on the natural and sensible meaning of words rather than on the literal meaning of those words, and in that respect I differ from my friends on the other side.

I now pass to another point. It is presumed that different acts passed at the same session, or at different sessions with respect to the same subject matter, are imbued with the same spirit and actuated by the same policy, and they should be construed each in the light of the other. The doctrine of construing acts in pari materia, strictly speaking, has relation to different acts, but the same principle prevails even more strongly in construing different parts of the same act under the doctrine that the several provisions of an act ought to be construed together, and each provision in the light of every other provision.

Now, looking at this treaty as a whole, we see that it has relation, except as to questions submitted under Articles IX and X, exclusively to boundary waters, or waters crossing the boundary from one country to the other. That throws some light on the sense in which the words "St. Mary and Milk Rivers and their tributaries" were used

in Article VI of the treaty. But the connection between Article II and Article VI is immediate and direct. They are intimate parts of a connected whole.

Now let us see what Article II says:

> Each of the high contracting parties reserves to itself or to the several State governments on the one side and the Dominion or Provincial governments on the other, as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters.

Here is a general principle laid down that each country may control absolutely without reference to the other the waters arising and flowing into that particular country.

Mr. POWELL. That is general, this is specific.

Mr. TURNER. That is what I am proceeding to. It will be seen that Article II lays down a definite principle with reference to waters which flow across the boundary; namely, that each country reserves to itself exclusive jurisdiction and control over the use and diversion of such waters on its own side of the line, subject to the obligation to make compensation to persons on the other side of the line who may be injured by such use or diversion under this provision. Neither country would have any ground to object to any diversion of waters, however complete, which would otherwise flow to it across the line. It would be a complete answer to any complaint about the matter that the right to make such diversion was expressly reserved by Article II, and that the courts of the country making the diversion were open to citizens of the other country for the purpose of reparation if it could be shown that they were injured by the diversion.

Article VI is really an exception to this general rule in that it abrogates the rule as to the St. Mary and Milk Rivers and their tributaries, and provides that those waters shall be enjoyed by both countries, and evenly divided between them. It might very well have been attached to Article II as an exception. Undoubtedly it was framed in the light of Article II and with the knowledge that it created a special case inconsistent with that article and really an exception to it. Therefore, I say that the object and purpose of the one may be properly deduced from the other.

The object and purpose of Article II was to establish a principle with respect to waters that flow across the boundary or into boundary waters. No other waters were in mind. Therefore, when an exceptional case was to be provided for, the natural presumption is that the exception referred to the same class of waters as those defined in the general provisions. No escape would be possible if Article II and Article VI were contained in one article, as they very well might have been. The fact that they were divided into two articles can not alter the principle. They must, notwithstanding that fact, be construed together, and thus construed they show what was in the mind of the negotiators in the writing of both articles, namely, that they had in mind only waters flowing across the boundary from one country to the other.

Lastly, I submit that the last clause of Article VI—that clause provided for the measurement and apportionment of the water by the reclamation and irrigation officers of the two countries under the direction of the International Joint Commission—sheds some light,

and by no means a feeble light, on the meaning of the article. While it is true that the officers of either country may, where authorized by treaty, perform functions in the other country, such authorization is unusual and when conferred ought to be conferred expressly and not by implication. That the officers of either country may go into the other in performing the functions of measuring and apportioning the water under Article VI, is the barest implication. There is no express authority for it. It is reasonable to assume, then, that the joint authority to measure and apportion the waters, conferred by the last clause of Article VI, was conferred upon these officers in the indeterminate language of that clause, because there were points where that authority could be jointly exercised without either impinging on the territorial sovereignty of the other, namely, at points where the waters pass from one country to the other, and where measurements could be taken by each that would check with those taken by the other. If that be true, and it seems a reasonable hypothesis, it throws an illuminating light on Article VI. It shows an intention that the joint measurement and apportionment should be made at the boundary, and nowhere else, and, therefore, that those waters only that were capable of measurement at the boundary were within the contemplation of the makers of the treaty.

Gentlemen, I want to present to the Commission the findings which I think they should make here, as the result of this hearing, and in this connection I want to say a word about the findings proposed by the representatives of the Canadian Government at the St. Paul hearing. They proposed that the commission give Canada from the St. Mary River up to a maximum flow of 2,000 second-feet, May to October, inclusive, 500,290 acre-feet, and of the Milk River below A. R. N. I. intake 72,000 acre-feet.

Mr. MACINNES. That is where that can not be used.

Mr. TURNER. A little further down they propose that Canada should get of the northern tributaries of the Milk River, the tributaries we have been talking about, 136,000 acre-feet, and to the United States of the northern tributaries of the Milk River, passed by Canada, 54,000 acre-feet. Now, I can not conceive of any principle upon which this Commission could make any such finding as that proposed by our friends on the other side, and I can not conceive of any principle upon which they propose it, except that which we lawyers go on when we bring a suit of damages against some one—we pray for $50,000 when we only expect to get $5,000—in order to give the jury a chance to come down in our favor. Of course, this treaty does not provide for this Commission going on and parceling out these waters in specific proportions. The waters are too uncertain, the flows of the rivers are too difficult to compute. You can not say that either country shall have any particular quantity of water at any particular time, except this priority providing for during the irrigation season. You can provide for these priorities in actual figures of second or acre feet, but with respect to all other divisions it must be by laying down general principles.

I propose these findings, and the findings are based on the argument which I have presented, and I assume that if the argument which I have presented strikes the Commission as correct, the findings will be made. If not, they will make other findings, but in no case

will they make findings apportioning to either one of these Governments any specific amount of water of any of these rivers outside of this priority they are entitled to during the irrigation season.

Mr. POWELL. That is the only thing that is fixed.

Mr. TURNER. Yes. The Commission finds and directs:

First. That Article VI of the treaty of 1909, in its provision for the apportionment of the waters of the St. Mary and Milk Rivers and their tributaries, between the United States and Canada, has reference to the waters of said rivers and tributaries that are international in character, that is to say, the natural flow of which, if not interfered with, would cross the international boundary. The said article has reference to tributaries arising in one country, the natural flow of which, if not interfered with, would cross the international boundary to join one or the other of the rivers after the latter has finally crossed the international boundary into the other country—making provision here for these northern Canadian tributaries that cross the border before joining the main stream.

Second. Tributaries arising and flowing wholly in one of the countries, and joining one of the rivers after it has finally crossed the international boundary into that country, are not within the purview of the treaty, and are not to be considered in any apportionment and division of the waters directed by said Article VI.

Third. For the purposes of division and apportionment of the waters of said rivers between the two countries, both during the irrigating and nonirrigating season, measurement of their flow shall be at the international boundary where the said rivers finally pass from one country into the other, but any water diverted from the St. Mary River or any of its tributaries, or stored by the United States, shall be computed as a part of the natural flow of the river at the boundary. The same principle shall be applied mutatus mutandis to diversions of the waters of the Milk River or its tributaries by Canada before that river finally crosses the boundary. The apportionment of the waters of the said rivers by the reclamation and irrigation officers of the two countries, other than the apportionment hereinafter described, shall be made during the irrigation season, shall be made daily, and shall be equal between the two countries, but more than half may be taken from one river and less than half from the other by either country whenever the said officers, acting conjointly, shall determine that to do so will conduce to a more beneficial use of the water in each country. Water from the St. Mary River diverted and stored by the United States, when released and turned into the channel of the Milk River, shall not be considered as a part of the natural flow of the latter river.

Fourth. The division of the waters of said rivers during the irrigation season, between the 1st of April and the 31st of October, inclusive, annually, shall be as follows:

ST. MARY RIVER.

(*a*) When the flow is 500 second-feet or less, one-fourth to the United States and three-fourths to Canada.

Mr. POWELL. You are taking 666⅔?

Mr. TURNER. No, sir. I mean 500 second-feet or less.

(*b*) When the flow is more than 500 second-feet, the excess up to 750 second-feet to the United States.

(*c*) When the flow is above 750 second-feet, the water to be equally divided.

Right here, let me say that the provision with reference to the amount of this priority is a very difficult one to deal with. Article VI provides:

> It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow.

How are you going to construe that particle "or"? Are you going to construe "or" as an alternative? Manifestly you can not do that. When the waters are not more than 500 feet, the United States is entitled to one-quarter of it, and you can not cut off that quarter from the United States with any reason or consistency. So you can not construe this word "or" here as an alternative. The word is frequently used in the sense of "to wit," "that is to say," in explanation of that which precedes, and gives to that which precedes the same signification as that which follows. That has been decided many times, over and over again. Giving it that signification, and that is the only one that you can give to it without absurdity, is to give to this language "or so much of such amount as constitutes three-quarters of its natural flow," the meaning, "to wit, that is to say, they shall have three-quarters of 500 second-feet." If that is the meaning, that is the extent of the direction here. They shall have three-quarters of 500 second-feet of the natural flow. What follows? They get their 375, and the United States gets its 125. Then comes in the general provision for equality of division, and you are bound to give the United States enough water thereafter, out of the St. Mary River, to get its 375 feet. That brings it up to 750 feet that is provided for, the priorities named in this treaty. Thereafter, you divide the waters evenly between the two countries. That is my construction of this clause. I understand that it has been generally understood that Canada was to have three-quarters of 667 feet. I can not see any ground for any such a construction. It is to have three-quarters of 500 feet, that is, 375 feet. She is not to get any more until the United States has enough to make up her 375 feet which makes 750 feet, and then the waters are to be divided equally between the two countries. I apprehend the same thing with reference to the waters of the Milk River.

The division of the waters of the Milk River during the irrigation season, between the 1st of April and the 31st of October, inclusive, annually, shall be as follows:

(*a*) When the flow is 500 second-feet or less, one-fourth to Canada and three-fourths to the United States.

(*b*) When the flow is more than 500 second-feet, the excess up to 750 second-feet to Canada.

(*c*) When the flow is above 750 second-feet, the water to be equally divided.

If, as a result of the method of division prescribed by sections 3 and 4, one country shall receive during any period an excess of water over the other, such excess shall be taken into account and equalized in subsequent apportionments.

Fifth. And here is something that I think is strictly logical and I think it ought to be the finding of the Commission. As to the waters of the tributaries of the Milk River arising in Alberta and Saskatchewan which, if not interfered with, would flow across the international boundary into the United States, before joining the said river, each country is entitled to one-half thereof at all seasons of the year. Manifestly, that provision about the irrigation season applies only to the rivers proper; the tributaries are not mentioned there at all. So these tributaries coming across the border before joining the Milk River are subject to the provision for equal apportionment and division, and equal apportionment and division at all seasons of the year. Of course, I need not say any more than I have already said about the proposal to give Canada 132,000 acre-feet of these tributaries and the United States 58,000. There is not any provision in this treaty on which any such division of these tributaries can possibly be predicated.

That is all I have to say, gentlemen, and I thank you very kindly for your patient attention.

ARGUMENT OF COL. C. S. MacINNES FOR THE DOMINION OF CANADA AND THE PROVINCES OF ALBERTA AND SASKATCHEWAN.

Mr. MACINNES. Mr. Chairman and gentlemen: There are some matters I can probably deal with this evening, but before going on I wanted to have put up this map which will enable me to make certain points clearer.

In the first place, it falls to me, I think, as the only counsel present who has been at all of these hearings, to take advantage of the opportunity, which is a sad one, indeed, of referring to the loss which the Commission has suffered in the death of one of its members, who acted as chairman of the proceedings both at St. Paul and Detroit. I refer, of course, to the late Mr. Tawney. As a member of the Canadian bar, I should like to be allowed to pay tribute not only to his courtesy, and if I may say so, his ability, but also to his marked devotion to the work of this Commission and to his desire and intention to help make the Commission such a body as was doubtless contemplated by those who took part in its creation.

We had a long and extensive argument to-day from Senator Turner, from whom the Commission has not heard on this subject previously. So far as I am concerned, there is a record of previous arguments by me, and I do not wish to travel over too much of the ground twice, although I quite understand that the Commission would like this matter fully dealt with, almost as if there were nothing else on record. I should like, however, to put on record a reference to my previous argument at St. Paul, pages 56 to 69, and pages 278 to 301, of the St. Paul record; also a written memorandum of argument, dated September 2, 1915, to which is attached a written memorandum of evidence which contains quotations of what purport to be the pages of the evidence. Unfortunately, the page numbers refer to the manuscript, and are, therefore, not the same in the printed evidence.

Mr. CLARK. That document does not appear in the records we have printed here.

Mr. BURPEE. It is filed with the Commission but it is not in the book. During the argument quotations were made from it by Senator Walsh.

Mr. MACINNES. Those pages will be corrected with the assistance of the secretary of the Commission, to whom corrections have been given. I would also refer to the Detroit record, pages 118 to 150.

Before proceeding with the argument to-day, there is a certain preliminary point which must be dealt with by myself as counsel for the Canadian Government, and that is certain correspondence which appears to have taken place between the Secretary of State for the United States and the Commission, which was referred to by the chairman, Mr. Magrath, in his opening remarks, and from which it appears that the letter was written to the Commission by the Secretary of State with regard to the jurisdiction of the commission; that a copy of that communication was also sent through the usual diplomatic channels to the Government of Canada; that a reply was sent to that communication by the Commission, which was acknowledged by the Secretary of State with that statement that his letter remained unchanged; that a reply was sent to that communication by the Government of Canada in the form of what we call an order in council; that a subsequent letter has been received from the Secretary of State, which purports to modify his previous communication, as not expressing what was his intention or his views in the matter.

Reference has been made by two counsel for the United States to that last letter. By Senator Walsh we were informed that he had had the opportunity of discussing the matter with the Secretary of State, who was quite clear that his previous communication did not at all express what his own views were, and that therefore he proposed to have the matter cleared up. Those also were the views of Senator Walsh, who found that the Secretary of State concurred in his views as to the dealing with this matter by the Commission. Senator Turner has informed us that in his view there is a situation as to the jurisdiction of the Commission which would, as he put it, be somewhat to this effect: That if the Commission did not deal with the matter so as to rule out what have been described as the all-Montana tributaries, which do not cross the boundary, that would not be satisfactory to the United States Government. I think, however, there must be some misunderstanding there, because I think we would all be clear on this situation that under Article VI the Commission would have jurisdiction to deal with the matter, carrying out its duties as laid upon it by the two Governments, in the treaties which have been made, and would be checked only to such an extent as, if by any chance, the Commission should obviously and manifestly go outside what has been committed to it under that article and do something different. If that were so, then doubtless what would happen would be this: That the Government, one or other of the Governments, might say: There is a manifest excess of jurisdiction here. But in doing that, that Government would not strike out from that finding of the Commission any particular part and send it to the other Government and say: So far we are bound, but no further.

The practical step would surely be this, that one Government, which of itself would have no power to make a change, would sug-

gest through the usual diplomatic channels to the other Government: Is there not perhaps some excess of jurisdiction here? To it, the other Government would reply: We will take that matter up, and when we do we think we can satisfy you that that view is not correct, but that the Commission has kept entirely within its jurisdiction. Then the other Government, after having heard the views expressed in that way, would either be convinced that it was so, that the jurisdiction had not been exceeded, which, of course, would naturally be the presumption, I submit, in connection with such a body as this, or that Government would say: Well, if there has been such an excess, what shall we do about it? Then it would be open, if such a situation should arise—personally, on our side we feel that there is no probability of its arising, no probability of the United States Government taking such an attitude, if the findings of the Commission should not be entirely to its liking—but assuming such a situation did arise, the matter would then be dealt with again in a diplomatic way, either by making such changes in the treaty as might be desired by a modus vivendi, or by a reference to somebody else or to this commission, to settle any point that might be considered worth while to be dealt with. But, subject to that, it is impossible to conceive that any Government should appear before the Commission—and I can not take it that that is Senator Turner's view—and say: If your finding does not agree with my argument, then the United States, without hearing further from Canada, or without considering the matter further in any way, will simply inform the Commission that they have gone too far. That, I submit, is not a view on which it would be possible for any parties on the Canadian side to argue or to deal with this matter further before this Commission, if we were to be informed that if the decision was not satisfactory to the other side, the other side would not be bound by it. So we must take it that what is meant, and what the actual situation now is, is this: That there is simply the possibility, remote I think, or I certainly hope so, that any technical point of jurisdiction is one which might be raised, but if raised, would be raised in a proper and usual way.

Then there was a further preliminary point raised by Senator Walsh in his argument, and that was that whatever Canada's construction or views of this article might be, they had been in some way prejudiced or affected by what had been done in connection with gauging stations. That is a point I should like to clear up, as it can be cleared up absolutely. It was, I should have thought, sufficiently cleared up at St. Paul. There were certain gauging stations, as shown by the correspondence at the end of the St. Paul hearings, which had been established by both countries on either side of the line. What was done was that these gauging stations on either side were brought into one, which was an obvious saving of expense and a perfectly natural thing to do. Apart from that, the situation as to the gauging stations in the United States or elsewhere, is shown by Exhibit B, which was put in at the St. Paul proceedings, and which shows the gauging stations that were in existence. From this you will see there is an abundance of gauging stations in Canada for the purpose of finding out all the waters of these two rivers which were constituted as one under the article, and that there are also gauging stations in the United States which would furnish the

information necessary, according to Canada's contention, to arrive at a measurement of the total waters to be divided under this treaty. These stations were there, they were in existence. Further than that, the evidence at St. Paul and Detroit shows that the two countries published their measurements taken from the gauging stations, that they exchanged reports, and that there was entire harmony in their getting together and discussing and checking the information available at these points. So the situation was there, and in such a way as to give the information in a broad and general way to enable Canada's view which it has held from the outset, to be carried out.

What was further discussed, after the Commission had taken it up, was the question as to what further gauging stations or checking stations might be considered. The situation is very far from having been in the nature of a construction adopted by the parties of estoppal. They have agreed to a construction different from what they now contend, namely, that there was a measurement at the boundary and there only. Any action in that regard has been, not by the Government as suggested, but by the reclamation officers, and they have dealt with the situation entirely in accord with what Canada's view of the subject is and has been.

Passing from that, I was much struck with the force and amount of attention that Senator Turner in his argument gave to the view that Canada's position, whether supported by the language or not, or whether the language was clear or not, could not be supported because it led to an absurdity, and the result would be such that one would be bound to come to a conclusion that something different was meant. In that regard, I would say that I think it is unfortunate that Senator Turner was not at St. Paul. I think if he had had the advantage of hearing the evidence orally, he would have been satisfied that the evidence, apart from what was really argument rather than evidence, of Mr. Sands made it clear that the figures taken by Canada and checked by the United States as representing the average flow of the so-called all-Montana tributaries accurately, subject only to unusual or extraordinary variation, represented the true situation as to the product of these all-Montana tributaries which would be chargeable against the United States, under the Canadian contention, as being half of the United States' share of the waters of this one stream, having regard to beneficial use and the areas to which the waters were applied, and he would have been convinced that the suggestion that there was some colossal amount which might make it necessary that the water should be made to flow backward was imaginary rather than real, that it was a monster of imagination conjured up with the idea of then saying that, there being such a monster in the path, this meaning could not be given to the article.

So far as facts and figures are concerned, you will find that Mr. Conner, who was one of the United States officers dealing with this matter and had first-hand information, stated on the top of page 51 of the St. Paul record:

> Mr. MACINNES. Now, as to these other propositions that you spoke of in general language, what are they, and to what extent was their beneficial use?
>
> Mr. CONNER. They are based on the tributaries entirely. Fifteen second-feet is from the main river. Our investigations cover the numerous tributaries over 14,000 square miles.

Mr. Conner had been all over the situation and knew what he was talking about. Again:

Mr. MACINNES. Have you any figures on this at all?
Mr. CONNER. Something like 1,700 second-feet is actually being beneficially used.
Mr. MACINNES. That is the aggregate?
Mr. CONNER. Yes, sir.
Mr. MACINNES. What is that in acre-feet?
Mr. CONNER. In acre-feet it is about 204,000.

That is the situation with regard to the water being used for irrigation outside of the project of the Reclamation Service, as to which there is full information, namely, that any additional water that there might be would probably be only flood water in an abnormal year, and of such a character that it would not be available for irrigation, and would therefore not come within the language of Article VI, because, if you will remember, that what is being dealt with here is the waters that are to be applied to irrigation and for power. These extraordinary waters which might occur in some abnormal year would not be of that nature if they could not be measured and made available for use in the ordinary way. Further than that, the suggestion that any water might at any time be called upon t be sent back to Canada is, as I say, entirely imaginary, and I might say, absurd. If at any time there was a considerable amount in the Milk River lower valley and it might be said that the United States would not be able to get as much from the St. Mary River, the situation would be that the United States would not be needing it. So there would not arise a situation which would cause hardship or trouble in any way, for the United States under such a condition of this one stream would have at the place where it was required the water that was needed for irrigation.

Mr. POWELL. That is, all the water they require comes down the Milk River, practically?

Mr. MACINNES. Quite so. Before concluding to-night I should like to call particular attention to this: All through the argument that we have heard from counsel for the United States we have not heard, as I remember it, one single reference to the fact that Article VI of this treaty says that these two rivers are to be treated as one stream. We have also heard practically nothing—a mere reference to it—as to the fact that the treaty provides for a division in which beneficial use is to be taken into account. We have heard a great deal about diplomatic negotiations, etc., but practically nothing at all about the irrigable areas to which this water which is under discussion was to be applied. That is what I would like to deal with more fully in opening to-morrow, after a reference now to the local situation, as shown on the map, so that the Commission may know what it is dealing with, not merely as a matter of law, nor yet merely as a matter of water, but as a matter of the lands to which the water was to be applied under the treaty for beneficial use, and after having made reference also to the fact that as to the lower Milk River Valley the United States has three available sources of water supply under this treaty. It has the local waters which are there and which it contends it is not called upon to take into account. It has the waters of the Milk River tributaries flowing from the north. It has also, by reason of the treaty, and by reason of the canal from the Milk River, a source of supply from the St. Mary River taken from here [indi-

cating]. It has therefore three sources of supply for the land which, it will be remembered, is in the lower Milk River Valley.

On the other hand, in Canada, for the land to be irrigated, there is but one source of supply and one only, with the exception, of course, of this small amount in the Milk River. What does that lead us to? It leads us to this fact. If the United States takes the position: It is true, we have water in the lower Milk River Valley, but we do not intend to bother about that, we do not intend to store it, or do anything with it—I am not saying they will do this willfully, but if they do not actively take steps in the other direction—for we will take the water we need from this Canadian canal, with the assistance, of course, of the money expended on the canal, and bring it down there [indicating], the result will be that although there are two other sources of supply open to the United States the Canadian irrigable area is deprived, either now or in course of time, of water which it can not get from any other source. That is the situation, which I submit, was not in any way dealt with or indicated in the interesting argument which we have had up to date from the United States Government.

The Commission adjourned at 5 p. m.

WEDNESDAY, *May 5, 1920.*

The Commission resumed this morning at 10 o'clock.

Mr. TURNER. I am desired by the officer of the Reclamation Service to say that there are some inaccuracies in the large map hung upon the wall; not sufficient, however, to prevent counsel on the other side from illustrating by the map, but if there are any particular conclusions to be drawn from what is shown on the map it would make a difference. The most important item is that none of the tributaries below Hinsdale are shown on the map.

Mr. MACINNES. Are there any others?

Dr. DAVIS (United States Reclamation Service). The irrigated areas are out of proportion. They are shown much larger relatively in Canada than they are in the United States. I do not know that there is any intention back of that, but it is a fact. We have not had an opportunity to compare it with the accurate map. I do not know whether there are other inaccuracies, but it is our understanding that there is not to be evidence or testimony introduced at this argument, and it is only having regard to that fact that I speak.

Mr. MACINNES. Quite true. I put on the wall the map to show the information of previous maps agreed upon.

Mr. TURNER. It is merely by way of illustration.

Mr. MACINNES. Yes. I understand that the only inaccuracy is in not showing certain tributaries below Hinsdale. I would point out that what is below Hinsdale to the mouth is not taken into consideration in this matter because it seems to be demonstrated that the waters below that point are not suited for irrigation, and would not fall within the scope of Article VI.

Mr. DRAKE. Might I explain the manner in which that map was prepared? It was not prepared to be filed with the Commission in connection with this argument, nor was it prepared to illustrate the case, but merely to show out in bold relief the principal streams

affected. It is drawn roughly to scale. The point raised by Mr. Davis is that the irrigation areas are not shown on quite the same scale in the United States as in Canada. The areas in the Milk River Valley are the irrigated areas as shown on the United States surveys map. The areas in Canada are commanded areas; that is, areas that would be commanded by the canal system which at present is not constructed but is projected. Some portions, just what portions we can not say, of the command areas will eventually prove to be irrigable areas. That is the explanation. There is considerable difference, which Mr. David quite appreciates, between commanded and irrigated areas. This map was not prepared in reference to this argument at all. The map is practically a copy of the map which was filed in St. Paul in 1915, and Exhibit 1.

Mr. TURNER. I just called attention to the fact.

Mr. EGLESTON. We should have opportunity to check it with the map exhibited at St. Paul if this is to be an exhibit.

Mr. MACINNES. It is not an exhibit. It is simply a map which we have hung on the wall to which we can point. This map is only intended to illustrate what was in the exhibit put in at St. Paul. I am glad the point was raised so that there may be no misunderstanding about it. I do not wish to refer to a single thing that is not supported by the testimony already given.

Mr. CLARK. I suppose this map is merely for the convenience of counsel and the Commission; is that it?

Mr. MACINNES. That is it exactly.

Mr. POWELL. If the figures of the run-off are correct, it would be a very great convenience to have this map.

Mr. TURNER. I understand that there is a complete map in, so that it could be verified if necessary.

Mr. MACINNES. Quite so.

Mr. DRAKE. One further remark. The map used yesterday to illustrate is not the map that was at any time filed with the Commission as an exhibit. It is a map that was prepared for the Commission by the United States Geological Survey and the Canadian Reclamation Service to show the areas in both countries that are affected, and the various streams within their areas. It was used by counsel yesterday merely for the purpose of illustrating their comments, but it is not an exhibit. It is in precisely the same position as this map; it is not to be filed as an exhibit but for the convenience of counsel.

Mr. POWELL. The figures on that map might unconsciously affect—are the quantities correct and the same as on the other maps?

Mr. DRAKE. The quantities there are from the reports prepared for the Commission by the United States Geological Survey and the Canadian Reclamation Service to collect in the one report the data which has been placed before the Commission and for the convenience of the Commission. The figures are the figures that have been agreed upon between the two countries; there is nothing of controversy there.

Mr. POWELL. Are they the same figures as in the maps that you refer to as being an exhibit?

Mr. DRAKE. They are not the same figures exactly as shown on Exhibit 1, but they are the later figures of the stream flow and are agreed upon by the two countries and brought up to date.

Mr. POWELL. This, to my mind, is probably the crux of the whole question. You speak about those figures; does that represent the annual run-off? You speak about the stream flow; how do you arrive at that, how did the people from whom you got the data arrive at it—from meteorological observations or actual measurements?

Mr. DRAKE. Actual measurements. To compute the run-off from these northern tributaries in Canada, what was at the international boundary was, I think, at the time of the St. Paul hearing, about 194,000 acre-feet per annum. We have several years later records now which did not exist then, which have been exchanged between the United States and ourselves, and are agreed upon so that there is no controversy. We have brought that figure up to 249,000 acre-feet, speaking from memory, which if anything would be in favor of the United States. I give that as an illustration to show that these figures are not quite the figures given at St. Paul, but they are figures agreed on between the two countries as the result of stream measurements.

Mr. POWELL. Take the figures, 189,000, in red on the map; is that actual measurement?

Mr. DRAKE. Actual measurement.

Mr. POWELL. Do you see these figures down to the south of the map; are we to take that as actual measurement—that area included within the pink lines on the map?

Mr. DRAKE. All these are matters of computation.

Mr. POWELL. I know that, but I want to know what it means. Does it mean an accurate estimate of the flow?

Mr. DRAKE. Yes.

Mr. MACINNES. I would ask the attention of the Commission to page 49 of the memorandum put in on behalf of the Commission at St. Paul. At that page you will find, in what I think is the most convenient form, a list of the exhibits which were put in at St. Paul and I may ask the attention of the Commission to these exhibits and the material shown thereon and the argument derived from them. With reference in particular to one of these exhibits, Exhibit A, the large watershed map, there is one copy of it here, and I do not know whether the secretary will be able to supply the members of the Commission with other copies. There is also Exhibit A–1, which is a similar map but showing the stream-flow data; Exhibit B is a diagram sketch map showing the existing gauging stations, which is the one to which I referred in my argument yesterday showing the existence of the gauging stations in the United States and in Canada, from which the information would be obtainable in connection with the Canadian or with any other contention in the matter.

It has been suggested, you will remember, that that information would not be available because there were only gauging stations at the international boundary and that Canada seemed to be concerned only with these. These gauging maps show that there were these gauging stations, for instance, in the United States at Havre and at other places, and then again at Hinsdale, which is the latest irrigation point. Then Exhibits L and L–1 are maps showing the irrigable areas in both countries in accordance with the figures which were produced at St. Paul. There is no question as to these figures. It

is the evidence to which I wish to refer which is put in diagrammatic form in these exhibits, I understand, quite to the satisfaction of Mr. Davis, because, so far as the exhibits were concerned, these diagrams were checked with the figures which were put in. Then Exhibit Q is a matter with which I shall deal in detail later. It is a diagram to illustrate what is described as the Canadian users showing the irrigable areas with acre-feet and depth of water. As the Commission will see, that is put in diagrammatic form on the map. Then Exhibit R is a smaller one which shows not only in diagrammatic form to illustrate either on the Canadian view or on the United States view, which cuts off, you will remember, the waters and cuts off also the flow into the other countries, or the tributaries which are entirely within one country and do not flow into the other. The interesting part of these exhibits is that you see the results as applied to the land itself, as shown in inches. That is to say, take the irrigable area, take the water allotted under either of these views, and see what the result is on the water available for these irrigable areas. It puts in very clear form what the result is. I shall leave these exhibits here and perhaps the secretary will be able to obtain copies for the Commissioners.

Mr. TURNER. Are not these things something that have already been put in?

Mr. MACINNES. Yes; I am directing the attention of the Commission to them as part of my argument, and as showing the evidence which was given at St. Paul.

Mr. KING. I understand you are not offering them as evidence?

Mr. MACINNES. They are already in.

Mr. CLARK. Are there any copies of these printed and filed with the report of the hearing?

Mr. MAGRATH. No; but they are filed in the office of each country.

Mr. CLARK. So that if the members of the Commission want to get at them, they will have to go to the original record?

Mr. MAGRATH. Yes.

Mr. DRAKE. If the members of the Commission wish copies of all the smaller diagrams which were prepared by Canada and filed as exhibits, there ought to be no difficulty in furnishing extra copies. But with respect to the large watershed maps, I would not like to undertake to supply them.

Mr. MACINNES. Turning to these local situations, there are certain points to which I should like to call attention. First of all, there is the question of the irrigable areas in both countries. As was pointed out at St. Paul, the estimated irrigable area of Canada is something over 700,000 acres. In the United States, in the lower Milk River Valley, the figures put in were 220,000, and I think the diagrams are prepared and based on 250,000 acres.

Mr. DRAKE. 219,000.

Mr. MACINNES. This figure, 219,000, is taken from the reclamation surveys reports as being the area which from their examination they consider to be available for irrigation in the Milk River Valley.

Mr. CLARK. I am rather uninformed with regard to this, but I understand in a general way that there is a great lack of water in that section for the land that can be irrigated if there was sufficient water. Is that true, as a matter of fact? Is there enough water to irrigate the land that would be made profitable by irrigation?

Mr. MACINNES. The answer to that would be this: That there would be a question as to whether some of the land to which you refer would be irrigable or not, because all things are, humanly speaking, possible. But assuming that you had the water, it is a question whether it would be economically possible to place that water on the land.

Mr. CLARK. My idea has been that there was a great acreage of this land that could not possibly be irrigated, taking the land on both sides of the border.

Mr. MACINNES. Quite so.

Mr. CLARK. Owing to the lack of water supplied. I want to know if that notion is correct?

Mr. MACINNES. I do not know that that is quite so much the trouble.

Mr. CLARK. Is there enough water running in the two rivers to produce results in all the lands?

Mr. MACINNES. We are getting into a rather large question there. That again would depend on the extent to which either or both countries concerned had reservoirs for all the water that was available. All the water that comes is there. That is not increased, except, subject to the increase of the Milk River water, by the water taken from somewhere else. All the water is there—the next step would be to prevent that water from running away, and that could be done, of course, only by suitable reservoirs unless the water is used immediately. The next question is: Where are your lands. Are they lands that would be benefited by irrigation, and, in the second place, would it be economically possible, would the expense not be too much, to place the water which you had stored upon the land?

Mr. CLARK. I do not make my meaning clear. Suppose you have 500,000 acres of land on the two sides of the boundary line?

Mr. MACINNES. On the two sides, of course there is more than that.

Mr. CLARK. I don't care how much land you take, take a million acres if you like—is there enough water, either running in the flow of the stream or susceptible by proper reservoiring, to irrigate that amount of land?

Mr. MACINNES. To irrigate 500,000 acres?

Mr. CLARK. To irrigate all the land there is.

Mr. MAGRATH. Is it not a general proposition in irrigated countries that there is only water for about 15 per cent of the land to be irrigated?

Mr. CLARK. I know, but I want to get it down to this proposition we are considering. My idea was simply this, that there is not enough water to irrigate all the land. It does not make much difference to us how much land there is in the watershed if there is not water enough by which it can be irrigated.

Mr. MAGRATH. I would say that in Alberta and Montana, there is not nearly enough water to irrigate all the land that can be irrigated, and that requires water.

Mr. CLARK. I am speaking of the water and the land in this particular section. Can there be a marriage between all the water and all the land?

Mr. KING. If there was enough water to irrigate all the land, we would not have this trouble.

Mr. CLARK. I am not theorizing; I am asking a question as an engineering fact, and I think it is important.

Mr. TURNER. Col. MacInnes seems to think it is important.

Mr. CLARK. I think it is important.

Mr. TURNER. I do not see what the irrigated area has to do with it at all.

Mr. MACINNES. What I was pointing at, if I may, was that I think the Commission could get some benefit by looking at the geographical situation, and at the problem with which these negotiators had to deal. I think there will be far more light and help to this Commission by dealing with the problem that the negotiators were dealing with rather than dealing with a question of law. The situation was, I was starting to say, that the irrigable area in the lower Milk River Valley, subject, as shown in the evidence, to the possible extension of that area, was checked, however, by the economic problem.

A further point in that connection, in answer to what Senator Clark was saying as to the duty of water in either country. The duty of water in Montana, as I remember it, was put at 1 foot—was it not, Mr. Drake?

Mr. DRAKE. One and one-half, I think.

Mr. MACINNES. In Montana?

Mr. DRAKE. Mr. Newell's evidence was to the effect that 1½ acre-feet of water would be his idea of what was required.

Mr. MACINNES. And in Canada? So I may be quite sure of the figures.

Mr. DRAKE. Our legal duty at that time was 2 acre-feet. Over a certain part of that territory it still is 2 acre-feet; but we have decreased that duty to 1½ acre-feet recently.

Mr. MACINNES. Then, as has been pointed out already to the Commission, there were two rivers that were being dealt with, both rising approximately at the same place, but both having an entirely different character, the St. Mary having a far larger and more constant flow, and also having a possibility of storage at its rise which did not exist in the case of the Milk River. The storage possibilities were great as to the St. Mary River; as to the Milk River they were not, although the latter has storage possibilities to a certain extent in Canada, and to a very considerable extent after it has crossed into the United States in what is known as the lower Milk River Valley. Those were two important points which affected the situation, namely, the different character of the flow of those rivers at different periods of the year, and the different possibilities as to storage.

The next point I desire to call attention to is the question of the tributaries, as to which there has been so much said. You will find that in both countries on the Milk and on the St. Mary certain tributaries rise, and join either river and flow over the boundary, but not as tributaries; on the other hand, certain other of these tributaries rise in one country and flow into the other. In that connection I would call particular attention to what are dealt with here as the eastern tributaries of the Milk River rising in Canada. Those tributaries had names of their own; in fact, in many cases it is somewhat confusing because some of them had more than one name. For instance, there is Lodge Creek, there is West Fork or Willow Creek—they are not all shown on this large map, but they

will all be found on the small map which is before the commissioners—there is Battle Creek or North Fork, there is Frenchman's Creek or White Water, and there is Rock Creek.

The reason I am calling attention to this point is that those streams which had names of their own do not become tributaries of the Milk River until after the Milk River, as a river, has crossed into Canada. And what I am pointing out is that although those streams had characters and names of their own, they are described as tributaries of the Milk River, and, as we say, they form part of this one stream which is being dealt with. The United States say: Yes, they are tributaries of the Milk River, but for the purpose of dealing with this matter we refuse to include that portion of the river from the eastern crossing which these tributaries join. In other words, they do not become tributaries of the Milk River, according to the United States contention, until after the Milk River ceases to exist.

A further point geographically——

Mr. POWELL. Before you pass from that point, Mr. MacInnes, I want to ask you a question, as I am not sure that I quite understood you. As I take your argument, it is this: That if a limitation is to be placed on the Milk River, including only that portion of the river from its source to the ultimate crossing of the boundary line, these northern tributaries would not be tributaries within the meaning of the treaty.

Mr. MACINNES. Quite so.

Mr. POWELL. And if they are tributaries within the meaning of the treaty, you say that inferentially extends the Milk River down to the lowest tributary?

Mr. MACINNES. Surely, for you must include enough of the river to enable them to become tributaries of it.

Mr. POWELL. I understand you.

Mr. MACINNES. Then on this large map and on the small map before you you will see a place marked Hinsdale. As I said before, the water rising down there can not be used for irrigation owing to the character of the land and otherwise. There is a similar situation in Canada. From a place called Kimball, where the Alberta Railway & Irrigation Co.'s canal starts, down to where the St. Mary joins the Belly River, or practically at a place called Whitney's ranch, the same situation exists. What is called the run-off of water from Kimball down, that is to say, in all Canadian territory is found to be approximately the same as from Hinsdale down to where the Milk River joins the Missouri. So that those portions of this watershed in the two countries can be eliminated from consideration here because the question is confined, according to article 6, to waters available for irrigation and power. As to the power part, it was shown at St. Paul, as you will remember, that that question does not arise here.

Then there is the fact that the Milk River after it crosses into Canada on the westerly crossing and comes out again at what is known as the eastern crossing, a distance, I understand, of something over 100 miles, may be used by the United States as a canal, it being so provided in the treaty. Of course, it is also provided that the United States will be liable for damages which might very easily arise from the excess or flood waters eroding the banks.

Mr. KING. May I ask you to state that again?

Mr. MACINNES. I was pointing out that there is provision made for the payment of damages, and it is obvious that these damages might very easily arise, owing to the fact that a much larger volume of water is let into the river and is kept there constantly than would exist in a state of nature, with the result that a breaking of the bank of the river might occur and there would be erosion.

It may be said: "Oh, yes, there is provision for payment of damages, but, on the other hand, no one, particularly of the farming class, would want a law suit in exchange for actual damages, and that very likely he would have neither the money nor the knowledge to institute proceedings, and that naturally a lawsuit, particularly where a government is concerned, would involve delay."

There is, of course, the further fact, which is obvious on the map, that water going down there in large volume would create a wholly different situation to what existed before, namely, that where there had been—this was all shown in the evidence at Detroit—a fordable stream, the greater volume of water would necessitate the erection of bridges, and so forth. I was pointing out that the granting permission to the United States to use this as a canal was a serious drawback to Canada, while on the other hand it was of tremendous value to the United States, because it enabled them to carry out their project, which otherwise would not have been feasible from a financial standpoint.

The next point is as to the user of this water at the time the treaty was made. On the Canadian side there had been what is known as a prior appropriation in accordance with the irrigation law by the Alberta Railway & Irrigation Co. on the St. Mary River. That prior appropriation was in 1899, and it extended to all of the low-water flow and to the high-water flow up to 2,000 second-feet. On the Milk River there was also a prior appropriation by the same company in 1902 to the extent of 500 second-feet of the low water and 1,500 second-feet of the high water.

Mr. CLARK. When you speak of the low-water appropriation and the high-water appropriation, do you mean that the high-water appropriation was to begin only after the low-water appropriation exhausted the entire natural flow?

Mr. MACINNES. What is the exact point, Senator?

Mr. CLARK. As I understand the law in the United States—I may be mistaken—the earlier appropriations are made up to the natural flow of the river, and then when by storage or otherwise the flow is increased additional water rights are granted for the increased flow. Now, you speak of two appropriations. Does the one take place only after the ordinary flow of the river is exhausted? I am asking simply for personal information.

Mr. MACINNES. I would ask Mr. Drake to answer that question, Senator.

Mr. DRAKE. Senator Clark's idea is correct. We have three recognized principles of granting water rights; a grant of the low-water flow; a grant of the high-water flow, which is made only after the low-water flow has been fully appropriated; and a further grant of the flood flow.

Mr. MACINNES. The Canadians had, therefore, the two appropriations which Senator Clark spoke of just now. I mean there was one appropriation on the St. Mary River which has two branches to it,

the high water and the low water, and the same situation existed on the Milk River. So in one sense there were four appropriations, but it was one appropriation really in two parts on each river by the same company, the Alberta Railway & Irrigation Co., now represented by the Canadian Pacific Railway Co., for which company my learned friend Mr. Tilley appears.

The matter in the United States has to be gone into in more detail, and I would like to call attention to page 33 of the record at St. Paul. You will there find that Mr. Newell gave us a list of the prior appropriations on the Milk River in the United States. They were:

Fort Belknap Canal & Irrigation Co.
Winters, Anderson Ditch Co.
Paradise Valley Ditch & Irrigation Co.
New Harlem Irrigation Co.
Cooks Irrigation Co.
Matthewson Ditch Co.
West Fork Ditch Co.
Fort Belknap Indian Canal.

I call your particular attention to the last one, because it appears in other places under the description of an agency ditch, and we also find it referred to in the diplomatic correspondence. Of those prior appropriations the last four were on what might be called the main body of the Milk; the others were on the branches or tributaries of the Milk which join it at practically the same place as where these other prior appropriations existed.

Now, if you will be good enough to turn to the map which is before you, you will find that the engineers have placed the situation on it. In the printed margin on the right two-thirds down the second column you will find—

6B Fort Belknap Canal.
7B Winter-Anderson Canal.
8B Paradise Valley Canal.
9B Harlen Canal.
10B Agency Ditch—

then a little further down—

18B West Fork Ditch.
28B Cook Canal.
29B Matheson Canal.

If you turn to the map you will find that those numbers which are in red with a little red diamond attached are all at or immediately surrounding this point Chinook as shown on this larger map, and that is where these prior appropriations existed.

Mr. POWELL. You mean a red triangle?

Mr. MACINNES. Yes.

There is also a reference in the record to a Rock Creek appropriation, which is 41B in the column to the right, and which will be found to the eastward of the others and just about Hinsdale. That, then, was the situation so far as the appropriations were concerned.

You have, of course, seen from the diplomatic correspondence that information was received that the United States were going to carry out this project of throwing the St. Mary River water into the north branch of the Milk River and taking it through Canada for the purpose of carrying it down to the lands in the Milk River Valley, the reason of that being, as I think I explained yesterday, that the

United States wanted to get another source of supply for these lands [referring to large map] which was of a permanent character and which they could make more permanent by reason of the storage, so that they would not be dependent on the fluctuations of the water on the lower river.

In Canada a canal had been constructed on the Milk River, which, it was pointed out to the United States, could, if the United States insisted on putting this water into the Milk River and carrying it through Canada without the consent of Canada, be taken out at the Milk River.

The matter, therefore, came up in that way, and that was the problem to be solved. What the United States wanted, as I say, was water to satisfy their prior appropriations at Chinook. They wanted a source of supply from the St. Mary River which would be permanent and sufficient to supply the reservoirs which they were going to construct there, the figures as to which are given in the United States Reclamation Service.

There is also reference to the fact that they wanted water to satisfy prior appropriations over on the Frenchman or Rock Creek. They wanted also such water as might be required in the lower Milk River Valley as a source of supply for lands there not dealt with by the water taken from the St. Mary.

Canada, on the other hand, wanted and was under contractual and statutory obligations to supply water for its prior appropriations on the St. Mary River to the extent that I have stated, namely, all the low-water flow and 2,000 second-feet of the high-water flow and on the Milk River to the extent of 500 of the low-water flow and 1,500 second-feet of the high-water flow. Accordingly the situation was, so to speak, that Canada was in a position to stand pat and say that that was what she was entitled to.

The difficulty had to be solved, and, as Senator Turner has said, there is possibly no international law absolutely laid down on the point; but the question came up as to whether it could not be dealt with in accordance with the prior appropriations. That was put forward by Mr. Hay, and that solution would have been satisfactory to Canada if her prior appropriations had been fully protected. But that is where one of the troubles came, that it was sought to cut down those prior appropriations which Canada was under obligation to fill.

Now, before going further into that phase of the case, as it would lead me into the negotiations, I want to next deal with the question of the measurement of the waters which were available for supplying these demands by the different countries and for the purpose of carrying out the bargain made in regard to them. I want to call particular attention, if I may, to paragraph 14 of the Canadian memorandum filed at St. Paul. I say particular attention, Mr. Chairman, for this reason, that it does seem to me that in this case nothing has perhaps caused more confusion and misunderstanding than this question of measurement and the fact that for the purpose of carrying out this provision there has to be more than one measurement—that is to say, a measurement for different purposes—because Senator Turner, for instance, in his argument continually referred to the fact

that according to the Canadian contention the water of the Milk River would be measured, as he described it, down at the mouth—which, of course, in any event would not be the case—but we will say at Hinsdale, and that where it was measured for that purpose it would have to be divided. That would be tantamount to saying that Canadians would have to go down into the United States to get their water, and in that way he seemed to seek to reduce the Canadian contention to a reductio ad absurdum.

Gentlemen, that is not the situation at all, and that is not the way in which the matter would be dealt with for the purpose of carrying out this arrangement. I do not think I can express it better than the way it is put at page 8 of our memorandum, which I would like to read. There we stated:

> It can not be too emphatically pointed out that the measurement of the waters in question to be made under the direction of the commission is required for more than one purpose.
>
> MEASUREMENT OF TOTAL.
>
> 1. For the purpose of ascertaining *the total* quantity of the waters to be apportioned between the two countries.

You will remember the treaty says that the two rivers and their tributaries are to be regarded as one stream, and that more can be taken from one than from the other for the purpose of greater beneficial use. For that purpose, as there is one stream and as there is a division by equal apportionment, obviously you have to get at the total of what is to be apportioned.

> MEASUREMENT OF DISTRIBUTING SHARES.
>
> 2. For the purpose of ascertaining the amount of the waters to be received by and debited to each country at different points, as forming part of the share of each country in the said total to be apportioned.

That, you see, is a different measurement and for a different purpose. You get the total, you then know what each country is entitled to, and then for the purpose of dividing that, as it happens as you see by the situation here that all the water is not taken in one place, there has to be a measurement for the purpose of division at the places where the respective countries take or are debited with their water. And if this article is worked out in different sections, so to speak, other measurements may be necessary in connection with the prior appropriations, although as a matter of fact it may very well be that the prior appropriations will become merged in practice with the other water. But, of course, there will have to be measurements at the places where those prior appropriations should be measured.

Now, having explained that situation as to measurements, I would like to refer to what has been described as the Canadian proposals. In that connection it seems to be said that Canada has put forward something which is in the nature of a new treaty—that she is trying to make a new bargain. That, gentlemen, as understood by those who were at St. Paul, was not the case at all. What was done was this: The treaty calls for a certain apportionment of these waters for beneficial use. Now, for the enlightenment of the Commission. Canada wanted to show where its beneficial use would be and where it wanted the water, and it desired to show that in a practical way so

that the matter could be dealt with on the easiest possible lines, that there should be as little dividing by days or weeks or months and at a whole number of different places as possible; but rather to get it down so that its beneficial use would be covered, and that could be done by a division largely according to territories, that is to say, by different rivers and by different periods of time instead of simply day by day.

On the other hand, while naturally Canada was called upon to show what was its beneficial use, it found that in preparing that statement it would have to consider what it understood from all the materials to be the beneficial use that would be required by the United States. Therefore our Canadian representatives put that down and they showed in this division what the result to the United States would be on this basis, and asked that the United States should demonstrate to the Commission at any time in what respect that might be defective or wrong, for we could not assume to have full information as to what the United States required. But on the evidence and on the reports of the United States Reclamation Service which we have before us we endeavored to cover that. Now, what is put forward here as the Canadian proposals—and I want to impress this on the Commission—is not a new treaty, but is what would suit Canada as far as its beneficial use is concerned, based on figures checked by both countries. And what will be the result of that to the United States? Will it be as described by Judge King, so absurd and so ridiculous that no two countries could have made this bargain; so absurd that you must depart from language that is absolutely clear, that you must make a new treaty, that you must write in language that is not there; that you must take rivers which are described as being one stream and cut them off, not in one place but in many places, and so have tributaries hanging in the air and yet call these split limbs part of that one stream? That, he says, is the result of the Canadian contention, that you have to change clear language and do something that is absolutely repugnant to that language—change one stream into many parts by inserting words which are not there.

That is described at page 14 of that memorandum as follows:

> A tentative suggestion (reprinted at the end of the memorandum attached hereto) was submitted by Canada. No objections have yet been stated by the United States to the suggestions therein, which contain a solution wholly in accord with Article VI and under which the United States, in addition to the use of the channel of the Milk River in Canada.
>
> *Milk River.*—(*a*) Will continue to enjoy all the waters of the Milk River in Montana.

The United States will get not a part but the whole of those waters. Where then remains this argument that Canadians will invade Montana to get that water, that the Montana settlers—over whom the United States has no control, and over whom even the State of Montana possibly has no control—will have their property taken away for the benefit of Canada? Nothing of the kind is intended, gentlemen. Under such a division as this—which, as I say, has not yet been criticized as a practical working out of the treaty—the settlers of Montana will get all the water that is there.

Mr. TURNER. They get all that already belongs to them.

Mr. MACINNES. Quite so. Does the canal in Canada belong to them, then?

Mr. TURNER. Certainly not.

Mr. MACINNES. Then the United States—

(*b*) Can also obtain practically all the waters of the Milk River in Canada.

That is, all the flow of the Milk River at what is called the eastern crossing.

Mr. TURNER. That is to say, Colonel, you take out of the Milk River 76,400 acre-feet, which is within 15,000 acre-feet of its total flow.

Mr. MACINNES. If the Senator will allow me, I will deal with the figures presently. I understand you are referring to the figures which we attached to the memorandum, and I will deal with those in a moment.

The situation as to the Milk River, you will remember, was that these prior appropriations existed at Chinook, and while there was water coming in at Chinook—some of which was all Montana water, which did not come from the boundary—still a large portion of that was coming from Canada, and they wanted, for the purpose of protecting those prior appropriations at Chinook, to have all of the water coming down from Canada. They were claiming, it will be remembered, that they had their prior appropriations there, although, on the other hand, the Canadians were able to show that they had their prior appropriations on the Milk River, which were granted as far back as 1902.

(*c*) Will obtain all the water that appears to be required from the eastern tributaries of the Milk River in Canada for the irrigable area involved.

That is to say, for their prior appropriations that might exist in Montana, and which perhaps could not be satisfied solely by waters rising in Montana, that sufficient water would come down from Canada which, together with that local supply up above the prior appropriations, would satisfy them.

St. Mary River.—(*d*) Will be able to get a larger average number of acre-feet from the waters of the St. Mary River than has been stated to be required for the Reclamation Service project.

That is, that even on this proposal, which is now criticized not by engineers of the United States, but by learned counsel for that country, the United States would get for their St. Mary River project as well all that is shown in the evidence as required for the Reclamation Service project.

Now, as to the figures, if I may say so, I think my learned friend has not fully understood them, which may be due to the fact that the full explanation in regard to them is not perhaps all there, some of it being scattered through the oral argument. I will quote page 298 of the St. Paul record, which contains the figures and the explanation, as follows:

It is suggested by Canada that the division of the waters of St. Mary and Milk Rivers and their tributaries may be made by the International Joint Commission, in accordance with the provisions of the treaty, in several ways. A division which appears to fulfill these requirements is appended hereto for the consideration of the commission.

That is what was done. It was no new treaty, it was put forward in explanation.

While such division would be acceptable to Canada, it is not put forward as the only method of division that would be acceptable.

This method of division recognizes the greater interest of the United States in the waters of Milk River, or in waters that can be diverted into Milk River, and the similarly greater interest of Canada in the waters of St. Mary River. It also recognizes the interests of both countries in the waters of the Saskatchewan tributaries of Milk River, and, it is believed, adequately fulfills all requirements on these tributaries.

Then there is a tabular statement headed:

Suggested division of the waters in accordance with the treaty.

	Acre-feet.
St. Mary River up to a maximum flow of 2,000 second-feet, May to October, inclusive:	
Canada	500,290
United States	.....

Not from April to October, but from May to October. Those are the months which will work it out. As you will see, in the article as to prior appropriations, there is no absolute following of months, because they are all taken into one account to produce beneficial use.

	Acre-feet.
St. Mary River below Alberta Railway & Irrigation intake:	
Canada	72,000
St. Mary River from November to April, inclusive:	
United States	131,662

The whole amount during that period goes to the United States, the same as the other amount from May to October goes to Canada.

St. Mary River, peaks of over 2,000 second-feet flood flow in summer	103,500

That is just as valuable as any other water to the United States by reason of the storage which they have at St. Mary to take that flood flow, and which storage was built for that purpose.

Milk River at eastern crossing	100,000

Here is the point, I think, that has caused confusion in Senator Turner's mind, if I may say so.

The total acre-feet going to the United States is	335,162
Less delivered at Alberta Railway & Irrigation intake on Milk River	76,400
Equals	258,762

That will be explained two lines below.

Dealing now with the Milk River:

	Acre-feet.
Milk River at Alberta Railway & Irrigation Co.'s intake during floods:	
Canada	20,000
United States	.....

This is on the assumption that Canada will build storage reservoirs at that point to enable her to make use of that flood water.

Now then—

	Acre-feet.
Milk River at Alberta Railway & Irrigation Co.'s intake, St. Mary or Milk River waters:	
Canada	76,400
United States	.....

Canada wanted some of the water in the Milk River obviously for the settlers there and in satisfaction of their prior appropriations, but it did not matter to Canada whether that water came from the St. Mary River or from the Milk River, and if the United States preferred that it should be taken from the one river, well and good; but

it is provided in this arrangement that United States is to get the total average flow of what the Milk River is up to the eastern crossing, namely, 100,000 acre-feet. Then the amount to go to Canada for use on the Milk River would come either from any incidental surplus over that amount or from the waters of the St. Mary River taken from here [indicating on large map] and flowing down through the Milk River by reason of this canal. In other words, we make use of the fact that these two waters are connected, so that this amount of water on the Milk River in Canada can be taken from one source of supply or the other. But that is not a cutting down of the water on the Milk River, because if it does not suit the United States to give it from the Milk River they supply it from the St. Mary River.

Mr. TURNER. How do you get the St. Mary water down into the Milk River that you say you want to put there?

Mr. MACINNES. From the United States canal, you will remember, it is diverted into the north branch of the Milk River and flows through Canada, so the Milk River is carrying both Milk River water and St. Mary River water.

Mr. TURNER. So you are using the United States canal to divert your water.

Mr. MACINNES. That is terrible. I submit that we should make use of the water.

Mr. TURNER. I am not saying it is terrible; I am saying you are assuming that.

Mr. MACINNES. Quite so. It is water which is put there——

Mr. TURNER. For the use of the United States.

Mr. MACINNES. I would have thought, Senator, for the beneficial use of the irrigable areas in these two countries, being carried out in accordance with the treaty, that treaty having been made between two neighbors instead of their adopting the principle of dog eat dog—one person putting the water into the river and the other taking it out.

Mr. TURNER. I am rather wondering at the assumption that you can use that canal without anything ever having been said about it.

Mr. MACINNES. I do not quite follow you. We do not use the canal; the water is flowing through the Milk River, which contains water that has been put into it.

Mr. TURNER. By the United States for its own purposes.

Mr. MACINNES. Evidently I have not made myself clear. The Canadians do not make use of the United States canal itself; they take out from the Milk River—that is, if it is desired—water which is flowing past. Now, it may be that that is ordinary Milk River water or it may be that it is water which is being added thereto by the diversion of the St. Mary River Canal in United States territory. But the waters are flowing by naturally mixed together.

Then I come back to the suggested division:

	Acre-feet.
Northern tributaries of Milk River, stored or diverted by Canada:	
Canada	136,000
United States	.....
Northern tributaries of Milk River passed by Canada:	
Canada	.....
United States	54,000

That is, if the United States for its beneficial use wants more of these northern tributaries so as to make use of them on the eastern crossing, then it is for the United States to say so, and for the Com-

mission to allot them a larger share, and for Canada to take a less share of that same water to the north. That is one of the points where adjustments can be made for the purpose of arriving at beneficial use.

Then here is the next point:

Milk River and tributaries below eastern crossing up to Hinsdale or Vandalia:	Acre-feet.
Canada	.....
United States	350,000
Milk River and tributaries below Vandalia:	
Canada	.....
United States	72,000

Mr. CLARK. Should that not be "down" to Hinsdale or Vandalia?

Mr. MACINNES. You are quite right. It should be down to Hinsdate or Vandalia, which, as you will remember we pointed out this morning, is the final point of irrigable availability.

Now, this is the situation: The water down there is being taken into account for the purpose of what there is available for these two countries for beneficial use, just as if it all belonged to one person. But it is not to be taken from there; it is being left there in the same way. I would point out that there has been added to this total which is being included all of these now so-called Saskatchewan tributaries of the Milk River, which used to have names of their own, and which were added to this common total and brought into the common pot.

Senator Turner very kindly paid a tribute to Sir George Gibbons as being a broad-minded statesman who brought everything in to account so that the whole situation could be dealt with and cleaned up. That being so, may I not be allowed to pay the same compliment to the United States negotiators and to say that they, too, intended to include all of the water immediately to the south which was part of this settlement of the whole situation? Otherwise you would have it that on the United States side you come to a point at the eastern crossing, and as to the rest you include all to the north but nothing from the United States to the south. So while on the one hand it is broad-minded to include everything so that the situation may be finally dealt with, yet on the other hand it is now suggested that the position may be taken that all the water lying immediately to the south which is being contributed by broad-minded statesmen is to be left out of consideration altogether.

Mr. TURNER. My tribute to Sir George Gibbons was that he wanted to include all the waters that had ever been in controversy. There never had been any controversy about these lower waters.

Mr. MACINNES. I do not agree with my learned friend on that. I think there was controversy on them just as much as there was controversy on other matters connected with the watershed, as I will be able to point out from one of Mr. Newell's memoranda.

We find at page 88 of the record what I think is a conclusive answer to my learned friend, that the water being taken here from the lower Milk River Valley south of the Saskatchewan tributaries was not in controversy. Mr. Newell, writing to Dr. King on the 15th of October, 1908, stated:

First. That the Government of the Dominion was appealed to many years ago by persons interested in southern Alberta to develop that district by a canal system to

divert water from St. Mary River, and finally decided to take action in the matter after reaching the conclusion from the reports of its own officers and other engineers that the diversion of the St. Mary River could not be carried out in the United States as a commercial undertaking.

Mr. TURNER. That is the language of the privy council.

Mr. MACINNES. Quite so; that is in quotation marks.

Mr. Newell proceeds:

This conclusion evidently did not take into account the fact that such diversion was feasible and has been demanded for many years by public sentiment and petition by citizens of the United States. The surveys begun in 1900 have been steadily followed up, and on March 25, 1905, the sum of $1,000,000 was allotted to begin the work now being carried on. The fact that the Dominion Government took upon itself the determination as to how the waters should be used without consulting the United States and that it has attempted to dispose of the waters of Milk River which rise in the United States and pass through a part of Canada—

That would be up in the northern part of the Milk River—

has aroused a very deep feeling.

Now, I invite particular attention to this:

This is steadily aggravated by the fact that Canada is permitting the tributaries of Milk River to be diverted, namely, West Fork or Willow Creek—

You will find that on the detailed map which is before you—

North Fork or Battle Creek, Frenchman Creek or White Water, and Rock Creek, in spite of the fact that these waters have been appropriated under the laws of Montana and already put to beneficial use.

So that there was exactly the same controversy, with the exception of the larger question of the canal, etc.

Mr. TURNER. That has no reference at all to the tributaries south of the line.

Mr. MACINNES. Surely.

Senator CLARK. You mean, south of the Milk River?

Mr. TURNER. South of the international boundary line. These diversions which he is speaking about, West Fork or Willow Creek, North Fork or Battle Creek, and so on, are diversions made from these tributaries in Canada.

Mr. MACINNES. Quite so.

Mr. TURNER. From these tributaries which afterwards flow into the United States?

Mr. MACINNES. Yes; and that was affecting the use of these waters to the south in the United States.

Mr. TURNER. Affecting the use of these waters in the United States as well?

Mr. MACINNES. Quite so. It was said that the Canadians were taking, or proposing to take, water through the Alberta Railway & Irrigation Co. canal which would affect the rights of United States citizens. Now, coming farther eastward, we find the same complaint on the part of the United States—that their citizens were being affected by the taking out of water to the north by Canadians.

Mr. TURNER. I thought that you were reading this to show that there had been some controversy about these intrastate Montana tributaries.

Mr. MACINNES. Well, I should have thought that they showed in the clearest possible language that they——

Mr. TURNER. What you have read here only shows a controversy about international tributaries that flow across the border.

Mr. CLARK. I think you gentlemen are at cross purposes. Senator Turner is referring to tributaries south of the Milk River in Montana alone.

Mr. MACINNES. Quite so, yes.

Mr. CLARK. And the Colonel is referring to the tributaries that come in from the north?

Mr. MACINNES. Yes.

Mr. POWELL. One is referring to intrastate and the other to interstate waters.

Mr. MACINNES. In this particular country to the east there was more controversy as to the prior appropriations and the use of the water in the two countries.

Mr. TURNER. There was no controversy as to the use of waters rising and flowing wholly in Montana, and there never has been. I would like you to read from the record anything which shows that there has been any such controversy.

Mr. POWELL. How could there be any controversy at that time about a stream in the State on the south side of the line?

Mr. MACINNES. The Senator and I may be entirely at cross purposes. But what I am pointing out is this: I understand from the Senator that he is suggesting that this controversy between the two countries as to the use of waters on either side stopped short of the so-called Saskatchewan tributaries of the Milk River, and in the country to the south, in the United States. I was pointing out that in that territory exactly the same dispute, or a dispute of the same nature, exists.

Mr. TURNER. If you will permit me, you were commenting on my commendation of Sir George Gibbons for including in this treaty the Saskatchewan tributaries as being very broad-minded statemanship on his part, and you said that the same statesmanship had been shown by the American negotiators in including these waters down in Montana that were wholly intrastate. I said that my compliment to Sir George was based on the fact that he included tributaries that had been in controversy; then you proposed to read and to show that these intrastate Montana tributaries had been in controversy. My proposition is that what you have read does not show that at all.

Mr. MACINNES. Very good. My proposition is this: Without this broad-minded action as shown in the treaty these Saskatchewan tributaries would have been excluded, and, as is now clear, that portion of the watershed would not have been brought into this article as well as the others. I really should have thought that could not have been made more clear.

Mr. GARDNER. You think, Mr. MacInnes, that that would include the waters flowing into the Milk River from the south?

Mr. MACINNES. Of course; you will see as the argument goes on. The Canadian contention is that the whole matter is dealt with; both rivers, with their tributaries, are treated as one.

Mr. GARDNER. All the previous correspondence, though, referred to the international waters.

Mr. MACINNES. I think I can show you very clearly that when they wanted to use the word "international," not merely for describing a situation but for cutting off rivers at the boundary and dealing with them there and nowhere else, they were perfectly well able to express their ideas.

Mr. GARDNER. Your contention is, then, as I understand you, that they included in their consideration the entire watershed of the Milk River?

Mr. MACINNES. Surely.

Mr. GARDNER. On both sides of the river?

Mr. MACINNES. Down to the lowest point where the waters would be useful for irrigation.

Mr. TURNER. That would include this 72,000 acre-feet, so you can not stop there.

Mr. MACINNES. I think, Senator, that we intend to be fair to each other.

Senator TURNER. I may misunderstand that, but I do not know what this 72,000 acre-feet below Vandalia is, unless it is that 72,000 feet which you say can not be used.

Mr. MACINNES. This memorandum says:

St. Mary River below Alberta Railway & Irrigation intake, 72,000.

It is exactly the same wording; it is simply a cross entry so as to show there all the waters. The footnote, No. 1, says:

1. These amounts are not at present considered available for irrigation but possibly for power.

The same amount is attributed to both countries.

Mr. TURNER. Still, it is charged up to the United States. We charged up the same amount to Canada, and the Canadian waters, you say, are not susceptible of use?

Mr. MACINNES. It is a similar amount of useless water; it is charged up on both sides of the balance sheet, so that the whole situation may be depicted.

Mr. CLARK. Let me get the reason for that charging up. Why not omit it entirely in the calculation?

Mr. MACINNES. That might have been done; I think it was just to have the whole situation——

Mr. CLARK. It is rather confusing.

Sir WILLIAM HEARST. As I understand it, it does not affect the result whether you throw out these useless waters on the lower part of the St. Mary and on the Milk River, or whether you take them in, because they exactly counterbalance each other.

Mr. MACINNES. Quite so, that is the situation. They were put in the memorandum so that the whole picture would be there. But I grant you, Senator Clark, that without further argument the thing is a little difficult to understand.

Mr. CLARK. A confusion of bookkeeping.

Mr. MACINNES. I shall not read again the footnotes on page 298, because they have already been stated in argument.

Now, the result of that proposition, as I have said, is set forth in graphic form in Exhibit Q, from which it will be seen that under that there will be provided for the United States very considerably more for its irrigable areas, as is shown in the evidence, than is provided for Canada, for its considerably larger irrigable areas. It is shown here, for instance, that the depth of water that will be available for Canada in an average year will be 0.84 feet, whereas in the United States in an average year the depth is 3.78 feet; that for a maximum year Canada will receive 0.81 feet and the United States 6.04 feet.

Mr. CLARK. Colonel, in order that I may understand you clearly, may I go back to my original question? You take now the entire probable irrigable area of each country and you divide the waters according to that irrigable area?

Mr. MACINNES. Oh no, Senator; not at all.

Mr. CLARK. That is what I was trying to get at in that last statement; my mind was somewhat confused as to that.

Mr. MACINNES. I am very glad to have an opportunity of getting it clear. We have had it stated what was the situation in the two countries. We get the treaty; we take that and make an estimate as to how that would work out so as to give beneficial use to the two countries. Having done that, we see what the result of that apportionment is with regard to irrigable area in each country, which we previously have been considering. You have got your irrigable areas; you have got your treaty; you get the result of the treaty; you turn back to your irrigable area and see how much water that provides per acre for that irrigable area.

Mr. CLARK. That is exactly what I understood. Now, you estimate your irrigable area; I have not been able to get through my mind as yet the substantial right to estimate the irrigable area. For instance, suppose there are 500,000 acres——

Mr. MACINNES. I agree it is arguable, Senator.

Mr. TILLEY. You only divide the water; you do not divide the irrigable area.

Sir WILLIAM HEARST. What do you mean by irrigable area? Is it an area that can be irrigated from certain waters?

Mr. MAGRATH. I was under the impression that it was the areas that were under consideration by the projects on both sides of the line that were taken into account.

Mr. POWELL. You are endeavoring to show that the scheme you suggested worked out no injury to either party?

Mr. MACINNES. It is the one common-sense arrangement which produced what the treaty contemplated, beneficial use.

Mr. MAGRATH. I was under the impression that these two projects had in mind the development of certain land by irrigation, and that they determined these areas as from these respective projects. Now, I do not know whether or not I am right, but that is what was in my own mind.

Mr. MACINNES. That is what I understand.

Sir WILLIAM HEARST. It is in the record.

Mr. POWELL. My idea is that this whole argument really has nothing to do with it, because the treaty says: "divide one-half," and if that can be done to benefit one by putting it here instead of there, and not injure the other, why the Commission in its discretion would do that. But I do not think that all this talk about irrigable areas has a blessed thing to do with the situation.

Mr. TURNER. This has to be done from time to time, not as a permanent order from the Commission.

Mr. MACINNES. Of course, Mr. Commissioner, this matter is one of first impression, so far as some of the commissioners are concerned. That is why this matter is being dealt with.

Mr. POWELL. That is shown to be a reasonable construction to be placed upon the treaty, and that would go in favor of your construction to a certain extent—that is your argument?

Mr. MACINNES. Yes. But in any event I would be bound to deal with this side of it, in view of the very forcible attack that was made by my learned friend, Senator Turner, on the treaty, on the ground that it led to absurd conclusions. Senator Walsh also went into these questions of figures, but Senator Turner took a somewhat different line. There is clear language in this treaty, as I have always pointed out. Senator Walsh, largely, and Senator Turner, to some extent, sought to say that they are entitled to read the treaty in a different way because of certain language in it, which we say is descriptive. Senator Turner, however, developed a new suggestion—few have a better knowledge of the decisions with respect to the constructions of treaties than he has—that you must apply the clear language that you find in the wording of the treaty unless it leads you to an absurd conclusion. Then he undertook to show, from these figures, that the Canadian contention produced absurd results.

Mr. POWELL. And you say, in response to that, Here is a suggestion I have to make which, if adopted, would show this reasonable result from the treaty?

Mr. MACINNES. Exactly. Of course, you have the matter in mind and thoroughly know, I trust, that the suggestion is not absurd, but it might be that other commissioners would not have the same opinion.

Then, I would like to turn for a moment to the treaty itself. We have described the geographical situation; we have dealt with the difficulties. We have seen what the result would be of a bargain as indicated in the treaty as construed by Canada. Now, let us look at this article for a moment and examine it more minutely in connection with the negotiations upon which my learned friend lays so much stress.

The points to which I wish to call attention in Article VI are these:

> The high contracting parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream—

That is, in this proposal as finally accepted, these rivers were to be treated as one stream—

> for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries,

They were to be one stream; there was to be this equal apportionment. Then it says:

> but in making such equal apportionment more than half may be taken from one river and less than half from the other.

That was one of the main advantages, as you will see, of making it the one stream; the result was that more could be taken from one than from the other. That is an important point to bear in mind in dealing with these negotiations; that as this thing finally boiled down, these waters were dealt with not separately, but as one, and in such a way that more could be taken out of the one than from the other—which, as you see, fits in with what the different parties were wanting.

Then, there were to be prior appropriations; I will not deal with that aspect of it critically or fully at the moment. Then there is the provision that the channel of the Milk River in Canada—nothing

international about that; entirely the channel in Canada—is to be used at the convenience of the United States. There is a servitude placed on that canal in Canadian territory for the use of the United States. So we have it that there was one stream; we have it that it was to be all the waters; we have it that there was to be equal division and more than half from one than from the other. We have it that there was to be a balancing, as one might describe it, of appropriation, one on one river and one on the other, and we have it that there was to be the use of a canal. Now, what is suggested on the other side—so that we may have that in mind when we are looking at the negotiations—is this: That although there is nothing in the article itself, there is to be a cutting down of the general language, which cutting down is to the effect that such parts of rivers and such tributaries as are not in both countries are to be included. It is admitted by my learned friends that the tributaries which are wholly in either countries, but join the main river before it goes across the boundary, are to be included. But that very fact, I submit, places them in an impossible predicament when they seek to argue that the parenthetical language "in the State of Montana and the Provinces of Alberta and Saskatchewan" has the effect of cutting out tributaries unless they are in the State of Montana and one or other of those Provinces. Even if that were to be granted, as you will see, that does not fit in with their contention, or with their limitation, because they themselves admit that there should be included tributaries which are not in Montana and in one or other of the Provinces. For instance, the waters of the various tributaries of the Milk and so on, which rise in Canada and do not flow into the United States, but join another river which does, according to their contention, these waters are to be included. Therefore my learned friends have to say, but the limitation is this, it cuts off those waters which are not in both countries and which do not flow across the boundary. So that you will see that their desire, then, is in some way to get in a limitation at the boundary. For the purposes of this article, it is not so stated, though the negotiators found it perfectly simple and perfectly easy so to state when they had that in view.

My learned friend found this further difficulty, that there had been descriptions of these waters as "international" waters. He said—perfectly correctly, if I may be allowed to say so—that there is no such thing as "international waters"; that waters that flow from one country to the other are not international waters. He said that that was not the correct expression, but that he would use it for the purpose of describing the points which he wished to make. Now, my objection is that when you use the word "international" in that way, you get into the thought of the two nations and of the boundaries, and of something different. So I submit that it will not assist but rather hurt, to use a word which is not a correct word, and which carries with it a signification which is the very crux of the dispute. I suggest that the better way to describe these waters is that the "demands" should be regarded as common waters, and that the others, which he says should not be included, as waters which are not common to both countries. Of course, my learned friend may use any language he chooses, but it seems to me that that would be a more correct designation of those waters sought to be excluded, when they

are not being excluded on any boundary principle in connection with an arrangement which, as I shall be able to develop later from the negotiations and from the facts, has been settled, not on any international basis but on a national basis—a basis under which the rivers in both countries are to be treated as one, and under which a canal in one of the countries, which under no conceivable view could be claimed by another country, is granted or has servitude placed upon it, in favor of the other country.

Now, it might be contended that my learned friend went so far as to say that it is for the Canadian side to find in these negotiations the bargain as contained in this article. That, I submit, should not be put forward to anybody as a task in construing a document, because obviously the final result is not to be found in the negotiations; the final result is one which the parties have reached after negotiations, written and oral. But he may put it to me—and I accept—that you will find flowing through the negotiations various ideas which grow and develop, and finally result—and, I trust, flourish—in the agreement finally arrived at. Well, in that connection, you will find various narrow ideas of dealing simply with prior appropriations and of dealing with parts of the waters up to an apportionment of the flood flow, but not including everything. Then you find the idea of treating them both as one stream. You are getting there on broader ground. You are getting it that there should be equality; you are getting it that there should be appropriations; you are gradually going on from one idea to another. Then there would appear to be some suggestion of narrowing again; of not having the streams as one but as having them separate; of having them come across at the boundary; no use of the canal; no prior appropriations. Then you find the proposals coming back again to a wider result, a result which is due to the good statesmanship, evidently on both sides, of making it clear that there was included here all the tributaries farther to the east in Saskatchewan, tributaries which, but for the use of general language, might have been outside of this arrangement and might have had to be treated under Article II or under some other negotiations. As I say, you find narrower ideas, then broader ideas, then possibly a swing back to narrower, and the final result of everything included, all one stream, not only the tributaries to the west but the tributaries to the east. And in that final result you do not find a trace of the language which they themselves have shown that they were perfectly capable of using, and of using in a very few words, when they desired so to express themselves. Why, if it was intended that these waters should be cut off at the boundary, it was only necessary to say so—nothing simpler—three words more, words that they had used before time and again. They are not here; and my learned friend has to go out to the highways and byways of rules of construction to find a limitation which could have been so easily expressed had any such limitation been intended.

The prior appropriations——

Mr. POWELL. Before you pass that, Colonel, of course your argument is simply this: That the words "river and its tributaries" mean the total river systems within these countries?

Mr. MACINNES. Surely.

Mr. POWELL. The total river system. Well, have you given any thought as to why that word "tributaries" was introduced there at

all? Just think for a moment. It must have some significance, because the river would seem to comprise all the waters of all the tributaries. "The waters of the river" is the sum of all the waters of the tributaries. Practically, the two expressions mean the same thing. Do you think then that there is any significance—I am just calling attention to that—in the introduction of the word "tributaries," or was it simply to mean the river system?

Mr. MACINNES. I would think so. What you say may be perfectly true as applied to a fully settled country, where everybody knows what a river is, and what are its branches and its tributaries, and so on. But when you get into a newly settled country, where tributaries have names of their own—as I was saying just now, not merely one name but two names—don't you get away from any question or argument as to whether you are including the whole or not, by saying that you take the river and its tributaries, which means not such waters as are designated by certain local appellations, or by local custom, not certain things which are called the branches of the Milk River, but waters which would be included by a geographer as being all the water which is tributary to that river. There was to be no possibility of conflict; there was to be no possibility of the suggestion being made: Why that is not a tributary of such a river, because it has its own name.

Mr. POWELL. There is no question about it that the word "river" embraces the whole river system, so far as water is concerned. But does it strike you that there is any significance in the word "tributaries"; that it may possibly mean that instead of waiting for the whole of the water to get into that river we were to have the right to divide on the tributary itself as apart from the river? Do you catch my meaning? It is just an idea that was floating in my mind; there may be something in the measurement.

Mr. MACINNES. I think I see your point, Mr. Commissioner. That might be so if these matters were being dealt with separately. But here, where you get it that it is one stream and all brought into the common pot, I would not think that they would have wanted to use that word, or intended to use it, because the idea here is not to force either country to take its share of the total apportionment, at each particular point or at each particular tributary. The idea here was exactly the contrary. The idea here was to get your watershed, to consider beneficial use and to let each country take it where it wanted to. So I think it was in the view of including everything that a geographer would include.

Mr. POWELL. Well, these eminent literary men, like Bryce, and the rest of them, have succeeded in a few lines in creating more ambiguities than arise under the Statute of Frauds.

Mr. CLARK. According to Senator Turner on one side, and Col. MacInnes on the other, there is no ambiguity.

Mr. MACINNES. So far as I am concerned, Mr. Commissioner, if you deal with the article and not go out and try to create ambiguity, there will be no difficulty.

Mr. POWELL. We will not say "ambiguity," we will say "questions."

Mr. MACINNES. I take it almost as a personal reflection that although I have had the honor of arguing this question before you three times, your mind is not yet clear upon it. But when you have

taken into account, Mr. Commissioner, the arguments that have flowed on both sides, I hope that you will get some beneficial result.

Before passing to the negotiations, if I may, I might ask the Commission to look at the map which is before them and which has on it the details that are in the record. If you look at the place, "Chinook," where the prior appropriations of the United States were, you will see that there is passing at that point not merely the main body of the Milk River but innumerable small streams, or whatever you call them, Box Elder Creek, Clear Creek, and so on, flowing from the Bear Paw Mountains in the south of Montana. We have also those which start from the north—here is one called Red Rock Coulee. We have also some of the tributaries—Lodge Creek, Battle Creek—which have their origin in Canada. But what I wanted the Commission, if they would, to get clear before them as shown on this map, is that at this point, where the prior appropriations of the United States were to be taken, there was flowing in water which, on my learned friend's contention, should be excluded; that water was coming in at this part which was water which had not flowed across the boundary. Do I make myself clear? If you look at Chinook and look at the water which comes in there, for the purpose of answering these appropriations, you will see that there were coming in there not merely waters from the north which flowed across the boundary, but other waters from the south and elsewhere which had their origin in Montana and which had not flowed across the boundary.

Mr. CLARK. Right there is a question that it might be proper for me to ask; I have had it in mind from the beginning. Is there anything in the negotiations, Colonel, to indicate that the negotiators in their discussion or in their notes considered any water—I am speaking now of waters in their physical sense—which did not, or could not by any possibility, pass the boundary line?

Mr. MACINNES. Yes, Senator, I am going to deal with that.

Mr. CLARK. I wish you would call my attention particularly to that when you get to it.

Mr MACINNES. I wanted you to get this geographical situation clearly in your mind.

I do not think that I may deal with anything earlier than the dispatch from Mr. John Hay, who was then Secretary of State, of February 19, 1903, which is at the top of page 61. In that dispatch there was a proposition from the United States which I should like to emphasize:

> It is proposed to deal with this matter in strict conformity with the laws concerning the rights to the use of water as recognized by the courts of the arid region, both on this side of the international boundary and on the other. The principle may be stated in the language of section 8 of the reclamation act of June 17, 1902 (32 Stat. 388):
>
> "That the right to use of water shall be appurtenant to the lands irrigated and beneficial use shall be the basis, the measure, and limit of the right."

The suggestion, in other words, was that to the question which had arisen there, there should be applied the principles of irrigation law as to prior appropriations. There was to be applied something which was not international law in any sense, but which was a domestic law, as existing in either country. As a matter of fact, the principles are entirely the same to be applied to the situation. But with regard to these waters which were flowing from one country to the other, there was to be applied the law of irrigation, which is based on the question

of prior appropriations. We shall see presently where that leads to in the development of the argument, but you will note that that was the proposition—that one country should be obliged to consider the water which had been taken from a river lower down, and that the matter should be dealt with according to irrigation law, which meant that it should be dealt with and measured as to quantity, not as to boundary or any division between the two countries, simply as if the streams were one at the place where the water was being taken. Now, what was the result of that? That you would deal with it as if the territory was one, and there would obviously be included in that all the waters above the place where the water was required and where it was to be taken, and where the prior appropriation had to be respected. Nothing can possibly be clearer than that.

Mr. TURNER. What was the letter from which you read? I did not quite catch your reference to it at the beginning?

Mr. MACINNES. This is Mr. Hay's letter, page 61 of the St. Paul record. I do not know whether I have made myself clear there. The complaint, we will say, from the lower to the upper country would be based, not on anything which had happened at the boundary, but on irrigation law. The question which would be dealt with under irrigation law, obviously, has not any boundaries in it, has not any cut across, is based on an accumulation of water which comes in at that particular point. So that it is the application of a national, a domestic law, to not international waters, but an international question. Now, there again, I grant you, on the question of terminology there is a great deal of discussion as to the use of the word "international." Of course, this was an international question; it would not be before you, gentlemen, now if it were not. But does that not involve that it should be dealt with by you by inventing a boundary when the parties have not said so, and where there is language which excludes such a consideration. As I pointed out just now, the boundary is excluded by the collection of these two rivers into one; the boundary is excluded by the application of irrigation law, which takes into account the waters which are subject to prior appropriation, not waters which are to be measured or cut off at some other place. I wish to call attention again to that, because reference has been made to the preliminary marks in some of these documents as indicating that this is an international question. True, it is international; it was a question between the two countries. But that does not involve that they were to cut things off at the boundary unless they have said so. It is just as if it was "re so-and-so, dispute between the United States and Canada." It is an international matter, but they do not necessarily solve it in that way, any more than they did in the controversy which took place between the State of Kansas and the State of Colorado, which was referred to and very ably dealt with in Mr. Gunn's memorandum. A similar situation had arisen there between the two States, and the matter went before the Senate, I understand, which acts more or less as an arbitrator or judicial body in connection with solving such disputes. The Senate there said that the two rivers in question were to be treated as one; they cut out the State boundaries, and that is the way they dealt with it. Now, I submit, that is the way that the parties here have obviously dealt with this matter, which, undoubtedly, is an international matter.

But calling it an international matter does not interject provisions into the treaty which are not there, and which would not be imported by the word "international," as my learned friend has attempted, because "international waters" has no meaning.

Sir WILLIAM HEARST. Mr. Hay, in the concluding paragraph of that communication, seems to amplify the idea he had, whatever that idea was.

Mr. MACINNES. Quite so. He says:

Inasmuch as the position taken by the Reclamation Service in this matter in regard to the rights claimed in Canada appears to be precisely that which is taken in the case of similar rights within the United States, both being treated according to the recognized rules of law governing the diversion and appropriation of water in arid regions, Mr. Hitchcock—

I understand that Mr. Hitchcock was the Secretary of the Interior—

regrets that he can see no reason for a change in the position taken by this Government in the matter.

I was directing attention to the memorandum of May 9, 1904, apparently communicated to the British ambassador. The first sentence says:

It has been represented to the Government of the United States that a large canal is now in the course of construction in Canadian territory which will divert a large amount of water from Milk River into the Saskatchewan Basin.

Now, we will follow the language closely:

that all normal flow of Milk River is now being used by the people of Milk River Valley in Montana, who have built irrigating canals involving a great expenditure of money and have thereby reclaimed 80,000 acres of arid lands.

Now, I point that out as showing to you that what was there involved was all the normal flow of the Milk River; in other words, they considered that all these southern waters in the United States were covered by these United States appropriations. So that the point there would be this: That the prior appropriations, so far as the United States was concerned, would exhaust the waters coming from Canada, and all the waters at this part where these prior appropriations existed of the normal flow. They had in mind there——

Mr. POWELL. You are passing on to another point, now?

Mr. MACINNES. Quite so.

Mr. POWELL. Before you leave that, assuming that the idea of making the two rivers common had its root in the practice in the United States; assuming that to be correct——

Mr. CLARK. What practice do you refer to?

Mr. POWELL. The practice generally in respect to irrigation as between upper and lower riparian proprietors or States.

Mr. CLARK. Just a moment. I would like to have that a little more definitely settled. What is that practice?

Mr. POWELL. Well, whatever it may be, I was going to ask a question, because they assumed, do you see, that the practice there should prevail. The United States put it up to Canada that the laws relating to upper and lower riparian proprietors, with respect to irrigation, should prevail. Whatever that may be, I am going to ask a question.

Mr. CLARK. Well, I will have to start with the understanding that in the irrigating part of the United States there is no such thing as riparian proprietors.

Mr. MACINNES. Quite so.

Mr. KING. In other words there is no "practice" at the present time.

Mr. CLARK. Oh, yes; there is practice, but it does not recognize any riparian right.

Mr. POWELL. Well, if it is introducing a question with respect to riparian proprietors, I will modify my inquiry.

Mr. MACINNES. I did not understand that you were dealing with the question of riparian proprietors; you were dealing with the question of irrigation law.

Mr. POWELL. It is the right to abstract waters from streams.

Mr. CLARK. There is no upper or lower right.

Mr. POWELL, There is not?

Mr. CLARK. No. The mere fact that you live higher up on a stream gives you no preferential right to appropriate the waters of that stream.

Mr. POWELL. Now, as between riparian States, that matter has been before the United States courts.

Mr. MACINNES. No, I think that is wrong, if I may say so. The dispute that arose—Senator Clark will correct me if I am wrong—between Kansas and Colorado was that one was a State which was governed by riparian law, a State in which riparian rights were recognized, and the other was an irrigation State, a State in which water was used for irrigation purposes.

Mr. CLARK. Hardly that. The question was as to the right of the State to appropriate all the water of a river that would ordinarily flow into another State.

Mr. MACINNES. Well, as I remember it, that was the situation as between the two States: One recognized riparian law, at least to some extent; and the other did not; the other was governed by irrigation law.

Mr. CLARK. It was a question of the right of a State to appropriate all waters flowing into that State, whether they flowed into the other State or not.

Mr. POWELL. That, then, is a question as between upper and lower riparian States.

Sir WILLIAM HEARST. As I understand the position taken by Mr. Hay in the communication read by Col. MacInnes it is this: Canada has nothing to complain of because she is being treated exactly as the United States is being treated.

Mr. MACINNES. Exactly, and that this law of irrigation should be applied.

Sir WILLIAM HEARST. Quite so—an irrigation law which is common.

Mr. CLARK. It is the law of prior appropriation and beneficial use, that is all there is to it.

Mr. POWELL. Now, I was going to put this question to you. Suppose the lower proprietors were proceeding by an injunction against the upper proprietors, the United States court, having, we will assume, jurisdiction over both; in a case of that kind would it be open to the upper riparian proprietor to claim: You lower proprietors are already appropriating waters to the south and there is no necessity for your taking additional waters from above, to meet present emergencies.

Mr. MACINNES. Surely it would be the other way round. If the complainant had to make out a case he would have to show that he had prior appropriations, we will say, for 500 second-feet.

Mr. POWELL. I am not speaking about the prior appropriations; I am simply speaking of the necessities of the land below.

Mr. MACINNES. Quite so. It would be for whoever was raising the claim to make out his case. He would say: I am entitled by my laws—I should have thought we were dealing with irrigation laws—but still he could say: I am entitled to that flow of water by law. Now, I am not getting it; I am short so much. Surely he can not go to the person above him and call upon him to allow to flow down to him an amount which, together with the other sources of supply to which the lower man is entitled, would give him more than his right.

Mr. POWELL. In other words, the supply that he gets from other sources is a factor in the problem as to whether he is entitled to call upon the other States to let the water go down.

Mr. MACINNES. Surely.

Mr. POWELL. As a real emergency?

Mr. MACINNES. Yes.

Mr. CLARK. Most of the States have their own laws in this respect. Take, for instance, the State of Wyoming, I appropriate for 160 acres of land. The State engineer tells me how much water I can take out of that stream for that 160 acres of land, and the man who has land below can not compel me to divide what the State engineer has given me, provided the State engineer has not given me more than sufficient to irrigate my land. In other words, I may have sufficient to irrigate my land, and the man below me may be compelled to go entirely dry.

Mr. POWELL. That is a case of intrastate municipal law.

Mr. CLARK. Yes.

Mr. POWELL. And as to interstate law, as administered by the Supreme Court of the United States.

Mr. CLARK. That has not yet been determined. It is still in abeyance and probably always will be.

Mr. KING. It is pending in the Wyoming-Colorado case.

Mr. CLARK. Yes; in which the Supreme Court has had two or three rehearings and has not yet determined what the law is—that is, as between citizens of different States, not as between two States.

Col. MACINNES. On page 63 of the St. Paul record is a further dispatch from Mr. Hay, dated December 30, 1904, and I wish to call attention to the fourth paragraph of that on page 63, reading as follows:

> The engineers report that the waters of the St. Mary River which flow northward into Canadian territory are now being utilized to only a small extent, and they state that it is practicable to store these waters in the United States, conduct them by a canal on the southern side of the international boundary line to the head of the Milk River, and there turn them into the Milk River, so as to increase the ordinary flow of that river,

and so on.

> Under this arrangement the prior rights of the Canadian settlers on the St. Mary River would be protected by permitting its ordinary flow to continue to pass into Canadian territory, and at the same time the great volume of flood water which passes down that river,

and so forth. I call attention to that, not so much in connection with the construction of the article, as with the carrying out of its provisions by the Commission, in the hope that some way may be found, as pertinent to the jurisdiction of the Commission, to develop

or encourage, if not to order, storage facilities in both countries to be developed as far as possible, because it is quite clear that if there is storage there will be greater water and less possibility of dispute between the two countries at any future time. I mean that as development goes on, and there is more storage, you are quite sure all the water is measured that can be got there.

There was a question on the record whether there had been an argument to store or not that indicated that there might be such an agreement. Anyhow, in the result, there was no formal agreement between the two countries to store, although it was shown that Canada was quite willing and ready to contribute to the storage which might take place at the best available place on St. Mary Lake.

Turning, then, to Mr. Root's dispatch of June 15, 1907, on pages 65 and 66, the matter now seems to be widening, and that the rivers are to be treated as one; but instead of the whole situation being dealt with, as you will remember is pointed out in Dr. King's subsequent memorandum, there is an endeavor to balance certain benefits without dealing with the whole. There are questions of storage in several months. There is a question of setting off all the water in one river against all the water of another in a way that is exceedingly difficult to comprehend. I can only say that if you were looking for ambiguity you could not do better than endeavor to solve this balancing of benefits, from the details that were given. As is shown by the facts, they could not land anywhere on such a basis because it is difficult to understand; I am referring particularly to Article V. There are other parts which I shall show are quite clear as to what was meant.

I invite particular attention to paragraphs 9 and 10 of this document, as showing to my mind conclusively that the parties had in mind and were dealing with waters which were wholly in one country.

Mr. CLARK. That is the point to which my question was directed.

Mr. MACINNES. Let us look at paragraph 9 on page 66:

The share of the United States shall in any event include so much of the available natural flow of the Milk River as shall be judicially determined as having been applied to beneficial use on or before November 1, 1905, by the canal systems taking water from the lower Milk River in Montana.

I have shown you to-day on the map Chinook, where those were being taken. What is referred to in paragraph 9 you will find in this red triangle shown on the map before you. To continue:

the same to be measured at the intakes of said canal systems; and whenever one-half of the natural flow of Milk shall be less than such amount, measured as aforesaid—

That is at Chinook, applying the facts to the document—

the share of Canada—

we will see in a moment that that is one-half:

the share of Canada shall be diminished so that said country shall receive of the natural flow of the entire Milk River system only the excess, if any, beyond such amount of decreed beneficial use.

So what is involved there is not only prior appropriations, but a one-half consideration of all the waters of the Milk River, which we are dealing with, when coming from Canada or coming in at this point, where it is expressly stated by Mr. Root the water is to be measured. Therefore, so far as Canada's share of these particular

waters is dealt with there, it has to be one-half of that water and of whatever is supplemental thereto and arises south of the boundary and up to the point where it is being measured for the satisfaction of these prior appropriators, that is Chinook.

Mr. MAGRATH. That is your interpretation of the entire Milk River system?

Mr. MACINNES. Yes; as being dealt with by Mr. Root. That is the entire Milk River system as they were dealing with it at the time.

Sir WILLIAM HEARST. And you say the intakes of the canal systems at which measurement is to be made are at Chinook?

Mr. MACINNES. Oh, yes; there is no dispute about that. To carry on, we get the same idea exactly in the other country, for whatever results it may produce. Paragraph X, on page 66, says:

> The share of Canada shall in any event include so much of the available natural flow of St. Mary River as has been applied to beneficial use on or before November 1, 1905.

You will note that Mr. Root dates it back, which was one of the points Canada was objecting to, because the result would be to cut down Canada's authorized appropriation on the St. Mary to an earlier date. It goes on:

> by the canal taking water from St. Mary River in Canada—

That, you will remember, is not at the boundary, but at Kimball, which is shown on the small map before you, just about the figure 25—

> the same to be measured at the intake of said canal; and whenever one-half of the natural flow of St. Mary River shall be less than such amount, measured as aforesaid, the share of the United States shall be diminished, so that said country shall receive of the natural flow of the entire St. Mary River system only the excess, if any, beyond such amount.

There they were speaking of the St. Mary River just as they were of the Milk River system. They are dealing with water for irrigation. Therefore, the system includes up to the point where it is being used for irrigation—in the United States, as it happened, at and around Chinook, and in Canada at Kimball.

Mr. POWELL. You have only given us one canal. How many were there?

Mr. MACINNES. Oh, no.

Mr. POWELL. Just at this moment you have only mentioned one.

Mr. MACINNES. No; I am speaking of the St. Mary.

Mr. POWELL. I am speaking of the Milk River. What were the canals that tapped below Chinook?

Mr. MACINNES. If you would refer to page 33 of the record, that gives a statement of what they were. Then this map—I called your attention to the numbers this morning—shows exactly where each one of them was. There are eight, and you will find each one of these numbers, as a matter of fact, around Chinook. That may be why Mr. Powell thought I was speaking of only one; I was speaking of them all——

Mr. POWELL. Now, below that, were there any canals that took water from the Milk River?

Mr. MACINNES. There were none spoken of in the evidence. What is spoken of as having arisen subsequent to this time is No. 41–b, Rock Creek Canal.

Mr. POWELL. That was constructed later?

Mr. MACINNES. Before the treaty was made.

Mr. POWELL. Was it in existence at the time Mr. Root made his proposition?

Mr. MACINNES. My recollection would be not, but that this lower one came in between Mr. Root's proposal and the treaty.

Mr. POWELL. Mr. Davis would recollect.

Mr. DAVIS. That was built before 1905, but it has since been enlarged.

Mr. POWELL. It was in existence at that time?

Mr. DAVIS. I think it was.

Sir WILLIAM HEARST. 1907 is the date we are speaking of, but if it was in existence in 1905 it would be there in 1907.

Mr. POWELL. It was in existence at this time, Mr. Davis says, and was enlarged afterwards.

Mr. MACINNES. My information on the Canadian side is that there was nothing to show in the official records that it was in existence at that time, but that it came in later. That is what I have been informed is the result of the record.

Mr. POWELL. Mr. Davis says it was in existence and taking water at that time, and was enlarged afterwards.

Mr. DAVIS. I am not sure about the enlargement. It was in existence at that time. Whether they enlarged it or not, I do not know.

Mr. MACINNES. What time was that?

Mr. DAVIS. 1907.

Mr. POWELL. I understood you to say it was constructed in 1905.

Mr. DAVIS. The exact date I do not know.

Mr. MACINNES. I am not wishing to check Mr. Davis at all, but Mr. Newell, in his evidence on page 33, does not include that, so I am entitled, on the record, to say it was not there, because Mr. Newell was at the head of the Reclamation Service, holding the position Mr. Davis now holds.

Mr. DAVIS. It does not divert from the Milk River.

Mr. MACINNES. From the tributaries?

Mr. DAVIS. Yes.

Mr. MACINNES. This list given by Mr. Newell, on page 33, includes diversions from the tributaries. I do not know how important the point is as to the argument, but I think I am correct in my statement on the record.

Mr. CLARK. Entirely correct, according to Mr. Newell's statement.

Mr. POWELL. He speaks of canal systems:

> Canal systems taking water from the lower Milk River in Montana, the same to be measured at the intakes of said canal systems; and whenever one-half of the natural flow of the Milk shall be less than such amount, measured as aforesaid, the share of Canada shall be diminished so that said country shall receive of the natural flow of the entire Milk River system only the excess, if any, beyond such amount of decreed beneficial use.

If there were only one canal on the main river, the only meaning you could attach to that is that the canals from the tributaries down below were also included.

Mr. MACINNES. There are apparently several, as shown by the map.

Mr. POWELL. That is the statement that was given by Mr. Newell. Now we are construing the meaning of Mr. Root's proposed arrangement.

Mr. MACINNES. Quite so.

Mr. POWELL. One thing is clear from Mr. Root's statement, and that is that there were more canals than one in the lower Milk River at that time. If there were only one on the main river, the plurality could only be got by assuming that there were canals for the tributaries.

Mr. MACINNES. That is quite true, but we do not want to get at cross-purposes. There would be more than one without this Rock Creek. There are several at Chinook, regardless of Rock Creek.

Mr. POWELL. There were more canals than one at that point.

Mr. MACINNES. If you will be good enough to look at the map, you will see them.

Mr. TURNER. I do not think there is much value in subjecting to microscopic examination these diplomatic interchanges.

Sir WILLIAM HEARST. Look at paragraph 7, please:

> The amounts of water chargeable to each of the countries under the several items, enumerated in paragragh 5, shall include all the waters of the river systems whether used directly or indirectly by the two Governments or by private parties in their respective territories.

Do you claim that under that paragraph the United States would be chargeable with all Montana waters used in irrigation in the lower Milk River Valley?

Mr. MACINNES. Yes; I would say that they would be brought into account, certainly, but there is no great difficulty there, because, as I have already pointed out, such water as there was there was covered by these prior appropriations.

Sir WILLIAM HEARST. But I suppose that if the United States was chargeable with that water, the more it was chargeable with of these Montana waters the more Canada would get at the crossing.

Mr. MACINNES. Quite so. There is no doubt about that.

Sir WILLIAM HEARST. I just wanted your views whether she was chargeable or not.

Mr. MACINNES. She was chargeable with that. But you will see by Mr. King's criticism later on that Mr. Root, while establishing a broad general principle for dealing with it, does not, in the system proposed of balancing one against the other, cover the whole situation, so far as distribution is concerned. You will remember, for instance, that Mr. Root, where he is describing the shares, only includes the waters up to a certain amount, 2,000 second-feet. In other words, he does, as I say, and as you pointed out in that paragraph, include the other things they were dealing with, although the actual distribution of it into shares does not fully exist, as he apparently thought it was unnecessary to exist, but the principle was that everything was brought in and up to such a point as would cover these appropriations.

Then on page 67 we have the order in council of March 2, 1908, of which I will read the last paragraph on that page.

> That under the most favorable circumstances the diversion of the waters of the St. Mary River in the United States will seriously affect the rights so created, as well as the public rights to the use in development of public lands of the natural surplus water of streams flowing through the territory, not for the purpose of protecting similar rights in the United States, but in order to create rights not now in existence. There is a somewhat indefinite prior claim on behalf of the settlers on the lower Milk River, which the treaty proposes to recognize and which apparently may at certain seasons allow Canadians no use whatever of the water of Milk River.

Moreover, the draft treaty provides for the carriage of a very large volume of water by the channel of Milk River, in Canada, all of which water must be allowed to pass through to the United States, while the Canadian use is restricted to a part only of the natural flow, which in the low-water period is very small. It is felt that the concession asked from Canada in this regard is a very great one, in view of the difficulties which may arise from the restriction thus placed upon the settlers on the banks of the river, and of the liability of damage to property from the increased height of water, and that there is not sufficient compensation allowed in the treaty for such concession.

The attitude of my learned friends has been to brush this canal situation aside as though it had no bearing, but I submit, apart from any value it has as a canal, it shows and indicates that it was brought in as part of a general scheme whereby everything should be linked together. And the emphasis is not so much on its monetary value as on the fact that it was used to make a settlement of this whole matter, and that everything was included. He goes on:

That the division of the waters of the St. Mary and Milk Rivers on the terms suggested in the draft treaty would, in practical operation, result in the Dominion of Canada receiving a less proportion of the water than that to which this country is equitably entitled, as although the rights given to the United States over the waters of St. Mary River are, in terms, balanced by rights given to Canada with respect to Milk River, the latter river is by no means equal in volume of constancy of flow to St. Mary River.

The point there is this: Mr. King was objecting that while Mr. Root's proposals were general in terms, in the carrying of them out there were limitations in the compulsory balancing of one against the other, and that is what I was saying. I think the whole course of these negotiations shows that as they went on the thing broadened until it finally broadened out into this treaty, and when it was attempted to deal with the matter by Mr. Campbell's draft, which is placed in the record here by Mr. Wyvell, there was a very narrow dealing with the thing and on a different basis, and that was rejected. Apart from that, everything grows on from prior appropriations to the taking into account of water in the entire tributaries, thereby affecting the share, as described by Mr. Root, and from then on, but at the same time tied down by certain balancing restrictions. At that time there is also brought in the principle of the one stream. There is also brought in this canal. From that you go on and get a final result, and the language used makes it clear that the negotiators were including not merely waters from the entire Milk River system, which the negotiators had in mind up to this point, but all the tributaries, and to make it clear that all that water was included, and that there should be no doubt about it, the proper geographical words were added "and Saskatchewan." The other part of it was not left to be dealt with under any article of the treaty, but was brought in, as I say, as part of this whole scheme, and as part of a watershed which was under construction prior to that, possibly to a more westerly geographical point. It made it abundantly clear that this had all been linked together, and here in the treaty you are dealing with the whole thing. You have a commission to give directions to officers. You are not going to have it left to officers who have to travel back and forth to Ottawa, but you are going to have a joint commission to settle the details, and the details they have to settle are the widest possible, together with all that relates to these two rivers, linked together by treaty, linked together by a canal, with provisions as to prior appropriations in either country and limited only by the extent to which

the waters of these two systems could be capable of use for irrigation and power.

Mr. POWELL. I was inquiring before as to canals on the Milk River to the west of Chinook. Are there any substantial tributaries from the south that flow into the Milk River?

Mr. MACINNES. You will see them on the map.

Mr. POWELL. I see one here, the Big Sandy Creek. That is the biggest one.

Mr. MACINNES. There is the Box Elder, Clear Creek——

Mr. POWELL. Give us only those that are to the west of Chinook. The engineers might have a look at this, because it strikes me as having a very important bearing on the question if you are reviewing the past. You see the relevancy of this. If there are substantial confluents from the south joining that river to the west of the Chinook Canal, they were taken into account by Mr. Root's proposition. Let us see if there are any.

Mr. MACINNES. The engineers have called my attention to the fact that while I have here East Chinook, geographically the last canal to the east is 10B, somewhat to the east of Chinook. It is described as the agency ditch, which is the Fort Belknap Indian ditch. It is on the reservation itself.

Mr. POWELL. Suppose we get all hands to agree to these facts if they are not disputed.

Mr. MACINNES. They are not disputed, as shown on this map. What you want is the names as shown.

Mr. POWELL. I want the names as shown of all the southern confluents to the west of this 10B.

Mr. MACINNES. If you will look, you will see that there is a vast number of them; they do not have actual names on this map. The map, if I may say so, is really the clearest answer to your inquiry.

Mr. POWELL. They may be coulees, which have really no substantial flow.

Mr. MACINNES. The principal ones, without exhausting them all, are the Big Sandy, the Box Elder, Clear Creek, and Snake Creek.

Mr. MAGRATH. West of Chinook?

Mr. MACINNES. West of the Fort Belknap agency ditch, 10B.

Mr. CLARK. These last ones that you mentioned do not seem to flow into the Milk River at all; they seem to be coulees.

Mr. MACINNES. The Box Elder seems to join Snake Creek and then flow in as one river.

Mr. POWELL. Are there any measurements of the flow of these confluents?

Mr. MACINNES. That I do not know.

Mr. POWELL. Have the engineers the measurements?

Mr. JONES. They were measured in 1918 and 1919. The figures have been supplied to the Commission, or I can get them for the Commission.

Mr. CLARK. Measured on what streams?

Mr. JONES. There is a station on Big Sandy, Clear Creek, and Box Elder. I should call attention of the Commission to the fact that there are three Box Elders. This is the one that comes in near Havre. There is one other small tributary entering near Havre.

Mr. POWELL. And that is all to the west of that canal?

Mr. JONES. Yes.

Mr. POWELL. And they flow from the south into the Milk River?

Mr. MACINNES. To continue with the order in council of March 2, 1908, containing certain objections to Mr. Root's proposals, although they had been wider than heretofore, the last paragraph I shall read—I have already read two—is the third one on page 63. I have already read the paragraph pointing out that the setting aside of one against the other would not be fair to Canada inasmuch as the Milk River set aside to Canada in the Root proposal was by no means equal in volume and constancy of flow to the St. Marys River. The objection summarized was this:

That for these reasons, and in order to give a fair measure of protection to the vested rights created in Canada, this country should receive considerably more water than the proposed treaty provides for apportioning to it.

Now, reading in order of record rather than of date, I come to the communication from Mr. Walcott, on page 75, to the Secretary of the Interior, which was forwarded to Canada:

This correspondence calls attention to the fact that the Canadian canal is being constructed to divert water from Milk River, and this will injure the property of the Government, particularly the irrigation system upon the Fort Belknap Reservation. The matter is one of great importance to the Government, as well as to the people of Montana, and I respectfully recommend that, as suggested in other letters, the matter be taken up through the Department of State.

That Fort Belknap Reservation is at ditch 10B. So they were making a reference to that ditch and to the water taken from it in accordance with irrigation law.

Mr. POWELL. I do not attach very much importance to that.

Mr. MACINNES. It was only as identifying one of these, which was at a point where all Montana water was included.

Mr. POWELL. It goes no further than this, that there will be an injury resulting from that diversion.

Mr. MACINNES. It was of interest, I thought, rather than of value, as referred to this particular one which we find is the most easterly. Then, on page 81, Mr. King puts the general principle admirably:

In view of the large area of arid lands situated in the basins of St. Marys and Milk Rivers, on both sides of the international boundary line, for the development of which irrigation is a vital necessity, it is thought that an agreement whereby all available water shall be utilized for the conversion of the present desert wastes to the fertility of irrigated fields, to the advantage of both countries, is in the very highest degree desirable. Such agreement, it is believed, to secure acceptance by the people of both countries and to fulfill its purpose of obviating all possible future contentions can best be based upon the principle of equal sharing of benefits to be derived from these international rivers, due regard being had to existing rights.

Mr. CLARK. Mr. King uses the word "international."

Mr. MACINNES. What I was calling attention to there was the proposal that all available water was to be utilized for the conservation of these lands.

Mr. CLARK. I was simply commenting on the use of the word "international" in the phrase "international rivers."

Mr. MACINNES. Oh, yes. I do not wish to travel over more of the ground than is necessary for this particular point. I would turn to page 90 where there is a matter which can no doubt be cleared up by the secretaries of the Commission. In Mr. Newell's criticism of Mr. King's proposal, you will see this paragraph:

This latter amounts to practically 359 second-feet. This proposal, as understood, gives the United States during April to July, inclusive, 359 second-feet then Canada

330 second-feet. This seems to be fair and in line with the principles which it is desired to follow.

The record stops there. We have not got here the document put in by Mr. Wyvell at Washington, but the copy which was furnished to me goes on to say "on the assumption that it includes all tributaries of the Milk River." It is of course important and desirable to have on the record whatever is correct, and the copy which I have includes those additional words.

Mr. POWELL. Who has got the original, the United States?

Mr. MACINNES. No; that should be here. It is the comments on the memorandum.

Mr. CLARK. There would be a copy of it in both places, I suppose.

Mr. MACINNES. That could be checked up.

Mr. TURNER. What do you want the original for?

Mr. MACINNES. We only want the language that is right, Senator.

Mr. TURNER. Is there any reason to suppose this language is not right?

Mr. MACINNES. Yes; I think there is. What is in the record does not contain all that is in the copy which I have seen of this communication, which contains the words: "On the assumption that it includes all tributaries of the Milk River." What we want is to get this thing cleaned up. I do not know how much importance attaches to it, but the record should, of course, contain a copy of what was put in.

Mr. CLARK. According to your understanding, there is a failure on page 90 to include all that was included in the criticism of proposal 5?

Mr. MACINNES. Yes.

Mr. POWELL. That is a mistake in transcription.

Sir WILLIAM HEARST. It looks like a typographical error.

Mr. CLARK. It is an omission.

Mr. MACINNES. Then, on page 93 there is this draft by Mr. R. H. Campbell, dated December 29, 1908, on which my learned friend seems to place a great deal of reliance, but as already pointed out in arguments at various times it is quite clear that this proposal contained in Mr. Campbell's draft is a swing back to a totally different kind of proposition. It is a proposition which relates, not only to these two rivers and their tributaries, but to all streams. It is a proposition which is expressly limited to streams which cross the international boundary. It is a proposition which makes no provision for prior appropriations, and no provision for a canal. I remember that Mr. Commissioner Powell made a remark as to this, as to why the United States might not favor it, although Canada would not, inasmuch as Canada's prior appropriation was of greater value than the prior appropriation of the United States. So far as that particular point is concerned, under this Canada would get part of the St. Mary, which is treated as a separate stream and it is assumed that half of the stream treated separately and not in unison with the rest, would be as good presumably as the prior appropriations. What is quite clear is that this is a totally different proposition and on a totally different basis what is also perfectly clear is that it expressly states the limitation to waters which cross the boundary.

Next, or at the same time, comes this memorandum by Mr. Newell, of December 29, 1908, on the same page.

Sir WILLIAM HEARST. Before you read that, you said it contained no provision for a canal. What does paragraph 7 mean?

Mr. MACINNES. That provides that there is to be responsibility for damage, but it does not contain what the treaty does and what had previously been contemplated, that is a definite consent and permission, which, as you will see, might be a very different thing, because if it is stated simply that damage will be paid for, there being no form of consent, objection could be raised and the matter not be allowed to continue. It is a very different thing to have a license or a servitude to be allowed to do a thing which is in a treaty and protected, than simply saying that if I do something I will pay the damages.

Mr. POWELL. Do you not think that the language implies a license to divert?

Mr. MACINNES. I would have thought it was very different. It certainly is different.

Mr. POWELL. It evidently contemplates a diversion, and it does not kick against its being done.

Mr. MACINNES. It is put in general language. It is stated there with reference to the Milk River and the canal on it, which the treaty deals with as a separate matter. It is a general provision that if either country causes damage to the other it will pay for it.

Sir WILLIAM HEARST. The provision for compensation is quite different.

Mr. POWELL. Your idea is that this is a general code without reference to the specific situation.

Mr. MACINNES. It is so in terms. I do not think we can find any ambiguity there at all. It refers to all streams. It is general as to streams, but limited to such streams as cross the boundary. To get back to the very point that I was making, it is a different proposition entirely because it relates to all streams. It makes no provision for prior appropriations and is expressly limited to such streams as cross the boundary.

To conclude on these prior negotiations, so far as reference to the documents is concerned, if you turn to page 94 you will see the printer has put in there "Draft received from Mr. Gibbons with his letter of December 31, 1908," and on page 96 the same document is headed "Mr. Gibbons's draft." I do not say that the point is one of importance, one way or the other, but I do say that the record ought to be made straight, and that these documents ought not to be so designated until proof has been given to that effect. I mean that whatever may happen we do not want a document called "Mr. Gibbons's draft" that really was not in fact Mr. Gibbons's draft.

Mr. CLARK. Are we to understand that this record, for the purpose of this hearing is not complete and not to be relied on? I can not understand the situation.

Mr. MACINNES. Let me explain that. At the time they were put in by Mr. Wyvell, counsel for the United States, he stated that they were Mr. Gibbons's drafts and that they were accompanied by a letter. As a matter of fact, our information was to the contrary. Mr. Mignault said that he thought the matter ought to be straightened out. There is no objection to their being on the record, but the objection is to their being designated as something which has not yet been cleared up.

Mr. CLARK. Then they are worthless.

Mr. MACINNES. As to that, I understand directions have been given by the commission requesting the commission's secretary at Washington to obtain from Mr. Wyvell or the State Department certified copies of this document. We have put in certified copies of what we put in.

Mr. TURNER. What about the draft headed "Original draft C. P. A?"

Mr. MACINNES. That is actually there in writing, as I remember the writing.

Mr. TURNER. Your idea is that both these drafts were prepared by Mr. Anderson, is it?

Mr. MACINNES. I think both were Mr. Anderson's. I am not sure. Mr. Wyvell's concluding remarks are: "There are two undated drafts of treaties." and he put them in there together. One has certainly Mr. Anderson's initials on it. The other he called "Mr. Gibbons' draft", but from what I can understand of the matter they were both Mr. Anderson's.

Mr. POWELL. The arrangement as between you and Mr. Wyvell is, on your part: I can not submit, it can not go in, it has never been seen on our side at all; and on the part of Mr. Wyvell: I can submit this later. I can get it in better shape. There is some uncertainty.

Mr. MACINNES. This is from the original draft. It certainly could not be subsequent to the ones which have been already put in.

The commission then adjourned for luncheon.

MAY 5, 1920—2.30 P. M.

AFTERNOON SESSION.

Mr. MAGRATH. Will you continue your argument, Mr. MacInnes?

Mr. EGLESTON. If your honor please, we ask to have inserted in the record two short memorandum briefs in support of our case, one prepared by Mr. Morris Bien, counsel for the United States Reclamation Service, and the other prepared by me. We will serve copies on the opposing counsel for their examination.

Mr. MAGRATH. Is that agreeable?

Mr. MACINNES. I have no objection whatever, Mr. Chairman, to additional arguments going in, provided we have an opportunity of dealing with them. As to one of the memoranda that has been referred to, of which I have just received a typewritten copy, I have not had an opportunity of considering it, but I have handed it to Mr. Tilley, who may be able to deal with it. As to the other memorandum, I understand that it is not available.

Mr. EGLESTON. If that is objected to we must, of course, leave it out; but if not, we will serve a copy on you for the purpose of your objecting or making a reply.

Mr. MACINNES. If my learned friend thinks it of sufficient importance, that could be done and we could put in a written reply. But one would naturally prefer not to cumber up the record with a lot of additional documents if it could be avoided. I would ask my learned friend to consider if he could not state orally what is in this memorandum that is not available.

Mr. TURNER. Mr. Bien's memorandum is a very explicit statement of some of the propositions urged by counsel here.

Mr. MACINNES. Quite so.

Mr. TURNER. I do not know what Mr. Egleston's paper may be.

Mr. MACINNES. That is the one I was asking about.

Mr. EGLESTON. The other memorandum is on a point that is not very material in this controversy, but it has been touched upon in the argument both of Senator Walsh and Judge King—the Government ownership of waters in Montana. It would be difficult to do more than state the position, because it is backed by some authorities which I have not at hand, but which are written out. If this memorandum can not be admitted later, as soon as I obtain a copy of it, we will not insist on its admission, because I think it is difficult to state the position and quote the authorities at this time.

Mr. TURNER. My idea is that that is one of the controversial matters that were very fully gone into at St. Paul and that have not anything to do with the case.

Mr. POWELL. It is the constitutional feature, is it not?

Mr. TURNER. It runs into that.

Mr. EGLESTON. That being the case, I will not insist upon admission of the second memorandum, but will ask that the first memorandum, prepared by Mr. Bien, be admitted.

CONTINUATION OF ARGUMENT BY MR. MACINNES.

Mr. MACINNES. Mr. Chairman and gentlemen, the legal members of the commission will doubtless expect me to deal with the authorities from textbooks and cases which have been cited by my learned friend, Senator Turner. I shall do so as shortly as possible.

In the first place, my learned friend cited Vattel's Law of Nations. I would also do the same. The reference I would make is to pages 244, 245, and 246, parts of which I will read:

> The first general maxim of interpretation is, that it is not allowable to interpret what has no need of interpretation. When a deed is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it. If this dangerous method be once admitted, there will be no deed which it will not render useless. However luminous each clause may be—however clear and precise the terms in which the deed is couched—all this will be of no avail, if it be allowed to go in quest of extraneous arguments, to prove that it is not to be understood in the sense which it naturally presents.

And further down on that page:

> There will be no security in conventions, no stability in grants or concessions, if they may be rendered nugatory by subsequent limitations, which ought to have been originally specified in the deed, if they were in the contemplation of the contracting parties.

The concluding language, as you see, covers absolutely the question of the insertion of words, which must be inserted if my learned friend gains his point, that this convention in Article VI is limited to waters crossing the boundary.

My learned friend cited also from Phillimore's International Law, Volume II, third edition. I would cite from the same source at page 99:

> There are, however, certain general rules of literal interpretation, which have been sanctioned by all jurists, and which should be mentioned in this place.

1. The principal rule has been already adverted to, namely, to follow the ordinary and usual acceptation, the plain and obvious meaning of the language employed. This rule is, in fact, inculcated as a cardinal maxim of interpretation equally by civilians and by writers on international law.

Vattel says that it is not allowable to interpret what has no need of interpretation. If the meaning be evident, and the conclusion not absurd, you have no right to look beyond or beneath it, to alter or add to it by conjecture. Wolff observes, that to do so is to remove all certainty from human transactions.

Mr. Commissioner Powell referred to Hall, a well-known writer on international law, and I will give a reference to the sixth edition, at page 327:

Jurists are generally agreed in laying down certain rules of construction and interpretation as being applicable where disagreement takes place between the parties to a treaty as to the meaning or intention of its stipulations. Some of these rules are either unsafe in their application or of doubtful applicability; and rules tainted by any shade of doubt, from whatever source it may be derived, are unfit for use in international controversy. Those against which no objection can be urged, and which are probably sufficient for all purposes, may be stated as follows:

1. Where the language of a treaty, taken in the ordinary meaning of the words, yields a plain and reasonable sense, it must be taken as intended to be read in that sense, subject to the qualifications, that any words which may have a customary meaning in treaties, differing from their common signification, must be understood to have that meaning, and that a sense can not be adopted which leads to an absurdity, or to incompatibility of the contract with an accepted fundamental principle of law.

Then I refer to some decisions of the United States courts. I find a case in the Maine courts which may interest Senator Gardner. It is Little v. Watson, and will be found in 32 Maine reports at page 214. It dealt with title to land in New York ceded to Massachusetts and confirmed by the fourth article of the treaty of cession being good as against State grant. This is the clause from the judgment that I would cite:

The literal is the correct construction of such an instrument, when the language is clear, precise, not inconsistent with other provisions and not leading to absurd conclusions. And in such case no extraneous means for an interpretation of the treaty should be sought.

When the language used in a treaty clearly declares a fact, or grants, defines, or confirms a right, it must be effectual even if found to be inconsistent with the purpose disclosed by the correspondence which preceded it.

In that case also as a matter of fact there were interviews as well as correspondence. That is, of course, putting the case much higher than I would need to put it here. That is putting it to the extent of being inconsistent with previous correspondence, although there what possibly influenced the court may have been this, that in going into such previous correspondence, and being aware that that correspondence did not contain everything, there having also been interviews, they might very likely still be not merely following the actual language of the treaty but coming to the absolutely correct conclusion if they went contrary to the correspondence because it was in accordance with the final interviews.

As I say, I do not need to go as far as that here, because I think I have been able to demonstrate to the Commission to-day that the final provisions of this draft are not contrary in any sense to the previous negotiations, even although we have not the benefit of all the interviews; they are not contrary to them, although very naturally as being the last they are not the same in all respects as the preceding, because they are a development arising out of negotiations, some of the reasons being made apparent from the docu-

Then the quite recent case in the Supreme Court of the United States of Rocca *v.* Thompson, 223 U. S., at 317, a case which is cited in Crandall on Treaties, 2d edition, at page 371:

> It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of the estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms.

There is the further question as to treaty-making power, which has been referred to by some of the counsel appearing in United States interests, although not touched upon by Senator Turner, in his argument, as I remember. It would seem to me, with all respect to those who raised the point, that it is entirely beside the mark and really has no relation whatever to what we have before us. But as it has been touched upon I would like to cite to you some extracts from what is considered to be the leading authority on the treaty-making power of the United States, and from an edition which was the last authoritative work at the time this treaty was made in 1909; it is Butler's Treaty-making Power of the United States, volume 1, section 3:

> The author fully appreciates that any attempt to extend Federal jurisdiction to matters which are not clearly expressed in the Constitution carries with it the onus probandi to its fullest extent. He is, however, so firmly convinced that the Government of the United States is completely endowed with all the essential attributes of nationality and sovereignty in regard to national affairs that he feels fully justified in expressing the following opinion:

I will leave out the first paragraph, which does not seem necessary here, and take the second paragraph, which seems to cover this situation:

> Second. That this power exists in, and can be exercised by the National Government, whenever foreign relations of any kind are established with any other sovereign power, in regulating by treaty the use of property belonging to States or the citizens thereof, such as canals, railroads, fisheries, public lands, mining claims, etc., in regulating the descent or possession of property within the otherwise exclusive jurisdiction of States; in surrendering citizens and inhabitants of States to foreign powers for punishment of crimes committed outside of the jurisdiction of the United States or of any State or Territory thereof; in fact, that the power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiation between sovereign States, is practically unlimited, and that in no case is the sanction, aid, or consent of any State necessary to validate the treaty or to enforce its provisions.
>
> Fourth. That all provisions in State statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequently thereto, must give way to the provisions of the treaty, or act of Congress based on and enforcing the same, even if such provisions relate to matters wholly within State jurisdiction.

Then the author goes on in section 7 to state the sources of his information and the grounds for his opinion. I will not read that into the record, but any member of the Commission who wishes to follow that up will see how Butler has absolutely exhausted everything on this subject. And you will remember that at Detroit, where we had a discussion on this matter, this appeared to be the view in the addresses of Mr. Root himself, who was Secretary of State at the time this treaty was made. As I have said before, I think the point is entirely academic and beside the mark, but I wish

ments, others not, because some of those others may have been through interviews; but there are such reasons as I have pointed out already that are fairly obvious, namely, that in dealing with the matter backward and forward, and which becomes limited or extended, that by degrees the matter becomes one which is dealt with on a broad basis so as to cover the whole situation, and to cover it for all time.

And that is borne out by the fact that it is put in here in a general treaty which is dealing on a broad basis between two countries, and evidently the intention was that it would be in the best interests of both countries to cover the whole situation rather than attempt to keep something back, whether for one country or for the other; and that it would not be contemplated that under such an arrangement finally agreed upon and placed in a general document, stated to be for beneficial use, that one country should be allowed to keep for itself absolutely in this sense water which otherwise would be available for the other country, and the only source of supply for that other country. That, it seems to me, would be a conclusion which no individual would have arrived at, and which no two States or Provinces would have arrived at.

It is inconceivable that in dealing with the situation where they had certain areas of land to be irrigated, and where one State or Province had two sources of supply and the other had only one source, that they either as individuals or as two States or Provinces, where there was no question of internationality—although that ought not to make any difference, but it does—I mean where you have not to get into any question between nations, that two individuals or two States or Provinces would never have dreamt of making a joint bargain to cover the whole situation where one side was allowed not to disclose, not to put into the account, not to deal with a source of supply which it had under its own control, which it might, as I have already pointed out in my argument, refuse to develop and allow to go to waste.

We would not expect an individual to say: "I won't bother to develop this water. I can do so, it is true, for a small amount, but it does not matter. I have not got to bring it into account, and I can get water up there. If those other people"—I am not talking now of nations—"if that other man is deprived, so much the worse for him." Can you picture, gentlemen, any individuals or any people who were not troubled with some suggestion of nationality—which, I submit, ought not to bring in a different principle—can you conceive of their making such a bargain in which the whole situation is being dealt with and yet one of the vital factors is excluded?

Then the next case I wish to cite is Sturges *v.* Crowinshield, decided in the Supreme Court of the United States, and to be found in 4 Wheaton, at page 202:

> But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

to cite those authorities in deference to the fact that the point had been raised by any of the counsel appearing on the other side.

It remains for me to say a few words on the subject of prior appropriations. My learned friend, Senator Turner, made the statement, without elaboration as I remember it, that these prior appropriations formed part of the equal apportionment in the sense of being charged up against them so as to lessen to either country its share of the equal apportionment. That view is one which you will remember was not taken at Detroit by the counsel for the Reclamation Service, although I think he said that he did not undertake to be speaking for everybody; nor has it been pressed or explained, as I remember it, by any of the counsel for the United States.

Mr. TURNER. I did not quite understand what you said my position was.

Mr. MACINNES. That the prior appropriations were to be included in the one-half share of either country. I thought you said that.

Mr. TURNER. I said, as I remember, that prior appropriations had absolutely nothing to do with this treaty, but that each country had been insisting in the earlier stages on a greater share of the waters than the other, on the theory that they had prior appropriations to meet. That was simply part of the claims made by the respective countries.

Mr. MACINNES. I was referring to the provision as to prior appropriations contained in Article VI.

Mr. TURNER. That is, the appropriations that have priority of right in the two Governments.

Mr. MACINNES. The language used, Senator Turner, is:

> It is further agreed that in the division of such waters during the irrigation season between the 1st of April and the 31st of October, inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet.

Mr. TURNER. That is the United States, not some private proprietor.

Mr. MACINNES. Then the point was up as to how the Commission in working out this matter should deal with the waters allotted by reason of those reciprocal provisions as to prior appropriations, whether they were included in the one-half of the apportionment that each country got, or whether they were outside of that.

Mr. TURNER. I understand your proposition now.

Mr. MACINNES. I was saying that I understood you to say that they were included in the one-half.

Mr. TURNER. Undoubtedly the country that gets the prior appropriations has to allow the other country a sufficient amount thereafter to equal those prior appropriations, otherwise the prime requisite of equality in the division could not be followed out.

Mr. MACINNES. As I thought, that is your view. We on our side hold an entirely different view, which we think is in accord with the language and with the intent of the parties, and we think that the matter should be put rather in this way: That there was to be an equal apportionment, if you will, between the two countries; that there were also these two prior appropriations, one on one river, one on the other, which might or might not have a different value in the water according to the flow of the different rivers. But so far as the two countries were concerned, the prior appropriation which each

got on a particular river was the prior appropriation which each wanted. So it got the prior appropriation on its river, so to speak, and the other country got its prior appropriation on the other river, which although perhaps greater in water was not what the other country wanted.

Another way in which the matter may very well be put, and which is entirely in accord with the negotiations if one looks at them, and in harmony with the other way of stating it that I have just mentioned, is this: That these prior appropriations are set aside, first, because they were in the nature of existing liens which were on the water—"prior appropriation" is an irrigation term and must be understood in that sense—and that the two countries in dealing with these waters came to a situation with these existing charges, one on one river and one on the other, and therefore those waters were beyond their purview in dealing with them.

My learned friend says that it is the United States that is mentioned. That, I submit, would be natural; you would not mention John Jones or the Belknap Canal in a treaty.

Mr. CLARK. Your notion, Mr. MacInnes, is that this 500 feet preference right was to be used by the Government obtaining it for the purpose of satisfying the appropriations of its citizens.

Mr. MACINNES. Yes; that each country, so to speak, was trustee for its citizens. Having got that, it is the balance which is divided. Either of those views is entirely in accord, and, I submit, more in accord with the language than the suggestion that those prior appropriations are to be debited to the share which is being dealt with under this treaty.

Mr. CLARK. That is, they are taken entirely out of the consideration of the whole matter?

Mr. MACINNES. Quite so. And, as I was saying, that was in accord also with the prior negotiations, because, as you will remember, when a suggestion was being put forward on a different basis by Dr. King that he had not been able to agree with Mr. Newell, you will remember he put up the suggestion of an equal division of waters on the boundary streams, each country providing for its existing interests out of its share of the water. It was therefore perfectly easy, if that is what they intended to do, putting it in that way, that each country was to provide for its share out of that. When we get to the later drafts, which are very similar to the final treaty, what we find on that point is this statement: "It is further agreed that there exists on the part of the United States the right to prior appropriations, and that there exists the right, etc., on the part of Canada;" which is language practically the same as we have here, and seems to be entirely in accord with the view that those are to be set aside first before you deal with it, or, putting it in another way, if you are considering them as an equal apportionment, the one was as good as the other.

Mr. CLARK. It looks to me on a cursory examination of it that they are putting aside the matter of prior appropriations on behalf of individual citizens on each river and saying to Canada: "You take 500 cubic feet out of the full St. Mary River to satisfy your proprietors." And they say to the United States: "You take 500 cubic feet, or such amount as constitutes three-fourths of its flow, and satisfy your prior appropriations."

Mr. MACINNES. Yes.

Mr. CLARK: "Then the balance we will divide according to the terms of the treaty."

Mr. MACINNES. That is my submission, and that is what I would have thought was the common-sense view of it. Those who are not as familiar with irrigation as yourself, Senator, might perhaps be led astray by the use of the words "prior appropriations," thinking that "prior" meant something to one country which was subsequently to be made up in the other. But those who are familiar with irrigation know that "prior appropriations" is one phrase, that it is not simply Canada as against the United States, but that it is a lien which is good against all the world: therefore what is available for division is limited to that extent. But obviously we have to apply to the language here the circumstances for which it was being employed.

My learned friend Senator Turner has made certain suggestions as to the findings of the Commission, and I would follow his course and venture to make these suggestions:

That the International Joint Commission should issue directions to the officers named in Article VI to make a measurement, if they have not already done so, for the purpose of ascertaining the amount of water available for irrigation—I understand we have not got to deal with power at the present time—in the St. Mary and Milk Rivers and their tributaries in the State of Montana and in the Province of Alberta and the Province of Saskatchewan, those being treated as one stream.

Mr. CLARK. By doing that don't you leave the matter just where it is?

Mr. MACINNES. I quite appreciate, Senator, what you say, but my submission is that that is what you have to do. I will go further to make it quite clear and say: that you would not make from the water so measured and so ascertained a deduction to the extent of such waters as did not flow across the boundary, but that for the purpose of making your equal apportionment the waters of the two streams were to be included. Frankly, I can not personally put it any clearer than I find it in the treaty.

Mr. CLARK. I think you have put it clearer in your later statement.

Mr. MACINNES. I say that you do not add any rider or exception to it as my learned friend has asked you to do.

That having done that, steps be taken to apportion the water equally between the two countries, taking more from one, less from the other, so as to obtain a more beneficial use, such beneficial use being arrived at, of course, from information received from the representatives of the two countries. That is, they will inform us where they wish to have the water.

If there be any conflict between the two countries, that is to say, as to whether both countries want to get more than one-half from any particular source, then it is for the Commission to investigate what would be more beneficial use and decide that, and then the other country would have to get what made up its share from some other source. That is the function cast on the Commission in the case of there being any dispute as to both countries wanting, from their view, beneficial use of the water at one place, that is, one wanting to get more than one-half, and the other wanting the same at the same point.

This is where I said before a little confusion was caused, although Canada wanted to help out the situation. We explained what we thought was our beneficial use, and we expected that if it was unsatisfactory to the United States their officer should so inform the Commission and make any counter suggestions, as to which we have heard nothing further.

Then, as I mentioned just now, in the making of this equal apportionment, when you are dividing you first of all set aside these two rivers in accordance with the more beneficial use of these prior appropriations. That, again, is indicated in the suggestions which Canada made before. It is quite possible that the prior appropriations will work into a general scheme of more beneficial use, which will have the result of less measurements and less computations being made by the officers of the two countries. Just in the same way as is indicated on the memorandum, the equal apportionment in accordance with this, assuming there be any dispute between my learned friend and myself, may very well be made not from day to day at each place, but by one country taking all the water of a river for certain months, and the other country taking all the water of that river for the remaining months.

I submit that those are the directions which this Commission should give, and that they should hear the parties from time to time and make such changes as may be deemed expedient. But as to what is to be apportioned, as distinguished from where it is delivered, is all the waters of these rivers as described in the treaty, without any exception or deduction therefrom, except such water as is not available for irrigation as stated in the treaty.

In conclusion, Mr. Chairman, I would say that it seems to me that this treaty, construed as Canada submits, is clear, but is, in fact, not as good as Canada might have got, and would have got, by an application of irrigation law in accordance with the original proposals of Mr. Secretary Hay; that the result of that application would have been to give Canada more on this river here at least, that is, water sufficient to satisfy its bona fide authorizations on the St. Mary River ahead of anybody else, and ahead of this project of the United States—which is to be commended no doubt for its enterprise, but which is certainly unique in taking the waters from practically one watershed in the west and conducting them clear away to a totally different lot of lands. On that basis the prior appropriation of the Alberta Railway & Irrigation Co. on the St. Mary Canal would have been recognized, and Canada would have got more out of the application of such principle than it would out of any such treaty, construed even according to its clear language—infinitely more so if restricted and whittled down in accordance with the contention of the other side. In addition to that, of course, Canada would at least have got some of the Milk River water, because of its appropriation depending doubtless, according to irrigation law, on the dates of the prior appropriations claimed lower down on the Milk River.

Nevertheless, that is not what took place. We have got this treaty here, and I submit that it is one which, in accordance with its language, is one which might have been made between two individuals or two States putting everything into the common fund; but, on the other hand—I do not wish to repeat myself—that to have a common arrangement, and to have the rivers and waters that come into that

arrangement truncated in every possible direction and deductions made, is an arrangement which no two individuals and no two States would have made; and that there is nothing to indicate in the clear language of the treaty, nor in the negotiations, that they did anything but take into account the waters applicable to the whole situation.

If, however, the treaty is construed according to its clear language, my submission is that the result will be one which will produce the greatest advantage to the arid regions, as they are described, on both sides of the boundary by making the most, under the direction of this Commission, of what nature has provided for that purpose; and in addition, that if the treaty is construed in that way, according to its language, and in such a way as will induce both countries to make the best use of its waters for that purpose, the treaty will live up, not only as to lands but in other results, to the language which it contains and to the expression "beneficial use."

Mr. CLARK. Col. MacInnes, before you sit down I would like to get your notion as to the grammatical construction in the first place of Article VI of the words in parentheses, "in the State of Montana and the Provinces of Alberta and Saskatchewan." What, in your view, do those words refer to?

Mr. MACINNES: I am glad you called attention to that, Senator. I have not referred to them to-day because I have referred to them so often before.

Mr. CLARK. I was not familiar with your view.

Mr. MACINNES. It seems to me to be perfectly clear that those words are descriptive and comprehensive; that this Article VI, or rather the substitution of it, was being negotiated by Mr. Root and the others as a separate matter between the two countries, and that in the end it was brought into this treaty where everything was dealt with by both countries. There might be a doubt as to what was being referred to—where these rivers were—and, further than that, they were referring to them, for they stated in the most comprehensive way everything that belonged to them, so that there could be no question, as I was mentioning this morning, that any part of them which might have another name was to be cut off. Therefore they took those rivers and said: "Here, we had better make it clear where these rivers are, and we had better make it clear that they comprise the whole watershed belonging to each country that is being dealt with in this treaty." If we take the whole Milk River, we find where are the tributaries to it, and we find them in Montana, Alberta, and Saskatchewan.

Mr. CLARK. Then your view is that the words in parentheses refer both to the rivers and the tributaries?

Mr. MACINNES. Certainly. And I would say one word in answer to what has been contended on the other side, that those are words of limitation. I submit that that is forcing the language, because it is read by them again as meaning in the State of Montana and in Canada, and even then it does not produce the limitation which they want, because even if with those limiting words you only include those two tributaries, that is not what they do include; they include tributaries which are in either country provided they flow across the boundary. So taking those words, and even putting the strained construction of limitation rather than that of description and comprehension, clearly it is not open to controversy what is intended,

and my learned friends do not arrive at the limitation they are themselves seeking to support.

Mr. CLARK. My question was directed to whether or not those words could be used with reference only to tributaries.

Mr. MACINNES. That would not be the grammatical construction I would think, Senator. The parenthesis, you will note, is put in brackets, which would seem to mean that it applies to both. I am quite willing to try to meet what your suggestion there might lead to, but I do not quite follow it.

Mr. CLARK. I did not put it forward in the shape of argument at all, and it would do some violence to the printing of it perhaps if I did.

Mr. MACINNES. It would.

Mr. CLARK. Suppose, for instance, there was a comma after the word "rivers," and the parenthesis was omitted?

Mr. MACINNES. Let us see what that would produce.

Mr. CLARK. "The high contracting parties agree that the St. Mary and Milk Rivers"—assuming that we know exactly where they are and what they are—"and their tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan"—would that put any different phase on the treaty?

Sir WILLIAM HEARST. The tributaries are to be treated as one stream.

Mr. CLARK. I was asking whether it would make any difference.

Mr. MACINNES. I do not think that would lead anywhere.

Mr. CLARK. I was simply asking for information.

Mr. MACINNES. I thank the Commission.

Mr. MAGRATH. Now, Mr. Tilley.

ARGUMENT BY MR. W. N. TILLEY, COUNSEL FOR THE ALBERTA RAILWAY & IRRIGATION CO.

Mr. TILLEY. Mr. Chairman and members of the Commission, I am sure that the Commission are glad to see me on my feet ready to make my address, because they know that except as to some reply I am the last counsel to appear. I am quite sure that it requires a great deal of patience to listen to an argument for the third time and for three days. I shall try to be as brief as I can, but the interests of my clients in the question are important, and I shall desire to go over ground even that has been gone over by Mr. MacInnes for the purpose of placing before the Commission the view of my clients as to this treaty, so that no more water shall be taken from our minimum amount during the irrigation season in the St. Mary River than has already been taken, because even during this past year we have had to prorate the water amongst our consumers, and serious enough as is the situation now having regard to the rights that were given to us originally, it would be still more serious if the argument for which the United States is contending should prevail.

First, let me say that my contention will be that we are asking for the treaty in its exact form. We ask for no change in the wording; we suggest that no word "and" shall be changed to "or," and no word eliminated. We are contending here for the exact, precise language of Article VI. And I venture to say, notwithstanding the remark made this morning, that if anyone were to sit down and try to draw the clause so as to cover what we are contending for, without

having in mind some criticism that ordinarily would not be thought of, he could not put what we contend for in more appropriate language. On the other hand, I have heard from no counsel on the part of the United States or of the interests represented here allied with the United States that does not involve some criticism of the language and some suggested change. It may not be great, it may be put in an attractive form, to merely change "and" for "or"; but when my learned friend Senator Turner was putting his point with regard to it he dictated practically a new clause.

The important reason assigned for placing any construction on the language instead of taking the literal language for which we contend is the point that Senator Turner attempted to make, that our contention, if acceded to, produces such an unreasonable result and such an unfair result that it could never have been contemplated. And I appreciate the importance of that contention all the more because the treaty itself is aimed at fair treatment to both nations so as to produce, as far as possible, equality between them.

When that is taken to be the general character of the treaty, and when we find that kind of language appearing in this particular clause, I appreciate that I should be expected to deal to some extent with the question whether the article measures up to the standard that has been set for it by the terms of the treaty itself. If it were not for that phase, I am not sure that I would treat the argument very seriously, because under the authorities of our highest courts both on the Canadian side, as reflected in decisions of the Privy Council, and in the Supreme Court of the United States, it is perfectly clear that in construing a document of this kind you must take the language as you find it, unless you find the conclusion is so absurd, so monstrous, that it could not have been in the contemplation of any person that such a result should be produced.

If that condition prevails, it may be said, then, to be a case where you examine carefully to see whether the language is capable of some other construction. If it is not, you must apply the construction that is literal even though it is absurd. But if you get that natural reading of the language, producing such an absurd conclusion, you examine to see whether it is capable of another meaning, and if you find that it is, depending upon circumstances and conditions and degrees—because no one case binds another in that regard—you may apply the other meaning.

Now, I hope to be able to show that this article carries out a measure of equality to both nations that is evidence in our favor, if evidence were needed, that the natural meaning of the words used should be followed. My submission is, of course, that the onus is entirely the other way, and that the absurd condition for which my learned friend Senator Turner contended is not present, and that not being present there is no occasion to see whether a secondary meaning can be given, that if you look for a secondary meaning you can not find it in the language used; and therefore of necessity, even if the result should be of the character my learned friend describes, the language will not bear any such construction.

In dealing with the matter I want to approach it from that standpoint, but I should give to this Commission what I regard as being possibly the most satisfactory authority on the proposition I have been discussing in view of the fact that my learned friend, Senator

Turner, has cited from English decisions, but has not, according to my submission, given to the Commission the proper view of the law. I am not saying that it is an improper view, but I mean that he has not given to the Commission what I consider to be the authority on this kind of case, because there are two points presented to us here. First, it is said the language is capable of another meaning, or should be amended so as to be capable of another meaning, because the conclusion or result is absurd. It is said to us as well that there has been some action, governmental rather than on the part of governments, that in some way places an interpretation on the language of this article, and that there is a contemporaneous construction of doubtful or ambiguous language which should be adopted by this tribunal.

The case I refer to is The North Eastern Railway *v.* Lord Hastings, 1900 Appeal Cases, at page 260. The facts of the case were that lands were granted to a railway for a right of way for a term, I think, of one thousand years, and the conditions of the grant provided that the lessee, who was taking steps to have his railway company incorporated, should pay a specified rent on coal carried over any part of the railway. The railway was constructed and for more than 40 years rent was paid by the company for coal carried over the railway and shipped at Port B when the coal passed over the lands that were leased. But if the coal was shipped over the railway but not over the lands leased no rent was paid. At the end of that 40-year period the contention was made that the rental to be paid under this lease for that right of way must be based on the coal passing over any part of the railway whether it crossed over the leased land or not. And it was held that that was what the language of the lease said, and that therefore rent must be so paid, and the court ordered an accounting for six years back to take into account rents at the higher rate.

Now, if any decision could cover the point here, my submission is that this is it. Because, mark you, I am arguing for the exact language of this clause. I am not suggesting that any word can be left out of it without creating a doubt as to its meaning; I am arguing that every word in it is required, that nothing can be struck out without leaving the document open to a doubt that does not exist with the words in it.

I shall not read from the judgment in that case, but my submission is that where you find one party to a controversy, let it affect a treaty or let it affect an agreement, who says, "I contend for the language itself; I want my rights determined on that language," if that language has a meaning according to the natural meaning to be given to the words used, you must adopt that language, and you can not go back to negotiations, examine documents that passed to and fro and analyze them—you can not do that sort of thing; you must apply that language. And, if I may say so, that seems to be the duty of this Commission, particularly if the point taken by my learned friend Senator Turner is right, that if you misconstrue your action is not to be recognized.

How can counsel come here and say for one of the parties to this treaty: "If you make a mistake in construing this language my client is not to be bound, but reserves the right to take such diplo-

matic action or other action as it thinks proper," and at the same time invite you to change the language of the document? It seems to me that that is a most unheard of proposition. And yet every counsel who has made a submission here when he has analyzed that language has suggested the propriety of changes in order to get at the meaning that he says should be ascribed to Article VI. So that I say if it is ever appropriate for a commission to be bound by the language, it is particularly appropriate as to this Commission.

If I may say so with deference to the Commission, it should not roam about to find out what the parties intended when the parties have submitted to them a document that expresses or purports to express their intention, particularly if the decision with regard to it can not be reviewed by some other independent tribunal by way of appeal. If that were possible I could quite understand the Commission putting a certain interpretation on the document; but if that is not possible, as it is not possible here, and if the parties to the submission are in the position that Senator Turner indicates of being able to reject what is not the true meaning of the agreement, then my submission is that the tribunal should act on the literal interpretation and say: "If that is not what the parties intended, they are of age and able to change the document. It is not the case of a will, it can be made right, but in our action we must obey the mandate which is embodied in the treaty and on each side confirmed by legislative action."

There is no more justification for changing the terms of this document than for bringing in evidence to construe the statute or the legislative action that was taken on either side of the boundary; and my submission is that it would be an unheard of thing if this were embodied in a statute to ask a commission to take evidence as to what the negotiations were, what papers happened to be left by persons who may, for all we know, have had numerous conversations on the very same subject, and no doubt had, and yet because we find some stray papers—those are produced without any satisfactory evidence in regard to some of them as to what is their real origin—we are asked to construe a treaty on the assumption that that is evidence as to what happened. I venture to suggest that it is not a hundredth part of what went on that was material if these questions raised here are going to be considered on the basis of: What did these people say and do when they were carrying on their negotiations?

Just one other remark with regard to the construction of this document, and then I pass on to a discussion of the merits. I quite appreciate that there are numerous remarks made by text writers that point to what you might call a more general or more generous or a looser interpretation of treaties than other ducuments. But that principle can not be applied to a treaty that came into existence as this one did. This is not a treaty made in the rush of attempting to settle a war, it is not a treaty made under the threat of action by one country against the other, but it is a treaty that grew up as the natural consequence of negotiations that had been proceeding for some time, drawn and settled at leisure, carefully considered in every aspect, and providing for permanent arrangements between two countries that were not bound to make them under any stress or

pressure that was imminent at the time, and providing as part of the provisions of that treaty for the creation of a tribunal of a judicial character to sit in judgment and hear cases and pass upon them.

Now, that sort of treaty is not to be treated in any different way, my submission is, than an agreement between parties. If you had an agreement between neighboring owners of property represented by the streams that are referred to under Article VI, would any person attempt to analyze the transaction to find out whether in his opinion it was fair on both sides, or would he assume that it was made as agreements are made in which each party capable of handling his own affairs, with competent legal services, prepares the language of an agreement that had been settled after being seriously considered to put into precise form what the parties intended?

I feel, Mr. Chairman, that I should more or less apologize for discussing the attitude that the Commission should take in regard to this, but the matter has been referred to, and I can not refrain—particularly as I represent a private interest and am acting for neither Government, and am therefore to that extent perfectly irresponsible—I can not refrain from saying that our rights have been put in your hands here without our being parties to the treaty, and we are here saying that our private rights are going to be affected by your decision; therefore we want to be bound by the treaty, if we are bound at all, and we do not want to be bound by what people might urge before you was intended without any appropriate language to express that intention.

I wish to submit that the language used in the parentheses refers to both the rivers and the tributaries, that that language was appropriate and proper and necessary to make it clear that the rivers and the tributaries being dealt with were in an area of land rather than being boundary streams, or streams that crossed the border. It was a geographical description to bring in two watersheds, to make them as one, and that had those words not been there we would have the argument much more strongly presented to this tribunal that rivers and tributaries must under the circumstances be rivers and tributaries that cross the boundary and are measured at the boundary.

My submission is that the way this agreement put these words was absolutely necessary, and that they were most appropriate to show that these negotiators having dealt with boundary streams, having dealt with streams that cross the boundary, were then dealing with streams in an area described geographically, and that those must be taken as one body of water, the waters of one watershed, and they were to be divided as the negotiators thought was fair.

Before taking up what, as I say, I desire to take up, and that is the diplomatic correspondence—not because I think it is material, but because it has been relied on and referred to here—let me describe what I conceive to be the important thing that these people were negotiating about. It is very well to say that in certain language and in certain documents we find the expressions, "streams that rise in one country and flow into the other, streams that cross the boundary, boundary waters, international waters"—we find the expressions in the document so often that this is all these people were dealing with.

Now, you do not go to the language of the document to find what the parties were dealing with in order to ascertain what the dispute was. I mean to say that the clauses of the greatest length probably cover the most important feature of it, and I would like for a moment to deal with what was the important thing here, who wanted it, and what caused this particular matter to be one of such importance between the two countries.

Starting from that point, it is perfectly obvious that in 1894 the Dominion for the first time—because its statute was passed in that year—adopted a policy with regard to arid lands as reflected in that statute; and then in 1896 and 1897, realizing as to this particular territory where those lands were chiefly situated, they appreciated that to make a proper working arrangement on a reasonable basis so that the greatest benefit would be got from the waters that were flowing, they approached the United States for the purpose of having some arrangement made that would be mutually satisfactory. That carries us back to the documents that are at pages 56 and 57.

The first of them is an order in council of the 13th December, 1895, about a year after the first statute passed by the Dominion Government, and the lands we are dealing with here are, I understand, the first lands in the Dominion to be dealt with under any irrigation system.

Mr. TURNER. The first document I find on that page is dated January 8, 1896.

Mr. TILLEY. That is the date I should have mentioned. This is described as an extract from a report of the committee of the Privy Council approved on the 8th January, 1896:

> On a report dated 13th December, 1895, from the minister of the interior, stating that a resolution was passed by the International Irrigation Congress of the United States at its meeting at Albuquerque, N. Mex., in September, 1895—

That is to say, following a resolution by that Congress, the material portion of which was that they asked—

> for the appointment of an international commission to act in conjunction with the authorities of Mexico and Canada in adjudicating the conflicting rights which have arisen, or may hereafter arise, on streams of an international character.

A map was inclosed and reference was made to the number of streams that cross the border. Your honors will notice the expressing there "important streams arise within the boundaries of Canada and flow south to the United States." I point to that because in all the language of these documents you have something that refers to the streams as either international streams, or streams that rise in the one country and flow into the other, or streams that cross, until you have our treaty, when you have streams within a geographical area.

That order in council suggests that the Canadian Government would be glad to cooperate with the authorities of Mexico and the United States with the object of regulating the use, for the purposes of irrigation, of the waters of the streams which have their origin in one of the countries named and subsequently flow through the territory of the other. The reply to that was that Mr. Olney was interested but had at the time nothing to offer. That is in 1896.

In 1899 our predecessors in title received the licenses or authorizations issued to appropriate water. If the Commission pleases we will turn to page 143.

The first is an order in council dated 22d May, 1899:

On a report dated 2d May, 1899, from the minister of the interior, stating that under the authority of an order in council dated 21st September, 1897, a quantity of water equal to 500 cubic feet per second during the low-water stage of the St. Mary River in the district of Alberta and 1,000 cubic feet per second during the high-water stage of the said river were reserved for a period not exceeding ten years.

Having recited the reservation made in 1897, which was immediately after this correspondence with the United States, in the last clause the order in council proceeds:

The minister recommends that provided the company is duly authorized to construct the canal the quantity of water reserved by the order in council of the 21st September, 1897, and as much more as is required to irrigate the tract of land described in their application be granted to the Alberta Irrigation Co.

So that you see there is a definite setting apart for that company of 500 second-feet in the low-water stage and of 1,000 second-feet in the high-water stage of the St. Mary River, with the provision that there might be more taken if more was necessary to irrigate the lands.

Following on the same page in 1899 is an order in council or a recommendation of the deputy minister of the interior under the provision of subsection (2) of section 15 of the act, whereby the Alberta Irrigation Company was granted the right to divert water from the St. Mary River at a placed named—

for irrigation and power purposes, no change or variation therefrom being deemed necessary—

and so on. That is merely authority to construct the works.

The next one is the Etzi-kom or Kipps Coulee water, and following that in June, 1900, we were authorized to divert the Pothole Creek water; in June, 1900, again the Nine Mile Coulee; on the 5th June, 1900, the Middle Coulee, and on the 19th June, 1900, the Pinepound Creek (or Spring Coulee) water we were authorized to divert.

Mr. CLARK. That does not appear to be the same grantee, does it?

Mr. TILLEY. That is the Canadian Northwest Irrigation Co. We are the successors of those companies, at least we own the capital stock of the present company and acquired their rights. So nothing depends on the chain of title.

Then in October, 1902, we have this document that groups up all these privileges that were granted to us and, in addition, gives 500 cubic feet of water per second from the Belly River, which is item No. 2; and under item No. 4, 500 cubic feet of water per second from the Milk River, including the flow of all its branches during low water, and 1,500 cubic feet of water per second during high water and flood stages.

So that by 1902 we had rights in the St. Mary River to the extent of 500 second-feet at low water and 2,000 cubic feet per second during high water; and in the Milk River we had 500 feet per second during low water and 1,500 feet per second in the high water and flood stages.

When this controversy arose those rights were treated by the Canadian Government as rights in us created by them. That is possibly somewhat important, because Canada was being pressed to treat whatever rights were to be respected on the St. Mary River as being rights acquired subject to the same conditions as rights conferred in the United States, and that as the water at the time was not being put to actual beneficial use the contention was made that these

rights so granted to my clients should be cut down to the lesser amount.

Mr. POWELL. That was an immediate vested right?

Mr. TILLEY. Yes, immediate vested rights that have only been impaired by anything done under this treaty. The Dominion Government has confirmed the treaty, and possibly we could advance certain arguments as to our civil rights within the Province being affected; but in the view that I am presenting this is a treaty between two nations, and the private individual's position is not a thing to be considered, we must merely construe the language of the treaty.

Mr. POWELL. They are vested rights to be acted on at the convenience of the grantee, I suppose?

Mr. TILLEY. Yes; and it was part of a governmental scheme as this correspondence shows. So it was the duty of the Government, and whether it was their duty or not they took the position in the early correspondence: We have created these rights in this company.

Let me refer to the correspondence again as it appears on page 58, or rather to the order in council that there appears. After reciting what had happened before the order in council proceeds in this way in the third paragraph:

> The minister submits that it appears now that under the provisions of an act passed at the last session of Congress the Government of the United States proposes to divert the waters of St. Mary River into the channel of Milk River for the purpose of irrigating certain lands in Montana.

Then the river is described, but I shall not stop to read the description.

At page 59 the need of this water to Canada is stated in this way:

> The proposed diversion of the river will render useless the greater part of the works constructed at a large expense by the Canadian Northwest Irrigation Co., and its revenues will be so affected that it will be unable to meet its obligations. The lands reclaimed since the canal was built being deprived of water, will no longer be suitable for cultivation, and will have to be abandoned. The numerous farmers whose prosperity seemed an assured fact will lose not only what they paid for their farms, but also the money and labor invested in buildings and other improvements.
>
> The minister further states that it has been contended that the streams discharging into the St. Mary River between the heads of the United States and Canadian canals furnish an ample supply for the land irrigated in Canada; that, however, is not the case. The whole of the water now flowing in the St. Mary River is required for irrigating the lands in the vicinity of the town of Lethbridge and the Canadian canal was constructed with a capacity sufficient for carrying this quantity of water.

Then the possibility of use if the water should be diverted into the Milk River is discussed. It is said:

> Should the water of St. Mary River be turned into either the North or the South Fork of Milk River, it will flow for about 150 miles in Canada before it can be used to irrigate lands in the United States. In report No. 254 of the United States Senate Committee on the Reclamation of Arid Lands it is stated that the diversion canal is to be continued to the South Fork of Milk River, "as it is not considered practicable for the Canadians to divert water at any point in Canada from the South Fork or from Milk River." Again, in the report of the hydrographer of the United States Geological Survey upon which was based the recommendation of the Secretary of the Interior to Congress it is said:—

Then the Milk River is described, and possibly I should read that, because the condition of the Milk River is one of the important things to be considered here—

> If the water is turned into either the North or the South Fork of Milk River it first finds its way into Canada before it can be used in the lower basin. The valley

proper of Milk River in Canada is comparatively narrow and has little irrigable land, so that any proposition on a large scale must contemplate using the high bench of lands above. Milk River in Canada from the junction of the North and South Forks downstream has a very slight fall—not more than 2 feet to the mile—and a canal of 100 miles or more in length would be necessary before the water could be brought to the upper benches. It is not, therefore, considered feasible to divert the water from Milk River into Canada.

Now, I emphasize that because on any scheme of fair play you must take into account, or the person who is dealing with what is regarded as fair play must take into account, that at that point it was considered to be a very difficult thing to store water.

Mr. CLARK. To divert it.

Mr. TILLEY. Yes, to divert it from the river. In fact, it was thought to be so difficult that it might be regarded as impossible, and that therefore anything thrown into the Milk River at the western crossing of the boundary line was bound to go all the way down the river and would pass back to the United States at the eastern crossing.

In regard to that the minister says:

The minister represents that the surveys made under his direction do not confirm the views expressed in the reports quoted above; on the contrary, they prove that the present water supply of Milk River and any additional amount diverted therein from St. Mary River south of the international boundary can be taken out in Canada at a moderate cost and prevented from flowing again into the United States.

And then the minister submits:

That action in this matter should not be governed by a consideration of what Canada may or may not do to protect her interests; a question of this kind should be dealt with on its merits as justice and equity may demand.

Let us consider what that means. What the United States wanted to do was to get the water from the St. Mary River south of the boundary line and by some means transfer that water that naturally would run north and never come back to the United States, and the beneficial use of which, if the water once crossed the boundary line, would pass to Canada for all time—the United States wanted to get that water transferred down to Chinook.

Although it was suggested in the correspondence that an all-American canal should be built to get the water down to Chinook without its going into Canada, we are told that that was an impracticable scheme, as it would cost from $10,000,000 to $20,000,000 and was really out of the question. So that the plan was to take these waters into Canada and get them back, not because of any right to do it, for there was no particular right to carry those waters through Canada, but because it was thought they could be passed into Canada, and come down through the Milk River and back into the United States without any possibility of diverting the waters out of the channel of the Milk River.

That was what the United States wanted to accomplish, to transfer the water from the headwaters of the St. Mary, from another watershed down to Chinook in this larger watershed to the east.

Canada, in reply, said: "Well, if you do put those waters into the Milk River, either the south branch or the north branch, it is possible to take them out." And whether for the purpose of demonstrating that that could be done or whether it was because they really intended to divert the water, a canal was built from the Milk River,

and apparently the United States realized that it was impossible to carry out the original scheme.

Now, that has been accomplished by the treaty, not possibly to the full extent that they would like, but it has been accomplished. And who is to say, on a question of fairness and equity, what is the proper arrangement to make in respect of it?

My learned friend Senator Turner this morning, when Mr. MacInnes was addressing the Commission in reference to a South Creek here being brought into the computation that is made necessary in order to work out the division, suggested that we were using the United States canal to divert our water. Well, something is due, and who is to say what, for enabling the United States to take the water from the headwaters of the St. Mary and get them down to Chinook, when they can not get them there without the consent of Canada. That is a problem that must be dealt with when anyone is considering what is fair play and equity as between these two countries.

That shows the position in 1902. In 1903 we have further discussions that are not very material until we come to Mr. Hay's letter written to the ambassador. He suggests what is fair in a sense, he suggests some sort of equal division so that the interests, at any rate, of both sides can be protected, but he does not say what protection will be afforded. He suggests at page 51 that the standard as to these prior appropriations is the right to the use of water so far as it has been already taken and put to beneficial use.

My learned friend Mr. MacInnes asks me to read that suggestion. Perhaps it is not very material, but let me read it:

> In the present case the intention is clearly expressed to avoid all interference with the amount of water to which the Canadian canal on the Milk River may be entitled. The engineer in charge of the work in Montana made a careful investigation of the river with a view to determining the amount of water to which claim might properly be advanced in Canada, and it is the intention of the Reclamation Service, in its recommendation to the Interior Department concerning this project, to make as full provision for the protection of any prior vested rights to water along the Milk River in Canada as it would make if the river were wholly within the boundaries of the United States and the rights of the citizens of this country only were under consideration.
>
> It is proposed to deal with this matter in strict conformity with the laws concerning the rights to the use of water as recognized by the courts of the arid region, both on this side of the international boundary and on the other. The principle may be stated in the language of section 8 of the reclamation act of June 17, 1902 (32 Stat., 388):

Then the principle is stated:

> That the right to use of water shall be appurtenant to the lands irrigated and the beneficial use shall be the basis, the measure, and limit of the right.

In the concluding paragraph Mr. Hay says:

> Inasmuch as the position taken by the Reclamation Service in this matter in regard to the rights claimed in Canada appears to be precisely that which is taken in the case of similar rights within the United States, both being treated according to the recognized rules of law governing the diversion and appropriation of water in arid regions, Mr. Hitchcock regrets that he can see no reason for a change in the position taken by this Government in the matter.

So that the scheme defined under that was to proceed, and no harm was to be done because in the view presented the prior appropriations were to be respected just as though they were prior appropriations of a stream entirely within the State of Montana.

In the memorandum of May 9, 1904, we find the following:

It has been represented to the Government of the United States that a large canal is now in the course of construction in Canadian territory which will divert a large amount of water from Milk River into the Saskatchewan Basin; that all the normal flow of Milk River is now being used by the people of Milk River Valley in Montana, who have built irrigating canals involving a great expenditure of money and have thereby reclaimed 80,000 acres of arid lands. It is further represented that the proposed diversion of the waters of Milk River in Canadian territory will cause great injury to the people of Montana by depriving their reclaimed lands of the water necessary for the purposes of irrigation.

Then the fact that the river rises in the United States is referred to, and so on.

Next an order in council is passed in this case, Canada practically saying that they are not particularly interested. That is the way the dispute was running at that time apparently, the United States at first confident in the view that it could take the waters down without any consent from Canada, and then Canada takes the position:

The minister of the interior, to whom the said dispatch was referred, submits that the records of the Department of the Interior show that authority has been given to the Canadian Northwest Irrigation Co. to divert from Milk River for the use on lands owned or held by the company in Canada 500 cubic feet per second at the low-water flow of that stream and 1,500 cubic feet per second during the high-water and flood stages of the river; also that authority has been granted to another applicant to divert 6 cubic feet per second of water from the same source also for irrigation purposes.

So that the position taken by Canada there was that rights had been granted to us in the amounts mentioned, and that seemed to be all the information they had to communicate to the United States.

On December 30, 1904, there is another letter from John Hay. He traces the Milk River from its source and describes it, and then he speaks of the threatened diversion and of the injury to the citizens of the United States if that is done. In the third paragraph on page 63 he writes:

The engineers of the Reclamation Service of the Interior Department of the United States believe it possible for the two Governments to make an arrangement whereby the rights of the settlers within the domain of the United States will be preserved and at the same time the water necessary to supply the canal built by the Canadian Northwest Irrigation Co. will be provided.

The engineers report that the waters of the St. Mary River which flow northward into Canadian territory are now being utilized to only a small extent, and they state that it is practicable to store these waters in the United States, conduct them by a canal on the southern side of the international boundary line to the head of the Milk River, and there turn them into the Milk River, so as to increase the ordinary flow of that river and furnish a supply of water for lands in the Milk River Valley within the United States. Under this arrangement the prior rights of the Canadian settlers on the St. Mary River would be protected by permitting its ordinary flow to continue to pass into Canadian territory, and at the same time the great volume of flood water which passes down that river destroying property along its banks would be restrained within the United States and diverted to the headwaters of the Milk River and be put to beneficial use in the lower Milk River Valley in the United States.

And he suggests the all-American route for this water——

Sir WILLIAM HEARST. It would seem at that time as though all that was contemplated was the storage of flood water, transfer that water to the valley of the Milk, and let the ordinary flow go down the river.

Mr. TILLEY. Yes, and give the Canadian settlers the right they would be entitled to in the ordinary flow of the river.

In 1905 we have this order in council—and the point I want to make is that Canada at that time was taking the position that these were vested rights—

The minister of the interior, to whom the said dispatches were referred, observes with respect to the conditions existing in the State of Montana and the districts of Alberta and Assiniboia along the Milk River, to which the honorable the Secretary of State refers, it is manifestly in the interests of both countries that the waters of the St. Mary and Milk Rivers should be conserved for the beneficial use of the owners of agricultural and ranch lands through which these waters flow, and that the Canadian Government should join in an arrangement with the United States Government for the purpose of attaining this end, due regard being had to the protection of vested rights in conformity with the laws concerning the right to use of water as recognized in both countries.

The minister therefore submits that as the United States Reclamation Service has been devoting much consideration to this matter His Majesty's ambassador at Washington should be asked to invite the United States Government to suggest such a plan for the settlement of all questions in reference to the waters of the St. Mary and Milk Rivers as would be acceptable to both countries.

That portion has already been read by Senator Walsh. The order continues:

The minister further observes with respect to the request for information in regard to the flow of the Milk River and of the St. Mary River, and the allotment of such waters by the Dominion authorities, that the department of the interior of Canada has not yet made a final determination as to these facts, such a determination being as yet unnecessary, in view of the fact that a license will not be issued to the Alberta Railway & Irrigation Co., which has authority to divert water from these streams, until the completion of its works within the period allotted to it.

The only point with regard to that is that the authority had been granted to exercise their rights when they would get their license, but at that time it was a vested authority in the company. They had the rights, but the actual license to go on and operate would be issued when they completed their works. That is the only point.

Mr. CLARK. Suppose the company had never gone on and completed their work, how would that right have been recovered by the Government for the purpose of giving it to somebody else who would complete the work?

Mr. WALKER. The authorization limits the time within which the works must be completed.

Mr. TILLEY. And that is kept renewed, I suppose?

Mr. WALKER. Yes.

Mr. CLARK. When the time has elapsed and the works had not been completed, does the authorization necessarily fail?

Mr. WALKER. The minister may extend the time from time to time.

Mr. CLARK. Suppose he does not, has he a right to give the authority to anybody else?

Mr. WALKER. To cancel it.

Sir WILLIAM HEARST. As I understand, they have a system of inspection, they go over the works from time to time to see if the conditions are being complied with; if not, the minister may cancel the authorization.

Mr. POWELL. They do not become void by mere lapse of time I understand.

Mr. TILLEY. No. They are voidable, not void.

Mr. POWELL. That would cause a condition to arise under which a declaration that they are void could be made?

Mr. TILLEY. Yes.

Mr. CLARK. Was this authorization an absolutely vested right?

Mr. TILLEY. With us it is a vested right. I am not discussing now whether it would be a vested right under your law; but with us it would be a vested right to this water.

Mr. CLARK. Depending upon another contingency.

Mr. TILLEY. But in the meantime an appropriation of the water for that purpose.

Mr. DRAKE. The only condition, Senator, is that when the grant is made the grantee shall show good faith. The conditions are thoroughly within the control of the grantee. The Minister of the Interior loses the right to cancel so long as the grantee shows good faith.

Mr. TILLEY. I suppose so long as the grantee performs the conditions the minister loses the right to cancel; and so long as he shows good faith his grant will not be canceled.

Mr. DRAKE. Quite right.

Mr. TILLEY. Now, I want to get before the Commission, if I may, exactly what changes were proposed. So far we have nothing definite except that this work was to go on, and that rights to persons who have what are regarded as rights under the law as it was accepted in the United States, although it is treated as being the same as in Canada—that their rights should be preserved, and that subject to that the waters should be diverted; and, as pointed out, the suggestion was that the flood waters should be diverted and the ordinary flow should be reserved for the persons entitled to their rights on the St. Mary River.

At last we come to the first sort of comprehensive document that was brought into existence in the nature of a proposed treaty, and that is at page 65. Reference has been made to clauses 9 and 10, and reference was made in former proceedings to the introductory words of this document. What I would ask the Commission to note is that while the introductory paragraph is a paragraph that seems limited to particular waters, immediately the document takes a broader aspect. It says:

> With a view to bringing to a determination the questions so long discussed relating to the use of the waters of the St. Mary River and the Milk River which flow across the forty-ninth parallel boundary between the United States and Canada, I beg to offer the following suggestions for a basis of a treaty for the equitable apportionment of those waters:

That would be: "The equitable apportionment of the waters of the St. Mary River and the Milk River which flow across the forty-ninth parallel boundary between the United States and Canada—that is the question that has been up, and with regard to that question I beg to offer the following proposition:" and, as I say, we immediately see the proposition when made is one that takes a broader aspect; it is not confined merely to the particular thing that had been discussed, it enlarges it.

> It is hereby agreed between the Governments of the United States and Great Britain that the waters of the Milk River and the St. Mary River and their tributaries shall be apportioned in perpetuity for use in the two countries according to the following stipulations and agreements:
>
> 1. That for the purposes of this agreement the St. Mary River and the Milk River and their tributaries, which are now separate and independent river systems, shall be treated as though they were the waterways of a single drainage system.

There is the first suggestion of that kind. I am not saying that this treaty goes the whole distance that our present treaty does, but I say there is the first suggestion of something of that kind being worked out; that is to say, for the purposes of the treaty the St. Mary and Milk Rivers and their tributaries, which are now separate and independent river systems, shall be treated as though they were the watersheds of a single drainage system.

And just before that is also the expression, "the Milk River and the St. Mary River and their tributaries shall be apportioned in perpetuity for use in the two countries according to the following stipulations and agreements:"

Then clause 2:

That the water available for irrigation from these two river systems throughout the period from March 1 to September 30 of each year, both dates included, shall be apportioned to each of the two countries from day to day in equal amounts.

There is what we have, but I am not saying that all the clauses of that treaty carry out that scheme; what I do say is the suggestion is there of what we ultimately got:

That the water available for irrigation from these two river systems throughout the period from March 1 to September 30 of each year, both dates included, shall be apportioned to each of the two countries from day to day in equal amounts.

Mr. POWELL. Do you attach any significance to the words there "separate and independent river systems" as respects scope?

Mr. TILLEY. I suppose what that means is that they are in separate drainage areas, so that they can not be brought together at all.

Mr. POWELL. But do you attach any broader signification to the phrase "river systems" than you would to "river;" does it imply more?

Mr. TILLEY. I would say that you take the river and its tributaries. It is the river system. It is a comprehensive description.

Mr. POWELL. That is what I mean.

Mr. TILLEY. It is a very comprehensive term and embodies the main river and all its branches, and groups up and includes all the arteries for water in a watershed. That is really what is intended there. And here you have two such river systems, two separate drainage areas with a main river in each and tributaries, and you treat each one as a separate system, and then you say they shall be treated as though they were the waterways of a single drainage system. It gets the idea, although, as I say, I do not contend that this treaty goes the distance that our treaty does. But it is a step in the direction of grouping up all the water in two drainage areas, treating them as the water of one drainage area and then apportioning them equally. That is reflected there, although I do not say that the exact clauses of this agreement carry it out fully.

Mr. CLARK. Does this memorandum of Secretary Root's include any of the waters east of the final crossing of the Milk River?

Mr. TILLEY. Yes.

Mr. CLARK. Where do you find that?

Mr. TILLEY. In clause 9 on page 66:

The share of the United States shall in any event include so much of the available natural flow of the Milk River as shall be judicially determined as having been applied to beneficial use on or before November 1, 1905, by the canal systems taking water from the lower Milk River in Montana.

Mr. CLARK. That refers to the use of water by the citizens of Montana. But section 5, on a cursory examination, seems to describe the water that shall be divided for the purposes of irrigation between the two countries. It takes:

All water of the St. Mary River and its tributaries diverted in the United States for use in its territory and not delivered into Milk River or its tributaries.

And—

All water of the Milk River and its tributaries diverted in United States for use in its territory above the crossing of such streams into Canada.

And—

All water of Milk River (including stored water of the St. Mary River turned into it), not in excess of 2,000 cubic feet per second, flowing into the United States at the eastern Milk River crossing of the international boundary.

That is what the United States is entitled to.

Mr. TILLEY. Quite so.

Mr. CLARK. What the United States is entitled to of the division includes nothing east of that boundary. Now:

The share to which Canada is entitled shall be the total of the following items:

And none of those items includes anything east of the crossing.

Mr. TILLEY. That is to say ——

Mr. CLARK. So in Secretary Root's memorandum here it would seem on a cursory examination that it refers to none of the waters except those that lie west of the crossing.

Mr. TURNER. Lying north you mean.

Mr. CLARK. I mean west of the point where the river crosses the boundary.

Mr. TILLEY. I think you appreciate, Senator Clark, that I am not saying that this treaty goes as far as our treaty does, although I think there is a good deal to be said that that was the basic idea, although possibly not fully and completely expressed, because when you go back to the earlier clauses it shows the idea of distributing equally all the water available in the streams, treating them as one stream. I think clause 5 was intended to give certain priority of use in the irrigation season.

Sir WILLIAM HEARST. Could there be any doubt of that being what was intended?

Mr. TILLEY. I think that is what was intended when I come to read paragraph (6); but it seems to me that lawyers would have a better treaty to make a living out of if they had the Root treaty than the one we have here.

Sir WILLIAM HEARST. This one seems fairly productive of results.

Mr. TILLEY. I think the other might really be more productive.

If you read the introductory part of paragraph (5)—

That the apportionment of water hereby agreed upon during the period specified in paragraph (2) —

That is, only during the irrigation season—

shall be determined in the following manner: The share to which the United States is entitled shall be the total of the following items:

That is, it is a sort of priority right during the irrigation season.

Mr. MACINNES. And not covering all the waters.

Mr. TILLEY. Because at certain points 2,000 cubic feet per second is to be taken.

Mr. TURNER. A good deal more water than is ever in the Milk River, I imagine.

Mr. TILLEY. I suppose.

Mr. MACINNES. A great deal less than is in the St. Mary River.

Mr. TILLEY. At any rate, it is language which gave a sort of priority right I would say.

Sir WILLIAM HEARST. If you refer back to paragraph (2), you will see that it provides for an equal apportionment during the irrigation season. Then does not the writer simply set out a list of priorities which he assumes will comply with this equal apportionment? It may be a question as to which is the superior clause.

Mr. TILLEY. That was the "joker" as some would say. But it professed to give equality.

Mr. CLARK. My query was not directed as to whether Secretary Root's note contemplated any division of waters that did not occur before the water crossed the boundary.

Mr. TILLEY. I appreciate that, Senator Clark.

Sir WILLIAM HEARST. I have not the Senator's point.

Mr. TILLEY. The Senator's point is this: Not whether there was to be equality as to all water before the river made the eastern crossing back from Canada into the United States—he does not question that; but he says, "Is there any division beyond that point?"

Mr. CLARK. Yes.

Sir WILLIAM HEARST. Does not section 9 clear that up? It says that in any event——

Mr. TILLEY. May I just refer to the clauses before that? Clause 6 provides:

> The total quantity of water to which each country shall be entitled, according to the items enumerated in paragraph (5), shall be maintained at equal amounts, as nearly as may be possible, from day to day during the period specified in paragraph (2), under such regulations as shall be agreed upon by the commission provided for in paragraph (14).

There again we have features that entered into this ultimate arrangement.

Then the amounts of water under clause 7:

> The amounts of water chargeable to each of the countries under the several items enumerated in paragraph (5) shall include all the waters of the two river systems whether used directly or indirectly by the two Governments or by private parties in their respective territories.

Then clause 8:

> That Canada shall in no event divert from the Milk River any portion of the stored St. Mary River water turned into the Milk River system by the United States, due allowance being made for losses while passing through the channels of the Milk River system, as fixed by the commission provided for in paragraph (14).

Then you come to clause 9, which points, according to my submission, to a division of waters beyond the eastern crossings where the Milk leaves Canada and goes into the United States, but it is not in nearly so plain language—to put it that way—as we have in our present treaty. I would not care to go the length of saying that this treaty actually contemplated grouping up as much water as the treaty shows by Article VI.

The share of the United States shall in any event include so much of the available natural flow of the Milk River as shall be judicially determined as having been applied to beneficial use on or before November 1, 1905, by the canal systems taking water from the lower Milk River in Montana—

That is, southeast of the eastern crossing.

Mr. CLARK. To my mind that simply said that when you come to make your division up there at the eastern crossing the share of the United States shall be at least enough to maintain the prior rights of the settlers lower down on the stream. I am not asserting that, but the query arises in my mind.

Mr. TILLEY. And I am not asserting to the contrary. As I say, I can not in any view of this discussion see that it is essential to me to prove that my identical treaty was proposed at some time before. I can not see that that enters into the matter at all. It is not one of the points I make, that I can go to the negotiations and find the identical treaty; all I am pointing to is that one of the parties interested in the negotiations at one time made a proposal that aimed in this direction.

Let me read the last part of that clause:

and whenever one-half of the natural flow of Milk shall be less than such amount—

That is, the amount of the prior appropriations—

measured as aforesaid—

That is, measured at the point where they take it—

the share of Canada shall be diminished so that said country shall receive of the natural flow of the entire Milk River system—

The question would be: What is the entire Milk River system? My rights do not depend on this treaty, therefore I do not take up my time in arguing exactly what the language of that particular treaty means. As I say, I would submit that that shows that at that point where these persons with prior appropriations are taking their water east of the eastern crossing from Canada to the United States of the Milk River—at that point the river is to be measured and they are to have their appropriations, and if half of the natural flow of the Milk at that point will not give them their appropriations, then Canada, using the water above, is prohibited from using it so as to reduce it to less than half. But at that point Montana water is coming into the Milk, and that is measured there, and in that way Canada gets the benefit of it.

I do not say that that goes as far as my present treaty, but I do say that on that basis of dividing the water the prior appropriations are taken care of, but to the extent to which Montana affords intrastate water for those appropriations Canada gets the benefit of that in the equal use she gets of the waters above.

I do not want to say that that is perfectly clear, because my only point in regard to this whole treaty is that it is astonishing how closely the American proposal in 1907 approached the thing that was ultimately arranged. It came from the United States, and it was a scheme of equal division, taking care of appropriations, giving certain priorities during the irrigation season, but in the end marshaling the systems into one system and making an equal division.

I do not want to be carried into detail any further than that, because if I am it looks as if I am seeking to prove that what was

done at a later stage was proposed in 1907, and I do not have to prove that at all. But I do say, and I urge it as one of the things that is important to be considered, that the United States outlined a scheme which, if Senator Clark had sat down to consider, he would say, "Well, I am not satisfied as to the exact limits of that proposal; you might have done that." But the nucleus of the idea that ultimately appeared in our treaty is in this Root proposal of directing the two systems into one system and making equality between the two nations out of the waters of the single united system. And there certainly is the feature that that does not stop at the boundary as to the benefits to Canada, because in the limitation that is proposed in regard to the protection of the prior appropriations in Montana, the lower valley of the Milk, the tributary waters from Montana are brought into the equation.

Mr. CLARK. Of course, I do not want to put any interpretation upon this section 9. As you say, there is no necessity for it, because it does not enter into the treaty. But unless, after a more careful reading of section 9, I should change my mind, it would seem to me that the section was intended as a limitation upon Canada as to the amount of water she should take at the crossing of the boundary, that limitation being put on for the purpose of protecting prior rights below the boundary.

Mr. TILLEY. You are not understanding me as pressing the matter unduly in regard to that? I am not trying at all to convince you to the contrary, because I do not think it is important.

Mr. CLARK. No.

Mr. TILLEY. But if you look at clause 11 you will see it reads:

The term "natural flow," as used herein, is to be understood as the flow of the river system in question—

It is not the river; it is "the river system in question"—

which would pass the point or points specified if no artificial structure had been placed in the stream channel and if no water had been diverted from or turned into it. Such natural flow shall be determined by the Commission—

That is to say, passing the point or points specified.

My submission is that it may be construed to be the whole river system, or it may not; but whatever is the right view with regard to that, it must be this, that it proposes something that to another mind would suggest the working out possibly of a broader plan, and in that way it is a suggestion that is important in showing how this thing grew up.

I do not think that Senator Clark misunderstands me. I think you appreciate, Senator, that the lower waters that come from Montana into the Milk before it reaches where these appropriations take place are brought into the stream and computed under these clauses as the stream at that point. I mean you appreciate I have been arguing that.

Mr. CLARK. Yes.

Sir WILLIAM HEARST. And to the extent they are satisfied below Canada benefits above. The amount of water she takes goes up or down according to the amount of water down at the point of intake.

Mr. TILLEY. Yes. Of course, the other suggestion in regard to that is that Canada gets her half above and this saves her being charged below.

Mr. CLARK. My contention is that the division is equal so long as there is enough water, no matter where it comes from; but if the water falls short, then the amount Canada is entitled to is diminished by the amount it falls short.

Mr. TILLEY. Yes.

Sir WILLIAM HEARST. As I take it, that is Mr. Tilley's contention.

Mr. TILLEY. Yes.

Mr. MAGRATH. A good deal has been said about the physical impossibility of taking water back into Canada. For instance, I see in this draft that you are discussing the expression occurs "amounts of water chargeable to each country." Is that principle enunciated there of charging each country with waters in connection with the balancing as between the two countries of the amounts they are entitled to?

Mr. TILLEY. On that branch, of course, it has never been any person's suggestion that Canada gets the right to take any water by bucket or otherwise from a stream that is away below the boundary, but that this is a matter of apportionment of water, charging each one with certain water, and then saying that they get half and half, with no obligation on either country to take its water from a particular stream or tributary. Everything is to be charged. That is why I point out that the Root draft is a draft that in many directions points to a scheme of the character which we contend is adopted in the present article. Whether that scheme was as broad as the present treaty is a point that I am not really concerned to answer. It may have been the extension of that with some elements of more equality during the irrigation season that enabled the parties to get together on the ultimate treaty. But the treaty does point to many things, including the one in item 7, where it speaks of the waters chargeable to each of the countries.

The comment on that is just as one would expect, that while there is a general scheme of equality the equality does not work out, because the Milk River is not of the steady flow of the St. Mary.

There is some discussion of this all-American route for this water, but that is not important, and at the bottom of page 67 is the clause that was referred to by Mr. MacInnes, and I shall not read it again. But objection is taken that under the arrangement, although it seemed to produce equality, this country would not get the water that it was entitled to.

That order in council refers to the report of the International Waterways Commission, and an extract from that report is given at page 68. It deals there with waters on or crossing the boundary line. So that matters are left in that position.

I think I can pass over everything up to the time when Mr. Newell was appointed—see page 77—on behalf of the United States, and Mr. King was appointed on behalf of Canada for the purpose of conferring together. From that point on, as I said when I commenced my argument, some evidence is afforded as to what happened, because certain papers are produced, but they are of no more value than would be the verbal discussions between the parties—and it is not suggested at all that we have the whole of the evidence.

We have, then, the proposals made, the first one by Mr. King to Mr. Newell, at page 81. His proposal is that:

In view of the large area of arid lands situated in the basins of St. Mary and Milk Rivers, on both sides of the international boundary line, for the development of which irrigation is a vital necessity, it is thought that an agreement whereby all available water shall be utilized for the conversion of the present desert wastes to the fertility of irrigated fields, to the advantage of both countries, is in the very highest degree desirable. Such agreement, it is believed, to secure acceptance by the people of both countries, and to fulfill its purpose of obviating all possible future contentions, can best be based upon the principle of equal sharing of benefits to be derived from these international rivers, due regard being had to existing rights.

Importance is to be attached to the expression "existing rights," because the existing rights include all the flow, as I have pointed out before, of the St. Mary River in the low water up to 2,000 second-feet during the high water.

Mr. King proposes as part of his arrangement to give:

Equal supply to the two countries during the summer; full equality would be assured if the winter storage supply of Milk River were equal to that of St. Mary River.

And he discusses that. Then he points out that suggestions have been made dealing with this former proposal, and that it was provided:

That the bed of Milk River, through Canada, shall be used to carry the waters stored by the United States to the points where it is to be supplied to the land.

This places upon Canada the heavy liability of maintenance of the channel of the Milk River.

And so on. He discusses the whole situation there, dealing with it as a matter which is proposed to work out an equitable solution, but he does not make any definite proposal.

Then apparently, I would say, he meets Mr. Newell, because at page 83 he shows that he had had a discussion with him and realizes that he has not done what Mr. Newell expected him to do, or there was some misunderstanding, and he comes along then with a definite proposition. It would appear to me that he misunderstood that he was merely to make comments on the Root treaty and to make comments only, when in fact it was understood that he was to make a proposal. He makes his proposal at page 84, and I would ask the commission's attention to that.

Leaving aside what appears to be a very serious question of undertaking to deplete the water supply of one internatioual stream for the benefit of another, your proposal is that Canada relinquish its right to the difference between what it is committed to supply and one-half the flow of the river, and shall further provide and maintain for you, for all time, a canal system, over 100 miles in length, being the channel of the Milk River, for the transportation of the amount you would withdraw from St. Mary River.

The withdrawal from St. Mary River would seriously affect vested interests in Canada, as previously referred to, and would hinder the natural development of the country, while the passage of a large body of water down the Milk River Channel might carry with it serious consequences.

Nevertheless, in the interests of friendly cooperation between the two countries, Canada is most desirous of reaching a settlement of this question, and to that end will be willing to recede to some extent from the position which it is believed she is entitled to take as to her rights, both on St. Mary and Milk Rivers. I accordingly submit for your consideration the following proposal:

That the United States shall be entitled to all the water of St. Mary River at the dam site of St. Mary Reservoir, for storage during the months of January, February, March, November, and December in each year.

That leaves the irrigation season from the 1st of April to the end of October, which is longer than was proposed in the Root draft.

That Canada shall be entitled to divert from the natural flow of St. Mary River 1,400 cubic feet per second during the remaining months.

That is, for the irrigation season the prior appropriation for Canada, under King's proposal, was as much as 1,400 cubic feet per second on the St. Mary River. There is nothing that I have seen in this record that shows where that 1,400 cubic feet per second is taken from, but I assume it has regard to the area that Canada wanted to irrigate, because in all these matters we must keep in mind that the irrigable portion of the land for Canada was between 700,000 and 750,000 acres, and for the United States about 200,000 acres. I shall give the reference to that, but those figures may be assumed for the present, and of course that is a point that must be familiar to all the members of the Commission who have heard the evidence and the previous argument.

Mr. TURNER. I wish to enter a decided protest against that statement.

Mr. TILLEY. Which statement?

Mr. TURNER. Two hundred thousand acres. Simply that much entered into the project of the reclamation officers. The testimony is that there is 3,000,000 acres of land capable of irrigation in that area.

Mr. TILLEY. The project that was on foot at the time this matter developed, and the project that made it desirable to bring about a settlement for the United States, was a project involving in the contemplation of the parties at the time 200,000 acres.

Mr. TURNER. That was just the reclamation project, not the necessities of the country.

Mr. TILLEY. Let me give the reference to that now if there is any question about it. Let us take Mr. Newell's evidence at page 25 and the following pages. First on page 25 he is asked, about two-thirds the way down the page, by Mr. MacInnes:

So that then your total requirement for that canal, subject to what you have just said about building the Nelson Dam, would be about 200,000 acre-feet.

Mr. EGLESTON. For the canal.

Mr. TILLEY. That would be for the canal, I suppose, from the St. Mary River. But he deals with it again at page 29:

Mr. MACINNES. This water of the Milk River is used of course upon the lands in the lower Milk River Valley?

Mr. NEWELL. Yes.

Mr. MACINNES. The water in the lower Milk River Valley is not taken anywhere else?

Mr. NEWELL. No; it is used in the comparatively narrow tract of land on both sides of the river.

Mr. MACINNES. You told us that the irrigable area which is to be irrigated with the part of the waters of the St. Mary River under your scheme and with all these waters of the Milk River Valley is approximately 200,000 acres.

Mr. NEWELL. That is our present plan.

Mr. MACINNES. Do you suggest in any way—because it would be news to me if it is so—that that amount could be increased?

Mr. NEWELL. I doubt whether we could get enough water to increase it notably, sunless we get a very greatly increased duty from economy of water in its use.

Mr. MACINNES. Apart altogether from that, where could you get the land?

Mr. NEWELL. There is plenty of land along the river.

Mr. MACINNES. Plenty of land; yes. But where is the land that could be irrigated? Because, according to your report I understood you had investigated that, and it is stated that your irrigable area is 219,000 acres.

Mr. NEWELL. Yes; that is the land we have covered under the present compilation.

Mr. MACINNES. Quite so; but where, if at all, is there any additional land that could be added to the irrigable area?

Mr. NEWELL. By extending the canals on the present grade farther easterly to cover higher and higher ground.

Mr. MACINNES. Which would involve, of course, higher and higher expense?

Mr. NEWELL. Yes.

Mr. MACINNES. But in your reports up to date it is not suggested that there will be a larger amount than 219,000 acres.

Mr. NEWELL. That is limited by the economic conditions and the water.

That was the area that was then regarded as being irrigable, as I understand it, on any economic basis. I am not saying that there were not lots of land there that would be the better for the water, but these were the areas that were at a level and under conditions that, if the water was there in the stream, they could be irrigated. And what was desired of course was that the United States, instead of depending on the waters of the Milk River, which were not of the constant character of the waters of the St. Mary River, and which did not come to them possibly at just the point they wanted the water, should, as I say, receive water from the St. Mary River for a scheme that at that time contemplated, whether there was possibility of expansion or not, some 219,000 acres in this vicinity. The idea that started this whole movement was the plan to irrigate that acreage, and if that could not be done wholly from the Milk River, in order to make their plan of irrigation an assured success, or at any rate a greater success than it otherwise would be, they wanted to hook up to the St. Mary River and tap the waters so that they would be sure of waters of their constant flow and volume to the extent to which they could get volume, rather than the flow they were then getting and could get from the Milk River.

It shows what importance they attached to that for their 219,000 acres when they proposed to go to the expenditure that they actually went to, and were willing to suggest an expenditure that would be involved in taking those waters all the way to the Chinook by an all-American route. That is all I want to say about that.

But here, on the other hand, we have a demand for lands available for irrigation requiring at least 1,400 second-feet, because we find that in King's proposal he reserves a prior right to 1,400 second-feet in St. Mary River during the irrigation season, and that under his proposal is one month longer than the proposal made by Senator Root.

Then King's proposal provides:

That the excess flow of St. Mary River during the last-mentioned period, above 1,400 second-feet, shall be divided equally between the two countries.

Then there is the corresponding proposal with regard to the Milk River. There the United States are to get all the Milk River during the months of January, February, March, August, September, October, November, and December, the irrigation season being different there.

That Canada shall be entitled to divert from the natural flow of Milk River to the present capacity of the Canadian Milk River Canal, agreed upon as being 330 second-feet, during the months of April, May, June, and July in each year, subject to the rights of appropriation from the Milk River within the territory of the United States, as existing at the date of the Canadian company's appropriation on Milk River (23d Oct., 1902), and now being judicially determined in the courts of Montana.

That the natural flow in the Milk River during the months of April, May, June, and July in each year in excess of the amount of 330 second-feet, together with the the amount required as above by the appropriations in the lower valley, shall be divided equally between the two countries.

I want to emphasize the proposal made by Mr. King there, because as I understand Senator Turner he, within a very short time from this, is suggesting that they got to a point where they were really agreed; and therefore it is important to know just what at that time, May, 1908, Mr. King was proposing to Mr. Newell as being a fair thing. In connection with that he asks for a prior right to 1,400 cubic feet in the St. Mary River during the irrigation season, and he asks for the present capacity of the Canadian Milk River Canal, amounting to 330 second-feet in the irrigation season on the Milk River, reserving, of course, the rights of persons who had prior appropriations below. He combines with that, of course, the idea that there shall be equality otherwise, and he also combines with it the fact that the channel of the Milk River through Canada shall be used for the transportation of the St. Mary River water to the lower Milk River Valley.

Mr. POWELL. The lower amount that was required by estimation there for these settlers whose rights were before the courts was 369 second-feet. Add to that the 330 and you get about 700 second-feet, which was not in the Milk River without going down.

Mr. TILLEY. The prior appropriations for those on the lower valley of the Milk have always in these proposals taken in the water that was available to them there.

Mr. POWELL. You have to go down there to get it.

Mr. TILLEY. Yes. These figures are senseless unless you apply them so that the measurement takes place at the point where the appropriations occur.

Mr. POWELL. And that is during the irrigation season.

Mr. TILLEY. Yes; of course, that is the important period. It is not a clause that provides for equality generally. I mean the provisions do not provide for that. The United States takes all the waters of the St. Mary River for storage except in the irrigation season, and the United States gets all the water of the Milk River during the season other than the irrigation season on the Milk. And in the irrigation season the St. Mary River waters are divided, 1,400 second-feet to Canada first and then equally, and the Milk River water is divided, 359 or 369 second-feet, whichever it is, measured lower down the Milk River for the existing appropriations, and then following upon that a priority of 330 second-feet to Canada.

Mr. POWELL. And the surplus equally.

Mr. TILLEY. As it was on the St. Mary River.

That is replied to by Mr. Newell——

Mr. MACINNES. If my learned friend will permit me I would like here to refer to a definite statement as to this irrigable area in the Milk River Valley, as to which there has been some discussion. I should have referred to it in my argument so as to make it clear. At page 119 we find the following discussion between Mr. Bien, who, you will remember, is one of the officers of the United States Reclamation Service, and Mr. Burley, who is one of the officers of the Canadian reclamation service:

Mr. BIEN. Have you any idea what the private irrigation area is in Milk River in Montana?

The reason for that question being that Mr. Burley had been all over the territory.

Mr. BURLEY. I have an idea from a statement that was made in the United States Geological water-supply papers for 1906 on the Missouri River drainage basin. It was not thought that there were over 50,000 acres at the outside that could be depended upon to any extent.

Mr. BIEN. Do you understand that that is included in the 220,000 of the project?

That is, the United States Reclamation Service project.

Mr. BURLEY. I should say that it was exclusive of that.

Mr. BIEN. Do you know how much of that is in Milk River Valley itself, the old canal?

Mr. BURLEY. I estimate that about 30,000 acres, in round numbers.

Mr. BIEN. I believe that is correct.

So that is how the figures come to be put at 250,000, 219,000, or 220,000, in round figures, for the United States Reclamation Service—30,000 over what was possible.

Mr. CLARK. I notice that it has run from 220,000 up to 8,000,000 acres.

Mr. MACINNES. When you get to Mr. Sands it might run to 80,000,000.

Mr. TURNER. That is Conner's evidence.

Mr. MACINNES. No; it is in Mr. Sands's. It seems that they view things from different aspects, Mr. Newell viewing it from the aspect of how much land can be brought under irrigation now by the funds at his disposal.

Mr. TURNER. It is the project.

Mr. MACINNES. It is the project that he is after. The other side say they have 8,000,000 acres provided they could get all the water in the world to put on it at any time they wanted it.

Mr. TILLEY. The evidence is all there. We can not give any more now. There is no doubt, I think, on the evidence that the scheme on which they were prepared to bring down the St. Mary River water was the scheme involving 200,000 acres odd.

Mr. CLARK. I think that is the scheme of the Reclamation Service.

Mr. MACINNES. Yes.

Mr. TILLEY. And that is the scheme that made the transportation of those waters desirable. If was the scheme that was warranting, or not warranting the expense and trouble, and so on.

Mr. CLARK. Yes, that was the scheme, in addition to the application for 3,200 filings upon the water made by private individuals. This was to open up additional land.

Mr. TILLEY. Yes. And in order to make that supply certain they wanted to get the St. Mary River water.

Then Mr. King sends his memorandum on May 1, 1908. That has been referred to several times, and I shall not stop to comment on it except to point out one or two things. The language at the top of page 88 has been referred to and read twice at least, I think, so I shall not read it again, but I ask the Commission to note the language in the last sentence of that paragraph:

It is not believed that any proposal to give Canada more than half the water can be entertained, although the details as to how this half may be ascertained are open to discussion.

Mr. CLARK. That is from Mr. Newell's statement.

Mr. TILLEY. To Mr. King—showing that having regard to the views that Mr. King was putting forward, they were not prepared to give up more than a half. They were prepared to arrange the

details of how the half was to be ascertained in a way that possibly might give more favorable consideration than just a straight definite half of the waters.

Then for the first time in this discussion I ask the Commission to note that at page 88 these northern tributaries of the Milk River are brought in, showing that claims were being made there and the waters were being diverted.

Mr. MacInnes has referred to the other matters connected with that.

Then I ask the Commission to note at page 92—I think Senator Turner refers to this—that Canada points out, through Mr. King:

As to diversions in Canada from the four tributaries of Milk River mentioned in Mr. Neall's memorandum, the authorizations have been restricted to the actual necessities of individual settlers. The authorizations, with the strict system of inspection, operate as a restraint against excessive use of water, rather than the opposite.

The Canadian Government would have been ready to consider any representations made on behalf of the settlers on these creeks south of the boundary line, but none appear hitherto to have been made, and not even in the draft treaty of 1907 nor in Mr. Newell's present memorandum is any remedy proposed on their behalf. Under clause 5 (c) of the draft treaty, Canada would apparently be entitled to all the flow of these streams north of the boundary line, accounting therefor only by a greater supply to the United States in the main channel of Milk River, not in these tributaries, a compensation which would not seem to be of service to the settlers on the creeks away from the immediate valley of the river.

Should not the Commission take in the full effect of these two paragraphs? First, Mr. King says to Mr. Newell:

This is the first time you have raised any dispute about the four tributaries of the Milk River. There has been no contention heretofore that any injury has been worked on the settlers on that stream on the south side of the boundary; and the Canadian Government would have been ready to consider any representations made on behalf of the settlers on those creeks south of the boundary line.

Now, there is this to be remembered about clause 5 (c) of the draft treaty—that goes back to the Root draft treaty—"that Canada would apparently be entitled to all the flow of these streams north of the boundary line, accounting therefor"—that is, accounting for the flow of these streams north of the boundary line if they took it all, "only by a greater supply to the United States in the main channel of the Milk River—not in these tributaries—a compensation which would not seem to be of service to the settlers on the creeks away from the immediate valley of the river."

Mr. CLARK. Do you think that that refers to the Root draft treaty that we were considering awhile ago?

Sir WILLIAM HEARST. It says specifically clause 5 (c).

Mr. CLARK. "Of the draft treaty."

Mr. TILLEY. That is the only draft treaty they had. We have had no draft treaty but one.

Mr. TURNER. He has been considering that draft treaty all through his memorandum.

Mr. MACINNES. It should be 5 (e), Senator, not 5 (c); that is a misprint.

Mr. CLARK. That is what misled me.

Mr. TURNER. Yes; it is a misprint.

Mr. TILLEY. Yes. Clause 5 (e) gives Canada:

All water of Milk River and its tributaries diverted in Canada for use in its territory, excluding any water of St. Mary River turned into Milk River by Canada and which has been measured under item (d).

Mr. CLARK. That clears up my mind entirely.

Mr. TILLEY. Will you allow me to point out what I think is the important feature of that? These two men had been discussing—and while on the strict language of the Root draft treaty I would not care to say exactly how far the language would go——

Mr. CLARK. The reference you have made here does not apply to clause 5 (c) of the Root draft treaty, but does refer to another part of it, 5 (e). It has nothing to do with your argument.

Mr. TILLEY. No; except that I want to come back to the point we were discussing before: What is the extent of the Milk River system in the Root treaty? Here Mr. King is saying "Under clause 5 (e)." If you refer to 5 (e) you find that Canada acknowledged priority, so to speak, in the irrigation season in the Milk River water and its tributaries diverted in Canada for use in its territory, excluding any water of the St. Mary River.

Now, the Milk River and its tributaries diverted in Canada under 5 (e) includes, according to these gentlemen, a tributary that joins the Milk River away below the boundary, and anything taken under that is said by King to be a taking that involves bringing the amount into account with the United States. So that it is not the Milk River tributaries to the boundary that are there being discussed, it is the Milk River tributaries that join the Milk River at a point south of the boundary line. And that adds to the point that I was suggesting as right, that the Root treaty was intended, although possibly he did not work it out to a true conclusion in all the details, to take up the whole system as a system and extend it to the waters south of the boundary line. But whether that was or was not the intention, that is what, as we submit, the negotiations ultimately resulted in.

Mr. POWELL. To complete that, it might be argued that under 7 they were constructively included, although actually they would not come under the technical terms of 5.

Mr. TILLEY. I think you will appreciate the difficulty I have in taking the Root clauses as they stand. I would not have to go that far. But here you have two men, who no doubt had been discussing that treaty, communicating with each other in that way, and I think it throws light on what was intended. And the Milk River tributaries under the Root scheme certainly included tributaries that never joined in Canada but joined in the States; and therefore that system must be taken as the Milk River and the tributaries which would make the Milk River where they joined it.

But, as I say, the point is not important one way or the other so long as it shows they were approaching the thing from different angles to come to a conclusion that would be satisfactory. No person was saying, "We will deal with nothing but the Milk River Channel and the St. Mary River Channel." No person was saying anything that pointed to a hard determined attitude with regard to dealing with nothing but international waters in the sense of boundary waters, or streams that crossed the boundary. Propositions were being made from all angles, the desire being to reach a mutually satisfactory arrangement.

The clauses below have been discussed. Mr. MacInnes pointed out that the clause commencing "The central idea of the proposal of May 1, 1908," was a balancing. And I ask the commission to note:

The central idea of the proposal of May 1, 1908, was a balancing of benefits and concessions while making provisions for existing appropriations.

That was the idea that certainly was in the minds of these people, to balance concessions, to appropriate in the sense of bringing things into account.

Then, following upon that, I think Senator Turner argued that here, by the few short expressions or paragraphs at the end of the King document, the parties came together, practically saying there was an agreement between them. All that was needed, so to speak, as I gathered from him, was that the agreement made should be reduced almost to the form of a treaty. But my submission is that they were just as far apart, or possibly farther apart, at the end of this letter of December 23, 1908, as at any time, because Mr. King says:

The principle of equal sharing of benefits, with compensation by quantity of water.

I ask the Commission to note that expression, "Equal sharing of benefits, with compensation by quantity of water." What I shall argue is that what our treaty merely provides for as it is, is compensation by quantity of water. You do not take it from a particular place, but the measurement of the whole, and dividing it in two tells how much water as a matter of quantity each one is to get. Mr. King says:

The principle of equal sharing of benefits, with compensation by quantity of water, suggested by the undersigned, doubtless has a disadvantage in depending for its application upon agreement as to details.

The difficulty of working it out is that it requires too much detail. Then he says, not as an offer, but as a feeler:

A principle which is free from this objection and is, moreover, a simple one, is that of equal division of water on the boundary streams (each country providing for its existing interests out of its share of the water).

Senator Turner says they were in agreement practically to have an equal division of boundary waters. In no sense was there any agreement in regard to that. It was a suggestion made by Mr. King to a man who wanted a canal for his water from the headwaters of the St. Mary over to Chinook, who had to transport his waters across, and who was being offered half the St. Mary with the obligation to get it to where he wanted to use it by his own means: in return Canada would have the other half of the St. Mary and would have, with the United States, half of the Milk at the boundary. That was the suggestion that Mr. Newell could not accept unless he abandoned all that he had been contending for. And Mr. King writes:

Mr. Newell appears to prefer this principle, though he does not state definitely that he accepts it as a guiding one, and some of his suggested amendments to the proposal of May 1 do not accurately accord with it. A similar objection lies against the draft treaty, which purported to be based upon the principle of equal division, but in its details did not well provide for carrying it out in practice.

So that ends the correspondence between Mr. King and Mr. Newell, and far from bringing these two into accord, or far from saying that they had reached a stage where they had said: "No matter what has

taken place with regard to other matters, we are going to stick to one thing, and that is division at the boundary or a division of boundary waters in the sense of waters that cross the boundary." They had not agreed on anything; they were sounding each other, presenting views, each one contending for such a priority in the irrigation season that made it practically impossible for the other one to accept it, and they remained in that position when, so far as they are concerned, they disappear from the negotiations.

The next document that we have is dated December 29, 1908, headed "Draft by R. H. Campbell." That is referred to again as a document showing that the parties were dealing with boundary waters. It does not show anything more than that Mr. Campbell drafted a clause. We have nothing to show to whom he handed it, nothing to show whether it was in fact rejected, or why, and it deals with all streams that cross the international boundary from the Atlantic to the Pacific.

It is a general clause referring to all streams, and without something to show why one or the other objected to it, or what advantage one or the other would get by bringing in the whole boundary line, one can not say why it was refused, whether it gave the United States an advantage or whether it gave Canada an advantage, because it dealt with situations that there is nothing here to show what was really involved to either country; it extended right across the whole continent.

The clause with regard to diverting waters is No. 7. I quite agree with the suggestion that there is the implication that waters might be transferred from one stream to another, as I think Mr. Powell suggested. But what that might mean to either country along the boundary is something I can not deal with at all. Whether the United States would object to it on that account, or whether Canada would object to it on that account, it is a clause that implied a sort of wholesale right on the part of either country to throw water into a stream that is not the natural bed for it going through another country, and the provision for damages is not the same, and so on. So that the document at the top of page 93, I submit, should just be disregarded because it throws no light at all on the situation.

Then you come to the draft prepared by Mr. Newell:

> That the waters of each stream flowing across the international boundary shall be divided equally in quantity as nearly as practicable between the two countries; that is to say, the waters of St. Mary River and its tributaries crossing the international boundary shall be measured as they cross the boundary and an equal amount apportioned to each country, due allowance being made for the quantity stored above the point of measurement in reservoir or reservoirs constructed in the United States; also the waters of the north and south branches of Milk River shall be measured where they cross from the United States into Canada, and the main Milk River and its tributaries measured where they cross from Canada into the United States, allowance being made for any water diverted or stored in any country before reaching the points of measurement.

One can not say but that that is possibly a draft, which Mr. Newell is endeavoring to work out, of the seeming suggestion that was made away back in October, 1908, two or three months before; or it may be a draft prepared by Mr. Newell in connection with attempts that were being carried on to bring matters to a head that Mr. Gibbons and Mr. Chandler Anderson were dealing with in a broad international arbitration agreement between the two countries.

No doubt between October and December 29, 1908, there were many discussions between the parties, and how this clause came to be drawn in that form, what criticisms were made of it, why it was not accepted, no one knows. But it is clear, and I think it is of the utmost importance, that in all these documents right down to the last one prepared by Sir George Gibbons—assuming it was prepared by him, which I am not at all assured of—in fact the document is not dated; at the same time at any rate we have one from Mr. Chandler Anderson which I shall refer to—this expression comes up each time. At page 93 we have the expression "the waters of St. Mary River and its tributaries crossing the international boundary," an expression that was constantly in the mouth of any person who wanted to describe the particular river and its tributaries, and to show that only those tributaries were to be included that crossed the international boundary line.

So that on December 29, 1908, Mr. Newell is endeavoring to divide, on terms satisfactory to him apparently, but he makes it a division at the boundary, and to get his division at the boundary he inserts words in his treaty that expressly provide for that.

Then at page 94 he provides for priorities, but not working out just the same. First, Canada has a priority on the St. Mary River of 400 second-feet, and the United States a priority of 400 second-feet, making 800 feet, and so on. That is not material to be considered now. Then he goes on with the Milk River priorities, 359 second-feet to the United States, and he proceeds:

> After the priorities above described have been provided for each country shall be permitted to divert water in excess of the priorities to an amount not exceeding one-half the natural flow of the streams.
> In computing this one-half the priorities above described shall be included.

There Mr. Newell, far from drawing something that expresses an agreement between himself and Mr. King, has inserted something entirely different from what Mr. King suggested, because at page 92 Mr. King had suggested that in this equal division of the boundary streams each country shall provide out of its share for any existing interests; while here it is being provided that these priorities shall be taken care of—not that each country shall take care of it out of its own share, but the priority shall be an absolute priority, and Canada to recognize it on the part of the United States.

Mr. POWELL. That is his declaration at the first, but the composition is muddled in the tail end of the paragraph.

Mr. TILLEY. How do you mean?

Mr. POWELL. "After the priorities above described have been provided for each country shall be permitted to divert water in excess of the priorities to an amount not exceeding one-half the natural flow of the streams." That is, as you say, clear and unequivocal. Then it goes on to contradict that: "In computing this one-half the priorities above described shall be included; that is to say, the 400 second-feet in Milk River shall form a portion of the one-half of the river allotted to Canada, and the 359 second-feet, or as much thereof as is obtainable from the natural flow, shall be considered as part of the one-half of Milk River waters." The last part is contradictory of the first.

Mr. TILLEY. What King proposes is that there shall be an equal division of the water of the boundary streams, each country providing for its existing interest out of its share of the water.

Mr. POWELL. But he provides the same thing in the tail end of this.

Mr. TILLEY. Does he?

Mr. POWELL. Yes.

Mr. TILLEY. Not quite, I think, if you will pardon me. Instead of saying: "We have no concern with appropriations; you have to look after yours, and if your people can not get appropriations out of your half share they can not get them at all"—that is what I understood King to mean—Newell comes back, not with a simple agreement for division and that you must take a chance on getting sufficient water to meet your appropriations; he comes back with the appropriations being a charge against the stream.

Mr. POWELL. The only thing is that he says, so to speak, the appropriation was 400 feet; while the other leaves it general.

Sir WILLIAM HEARST. He sets out specifically in the treaty the same method of treating appropriations that I understand Mr. Turner to contend for under the treaty we are construing; that is, it is taken in the consideration of the half.

Mr. TILLEY. Yes; but Newell does not provide in this just simply as King had provided—at least, I would suggest not. King had proposed that each should take care of his own appropriations.

Mr. POWELL. He goes further.

Mr. TILLEY. I do not think this was a communication from Newell to King, but I think it was prepared in connection with the final drafts, and possibly he was not at all attempting to draw anything to comply with King's suggestions.

Sir WILLIAM HEARST. Is there anything on the record to show that this was communicated to any person on the Canadian side?

Mr. TILLEY. I think not. In the last paragraph we find:

> In consideration for this equal division Canada will permit the United States to send down through the channel of Milk River undiminished in quantity the water which may have been stored by the United States in its own territory.

And then the concluding paragraph deals with the compensation to be made by the United States. There again it is not in accordance with anything King suggested, because he did not suggest that in consideration of equal division the United States would be entitled to use the canal.

That is Mr. Newell's draft at page 94, and then follows what is said to be a draft received from Mr. Gibbons, and which is duplicated on pages 96 and 97.

Sir WILLIAM HEARST. Are these two drafts identical?

Mr. TURNER. They are identical.

Mr. CLARK. This draft on page 94 seems to be an authentic draft from Mr. Gibbons, while the draft on page 96 is not authenticated at all.

Mr. TILLEY. Each of these headings is just written on the exhibit, as I understand it.

Mr. CLARK. On page 94 it is headed, "Draft received from Mr. Gibbons with his letter of December 31, 1908."

Mr. TILLEY. There is no letter produced, and Mr. MacInnes said he did not think that Mr. Gibbons did prepare this draft, and we have had no explanation from Mr. Wyvell as to where he got it.

Mr. TURNER. Do you want to consider it as not in the record?

Mr. TILLEY. No.

Mr. TURNER. What are you talking about then?

Mr. TILLEY. I am answering one of the commissioners, who suggests there is something shown to be authentic about the document. I propose to argue the case on the record exactly as we have it in the document produced by you, said to be something, and we are asking you for a little more proof, but not objecting to its going in.

The only point is that Senator Turner in his argument tried to put this in a position that this language must be read against us, because it was Mr. Gibbons's drafting. To the extent to which that is material, it breaks down for lack of proof. But here is a document suggested by some person, and we find a treaty with a clause in it very much like this; and I want to point out what I think is of the utmost importance in regard to these two drafts, that is, the addition of the word Saskatchewan, when ultimately added, did not change the effect of this first draft, that the first draft meant the same thing, and it was made clearer in the treaty possibly; but the result is just the same in regard to rivers and tributaries therein included. May I read the first paragraph?

It is agreed that for the use of irrigation the St. Mary and Milk Rivers (in the State of Montana and the Province of Alberta)—

That is the first time we have had any suggestion of the geographical location of the area through which the river runs as distinct from a description of a river running from one country to the south or at the border, or anything of the kind. It is a deliberate change of language, and according to my submission, in saying that these two rivers are in the States or in the Provinces, however they may be described in the territory through which they run, the aim is that those rivers and their tributaries are to be treated as one stream.

Now, the St. Mary River and the Milk River are, of course, in Montana and Alberta, and not in Saskatchewan; their tributaries extend to Saskatchewan. But the expression "the St. Mary and Milk Rivers (in the State of Montana and the Province of Alberta) and their tributaries," includes all the tributaries of those two rivers, and the language in parentheses shows that it is to be those two rivers, not at the boundary line, or not treated merely as boundary waters, but as rivers running through Montana and as rivers running through Alberta; that is to say, over the boundary line rather than at the boundary line in the case of each river; within the territory rather than at the boundary of the territory of each country.

Just let me deal with that language for a moment. When that language comes into Article VI, the expression "in the State of Montana and the Province of Alberta" is transposed to after the word "tributaries" instead of before it, and then you have "the St. Mary and Milk Rivers and their tributaries in the State of Montana and the Province of Alberta." That was wrong, because when you express it that way the tributaries run into the Province of Saskatchewan. So that a description that was inclusive of all the rivers, that is to say, rivers throughout their length in the country on each

side of the boundary, and not rivers on the boundary line—those rivers described in that way would group up the whole river system and include tributaries even if they extended into Saskatchewan.

Now, when the description of the geographical area within which these rivers run that are being grouped up and put into one system is transposed to after the word "tributaries," it was left with an inaccurate description of the whole system, because you had to add one more Province to the geographical area in order to group up the rivers with all their tributaries.

That is my submission with regard to that. The meaning is perfectly plain. There is no word to be changed either in the first draft or in the second draft to mean exactly what we say. The St. Mary River and the Milk River, if you describe the Provinces that they are in for the purpose of showing that it is the rivers in the Provinces or in the States; that is, if they were both being described by the same name in the countries rather than at the boundaries—which they have been talking about heretofore to a great extent—to make it perfectly clear that it is not at the boundary you say "in the countries that are on each side of the boundary," those being Montana and Alberta, then you take all the tributaries of those two and you get those tributaries right into Saskatchewan and obtain exactly the same river system by transposing the geographical description to after the word "tributaries;" but if you do you must add one more Province, because the area is not broad enough to take in what was originally described in the first draft.

Then, just reading on from that, it says:

> and the total amount that can be diverted from the two for such purpose is to be distributed so that each country shall have the right to one-half of the whole, but in the distribution more may be taken from one stream and less from the other by each country, so as to afford a more beneficial use to each.

My submission is that, notwithstanding that we have had all this evidence and three arguments, nothing could be plainer than that language if rivers—complete rivers from end to end—in Montana and Alberta were carefully and distinctly described as being the things that were to afford the water which in bulk was to be divided and appropriated between the two countries; and that, having given the rivers from end to end, you say "all their tributaries," and it is needless to go on and say where the tributaries are, because it is anything that hitches onto those rivers from end to end.

And the very way that it was introduced into this paragraph confirms, in my submission, that that is the right view, because there is no attempt to describe tributaries; there is no effort to say where they are or what Provinces they are in, or what area they cover, because, having described the main streams from end to end, you bring in to them every tributary that joins them at any place.

So that with the original words you have the two rivers in those countries, getting the idea that they are on both sides of the boundary line, regardless of whether the river is going toward Canada or away from Canada, because you have the Milk River here running down out of Canada at the eastern crossing, with the St. Mary running north and never coming back to the United States at all. So that regardless of which side of the boundary you are on in respect to the St. Mary River, regardless of which side of the boundary

you are on in respect to the Milk River, you have those two rivers there with their whole length in these countries, and you have expressly and finally shown the concluded opinion not to deal with anything at a boundary line at all, but to disregard the boundary line and treat the matter from a broader aspect, working out equality, so that the entire water from these watersheds shall be available for equal distribution between the two countries.

Therefore, it is important, according to my submission, that you find that at first the location, so to speak, the geographical area that was affected by the two rivers as main rivers is first described, and tributaries without any description; and when you for proper drafting or otherwise take a geographical description and put it after "tributaries," you have to add on one more Province. Why? Because your geographical area is wrong unless you extend it to include tributaries that were already provided for under the original draft, as they extend up into Saskatchewan, and that Province must be added in order to get your description correct.

Mr. POWELL. In furtherance of what you are arguing there, this fact is rather important, in considering that the two expressions are the same, that the Milk River begins in Montana and ends in Montana, and there is no tributary to it outside of Montana, Alberta, and Saskatchewan, so that the two, when you make a mathematical analysis, are exactly the same.

Mr. TILLEY. That is my point.

Mr. POWELL. Taking your construction.

Mr. TILLEY. Yes, that is the point I am trying to make in regard to that. The main river is just in the two—Alberta and Montana.

Mr. POWELL. It never goes out of the two.

Mr. TILLEY: Yes.

Mr. POWELL. And there is no tributary outside of the three sections.

Mr. TILLEY. If you describe the main artery by the two Provinces, and make that geographical area for the main artery and add all the branches of the main artery without making any geographical area for those, you give it exactly the same as if you say "the main artery and the branches" and give the geographical description that covers the area to which any of those extend. You have exactly the same thing when you transpose the description of location and put it after the word "tributaries," provided you add another Province, because the expression "tributaries," used without any description as to location, in fact extends not only into the two main places—that is, Montana and Alberta—but also into the additional Province of Saskatchewan.

Mr. POWELL. Of course, subject to all this is the consideration that has to be given to the judge's argument that there are two units—one territory is formed by Montana and the Province of Alberta and the other is formed by Montana and the Province of Saskatchewan.

Mr. TILLEY. I would like to say a word or two in regard to that when I come to Article VI, as we have it at the end. I am developing this point now only for the purpose of indicating that not only does the language bear my construction but I produce two documents that bring the same result; and it has been emphasized against me that no very great change was intended because it was done by

telegram. Senator Root put it that there was some mistake about it. Apparently Mr. Gibbons either did not know much about his subject—I think he put it that way—or was not accurate in his expression, being a busy lawyer, and I think he went so far as to suggest for the consideration of this Commission that Mr. Gibbons would undertake to draft an article dealing with a complex subject such as this without getting any help from people who had been drafting and studying these expressions.

Mr. TURNER. Secretary Root did not make that statement.

Mr. TILLEY. No; Senator Turner. I took it down from his address, that he suggested Mr. Gibbons—I do not know whether it is reported here or not—did this unaided by people who knew the situation, and that there was some carelessness.

What I say is this: I emphasize that the language used in this document must receive the literal interpretation, because I produce the first draft and the second draft, in which a change is made on a telegram adding the word Saskatchewan; and I say that on the literal interpretation of each they both mean precisely and exactly the same thing and cover exactly the same streams and group up and include the same waters for equal division. And I say, instead of it being open to the argument that this thing is something that is not carefully considered and carefully drawn, no person made any mistake, that it was all done with the greatest of care, and that this document produced as being Chandler Anderson's original draft, one might assume that his original draft would be before the final draft that was accepted, and apparently this that has Mr. Gibbons's name at the head of it, but which Mr. MacInnes has gone as far as to suggest was Mr. Chandler Anderson's ultimate draft—I say it is fair to assume that his original draft was before this other draft, because no doubt there would be a good deal of drafting.

What is the original draft? Of course, we get no light on this document except from the treaties. But his original draft is that each country shall have the exclusive right to one-half of the natural flow of St. Mary River and the Milk River and their tributaries, the amount thereof to be determined at the point of storage and diversion and at the boundary.

Now, that is rejected. Undoubtedly, that was the language put forward in the short time it was in the very eye of the people who were settling this treaty, and they had it before them, and we find no word that points in that direction in the treaty. And when you put side by side with that a clause pointing distinctly to the boundary line, you put side by side with that a clause that points to the geographical area rather than to a line, what must the conclusion be except that these people who were settling this, if you are to take these documents as evidence of anything, were attempting to make that distinction and that change? That it is intentional is apparent from the fact that it is covered by language in two forms, both meaning the same thing, and my submission to this Commission is that you could not have stronger evidence that this was carefully considered and carried out as the actual intention of the parties.

(Adjournment from 6 p. m. until 7.30 p. m.)

Mr. TILLEY. Before the adjournment I referred to the documents headed "Mr. Gibbons's draft" and "Mr. Anderson's draft." There only remains to say a word about the telegram from Mr. Gibbons to Mr. Anderson at page 97. If one reads the telegram one is impressed with the fact that all these changes proposed are changes more or less of a verbal character, merely for the purpose of expressing the intention of the parties more clearly or in more appropriate language, and that supports the view that I have suggested, that the addition of the words "and Saskatchewan" was made for the purpose of enlarging the area which included within it the rivers and tributaries, because the tributaries were in the new draft described as being within the area. That, however, does not make an end of the matter, because it is clear from Mr. Anderson's telegram to Mr. Gibbons at page 98, sent on January 9, 1909, that having got these telegrams with suggested changes he went to Washington, as he says: "Going to Washington Sunday morning to confer on all amendments." So that everything was carefully considered at that time and the amendments were agreed to, including the addition of the words "and Saskatchewan."

That being the way in which the article was brought into existence may I just say a word or two with respect to the article, having regard to one or other provisions of the treaty itself? Mr. Bien, in the memorandum which he desires to file, discusses the terms of the treaty itself, and, so far as Mr. MacInnes and I are concerned, there is no need of any further reply than such comment as I make in regard to the treaty now. Mr. MacInnes says that he does not desire to add anything to what he has already stated.

First, in the preliminary article you have the description of boundary waters there defined as:

> The waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes—

and those include:

> all bays, arms, and inlets thereof, but not including tributary waters which in the natural channels would flow into such lakes, rivers, and waterways—

and then these words:

> or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

So in the very treaty itself we have the expression which I have referred to as being in the preliminary correspondence and negotiations, so far as they are reflected in the documents, we have "rivers flowing across the boundary." We have the express language of the treaty, from the very preliminary articles to the end of the treaty, and if they are to come within that category in order to be within the treaty, we would expect to find them described by that short expression, "rivers flowing across the boundary." So when you come to an article in the treaty like Article VI, that describes waters in some other way, you must at once say, "these can not be waters that cross the boundary, because they are not described in the very language that the preliminary article says shall be used

to describe certain waters; and that is shown further by Article II, which reads:

> Each of the high contracting parties reserves to itself or to the several State governments on the one side and the Dominion or provincial governments on the other, as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in the natural channels would flow across the boundary—

So that again you have the same expression, "rivers or streams that flow across the boundary," used whenever the streams being referred to or described are streams that come within this treaty if they flow across, and they do not come within the treaty if they do not flow across.

Therefore, I repeat that even if it should be limited to streams flowing across the boundary, if that is to be one of the features that brings them within Article VI, we would have the rivers described in that way and not in some different way than has already been used both in the preliminary article and in Article II.

Then Article VI must be approached from the standpoint that the waters being dealt with are not waters that are boundary waters, because they are not described as boundary waters, nor are they waters that flow across the boundary; that is not their feature. Then what is it? As I said before, it is waters within a geographical area, it is waters within the country of each, instead of waters merely at the point of the boundary line. And the language, as I say, is appropriate for that, and it is not appropriate for any other thing.

For instance, Senator Walsh suggested: Leave out the words in parentheses, and you have just what Canada is contending for. Well, perhaps the commissioners will be good enough just to look at the article, leaving out those words, and see just what questions might arise. It would read then:

> The high contracting parties agree that the St. Mary and Milk Rivers and their tributaries are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries.

At once the question would be raised: Where are they to be treated as one stream? And as the treaty was a treaty regarding boundary waters, and so on, it would be suggested that they are to be treated as one stream at the boundary; that would be a possible argument and the expression "and the waters thereof" where? It might be argued at the boundary. The words that are in the parentheses are, one might almost say, necessary for the purpose of excluding any possible argument that this is a case of dealing with waters at the boundary, because it says:

> The St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated (in the State of Montana and the Provinces of Alberta and Saskatchewan) as one stream for the purposes of irrigation and power, and the waters thereof (in the State of Montana and the Provinces of Alberta and Saskatchewan).

Reading it that way, then, you have it clearly shown that no question can be raised as to where these waters are. There the streams are to be taken as one, they are to be taken as one throughout the Provinces and the State, and the waters thereof in the Provinces and the State are all to be treated as the waters of one stream.

It has been suggested that a more appropriate expression for the United States contention would be to substitute the word "or" for the word "and" between Alberta and Saskatchewan. I think it was argued by Senator Walsh that that would be appropriate, then, to describe a stream in the State of Montana and the Province of Alberta, or you would have to assume that there was an ellipsis there, to be supplied by the words "in the State of Montana and the Province of Saskatchewan"; and it was said that it must be a river at one and the same time in each of these Provinces, taking Province and State as being correlative terms. In no place has there been any suggestion of a river at one and the same time in both countries; that has not been the language used. They had described those rivers as streams that crossed the boundary, streams that rise in one country and run into the other; but no person has heard before, until we get this verbal construction by the United States of this clause, of streams that are at one and the same time in two places; and when you think it over it is a very unappropriate expression. No river is at one and the same time in two places, the waters of no river are at one and the same time in two places, and to say that a river is to be at one and the same time in two countries merely because you have the word "and" coupling the two named places, is rather a stretch of the imagination. One can hardly assume that any person intended that to be the construction, particularly, as I say, the rivers have never been described in that way before.

But supposing the United States had that change made, with the "or" for "and" and the ellipsis supplied by adding "the State of Montana" again before the word "Saskatchewan" what would you have? You would have all these tributaries of these rivers in Montana before either river crosses the boundary eliminated from Article VI, and that is important because wherever the preceding documents have referred to a river crossing the boundary they have always used either the expression "river and its tributaries" or some expression such as "the natural flow of the river across the boundary," defining "natural flow" to be the flow that would go across the boundary in a state of nature, if there had been no diversion of the river or any of its branches.

That appears in Senator Root's draft treaty. It is shown there that the United States regarded these tributaries in Montana before either river crossed the boundary, being tributaries of such size and importance that they should be brought within the treaty by express language. That is shown at page 66. If you look at part (*a*) at the top of that page you will find the following:

(*a*) All water of the St. Mary River and its tributaries diverted in the United States for use in its territory.

So that before the St. Mary River reaches the boundary going north through Canada it has tributaries that in the Root draft treaty were of sufficient importance to be incorporated by express language along with the river itself as one of the places from which the United States could take its priority of waters.

Likewise the Milk River:

All water of Milk River and its tributaries diverted in the United States for use in its territory above the crossing of such streams into Canada.

So the expression "above the crossing" means above following the stream in the United States. Therefore, you have there these two rivers and their tributaries referred to expressly in the Root draft, and yet if we had the language of that clause, which is supposed to be a clause of limitation, worded as has been suggested by the United States counsel, we would have a clause that would eliminate by express language the very tributaries that were being expressly referred to in the Root draft treaty.

Similarly, the Milk River in Alberta has branches on the map, filed here as Exhibit A, that are entirely in Alberta. Those surely are brought within the treaty. The Milk River has branches on the south side that extend out into Montana, but on the north side it has branches in Alberta only, so that there you have tributaries of such importance that, if you change the language in the way you say you must change it in order to work out the real intention of the negotiators of this treaty, you must make a change in the language that actually excludes rivers that certainly the negotiators, if we are to pay any attention at all to what they were doing before the treaty was signed, had intended to bring into the treaty. They either brought them in by referring to the streams that crossed the boundary with the waters they would carry in a state of nature if there had been no diversion, or in some other appropriate language these rivers were included as the rivers that crossed the boundary. Here the Commission is clearly asked to alter the literal interpretation of the treaty so as to actually exclude tributaries that plainly were in the contemplation of the parties that were instrumental in suggesting the draft, because no doubt the experts of the United States were behind the Root draft, in which the tributaries were expressly included.

I think I have nothing further to say with regard to that phase of the question, but I would like to say a word or two with regard to the clause relating to prior appropriations. It is to be said in a word, but the argument advanced by Senator Turner indicates the importance of ascertaining just what is intended by that clause and seeing that it is properly applied, because Senator Turner has said that on the St. Mary River we are entitled to an appropriation of three-quarters of 500 second-feet, which would be 375 feet, and that the United States on that river is entitled to 125 second-feet, being the balance of the 500, and an additional 250 second-feet, making 375 feet; in other words, giving to the United States a second priority following ours of an equal amount. That is what he puts forward, as I understand it, as working out equality, and he says that "the governing principle of the clause is equality, and therefore the appropriation is to be treated as part of your share of the water, and when you have got your appropriation the way to make us equal with you is to give us an appropriation of the same amount."

That way of looking at it, and that way of dealing with it, was expressed in some of the former documents, only to be rejected here. What we have here in the case of each of us is a prior appropriation. My learned friend can describe it as being something in the nature of a prior right, but it is intended to be a prior appropriation in the sense in which that expression is used, and it is an appropriation to the country for the benefit of its inhabitants to take care of the claims of the settlers along the rivers.

Now, then, that prior appropriation may be looked at in one of two ways—either that it is a prior appropriation and the waters that are to be equal are those that remain, or, by the express terms of the treaty, each of us is given a prior appropriation which is taken to be and is to be equality between us with regard to the appropriation.

But on the St. Mary River, for instance, if that is the only river to be considered, if the clause read as to the St. Mary River, "that the waters are to be divided equally between the two countries, and in making the division Canada shall be entitled to a priority of 500 second-feet," the whole priority would be wiped out unless the priority was treated, so to speak, as a first charge or a first lien, and the equal division came after that; and my submission is—and it is an important matter to the company I represent—that you eliminate the idea entirely of prior appropriation if, the moment you had given the prior appropriation, you give to one of the countries something that can be regarded as intended to equal the appropriation that has already been conceded. It must not be a thing of that character, it must be an appropriation in the strict sense, and it is only the surplus waters that are capable of being divided.

So you can put it in one of two ways: Prior appropriation comes first, and the surplus waters are the waters to be divided; or you can put it that there is to be an arbitrary setting of one appropriation against the other, which is to be taken as equality to that extent.

There is only one other feature that I desire to refer to, and that is the treaty, and my submission brings out in the plainest possible way just what should be done in the circumstances that existed in order to work out fair play, equity, and decency between these two nations, so that each, having regard to its requirements, would get treatment that would be equivalent to the treatment that the other country got.

It must be remembered, Mr. Chairman, that the plan of making the rivers of these two separate watersheds—I suppose all watersheds must be separate—but these two watersheds with the height of land between them of such a character made it difficult to bring the water of one to the other; the plan was only made possible by the arrangement that was made, with the consent of Canada, that the headwaters of the St. Mary River should be taken across, partly by an artificial and partly by a natural channel, a portion of the canal being in the United States, the main part of it being in Canada.

Without that consent on Canada's part, this idea of bringing the waters together and marshaling them was impossible, and that was the thing of prior importance to the United States, that is the thing they were after. So that we find Canada consenting to an arrangement whereby all shall be brought in and treated as one group of waters, and a connecting canal made that worked out the arrangement, so that it is possible, with her consent, in her territory, being the thing that the United States wanted, to bring that arrangement about. And my submission is that at once you have got a proposition that would appeal to any person not as a thing absurd, in the language of Senator Turner, but as a thing that is in entire harmony with the treaty, which purported to be a treaty dealing equitably and fairly between the two countries.

That treaty was drawn and brought into existance in 1909, some three years after the decision of the Supreme Court of the United

States in the Kansas and Colorado case. That is to be found in 1906 Supreme Court Reports, volume 206. There the question came before the Supreme Court of the United States as a question to be decided not on any strict rules of law but, as I would put it, according to equity and good conscience; and the question was whether the upper State was entitled to take away the waters of the Arkansas River, so as to deprive Kansas of the water that would flow in the natural course down this stream, raising the question of riparian rights, as to whether each State was entitled, as an owner would be, to the natural flow of the stream, making such use of it as was proper having regard to the rights of people below.

The Supreme Court reached the conclusion that Colorado had taken from the river waters that appreciably affected its flow. The lack of water in the State of Kansas was attributed during the trial and in the argument to various causes. It was suggested that there was some subterranean river running away from the surface river, and carrying away waters in that way, and that really it was not Colorado that was causing this loss of water. It was also suggested that the river was in reality a river that had its source in Colorado and then another source, so to speak, in Kansas, and that it should be treated as such.

All that was rejected and the Supreme Court reached the conclusion that the river was appreciably affected in its flow, and had the case been one that depended on the common law of England, it was a case in which between individuals there certainly would have been a restraining order; but having regard to the fact that it had to be approached from the standpoint I have indicated, they went into every feature of the situation to ascertain whether there should be a prohibition against the diversion of waters, or whether there should not, and they considered the need of the State of Colorado, the use the water was made of there, the benefit it was, to some extent suggesting the benefit that is reflected from one State to the other if there is progress and business industry in a particular State—they considered, as I state, every feature from the standpoint of Colorado, and came to the conclusion that the waters were being put to their beneficial use and were building up substantial trade and industry there.

Then, on the other hand, they considered the standpoint of Kansas just in the same way. I can find nothing in this case which indicates that they had brought before them the question of the amount of waters afforded by other streams in Kansas, but if that question had been one that had been raised as against Kansas in this sense—that here while you are conducting the flow of this river through your State you are letting your own waters go to waste or you are not making the most beneficial use you can of them, so you are not getting that hum of industry which you could if you made proper use of them. All these things would have been considered.

Now, what do we do here? I venture to say that the negotiators of this treaty had in mind just the same situation as between Canada and the United States. Here the United States had away down in the valley of the Milk River an area of land—it is immaterial to consider whether it is possible in the future by new methods or by less expensive procedure or saving in water to determine whether they can irrigate a great many more acres, but at any rate at that

time the prime thing in the minds of the Americans was to have water to irrigate a tract of some 200,000 acres of land, and more if they could get it, of course. On the other hand, Canada had 750,000 acres of land situated in a desirable way for the purpose of irrigation and needing the water, and it had a right to use the water practically where those lands were situated, the St. Mary River rising in the United States being unable by any economic method to be tapped by the United States and carried over to its arid lands, but situated and running so that it was in perfect form for use on the Canadian side.

What did they do? They said: "Here, in this treaty we have dealt with boundary waters, we have fixed those up here; we have dealt with waters that cross the boundaries; they are fixed up. Now, here is another situation that must be dealt with, because in this we are not dealing merely with boundary waters, but we have a situation that has been present to the minds of people who have been anxious to settle it for some time, and that requires treatment on some basis that works out beneficial results for both countries. You have your arid lands; we have ours. We have a stream flowing north through our lands, and we have a stream that you are depending on, also flowing through Canada. What shall we do? Why, let us disregard that boundary line as to the amounts of these waters that are available; let us use all these waters. How? Equally between us. The only curtailment on that being that certain amounts shall be appropriated on one river in one country, and a certain equal amount on another river in the other country, to satisfy claims of persons who have liens or charters, so to speak, on that water; other than that, let us treat all those waters that we both have available in this whole area as though they were one water system, and let us have an equal apportionment."

Mr. Chairman, my submission is that that is what the treaty calls for.

Mr. CLARK. Just as a matter of personal curiosity, there is about 500,000 acres of your land there?

Mr. TILLEY. 700,000.

Mr. CLARK. How much of that land at the present time has been put under water?

Mr. TILLEY. I do not know.

Mr. DRAKE. 82,000 acres last year.

Mr. TILLEY. The trouble is that this scheme from the beginning has been more or less held up.

Mr. CLARK. I understand that.

Mr. TILLEY. It is a pressing question with us. It has been held back, which is a serious matter; and the threat that we may not get the water contemplated when the treaty was made is a much more serious matter.

Mr. CLARK. I understand that.

MR. BIEN'S MEMORANDUM.

Mr. MACINNES. Mr. Chairman, if you would allow me for one moment? You will remember Mr. Egleston asked permission to put in a written brief or memorandum on behalf, I understand, of the United States Reclamation Service. He has handed me a copy of it.

Most of it is argument based on certain articles of the treaty, which I think have been sufficiently dealt with by the arguments already presented to the commission. On two of the pages, however—the pages are not numbered—on pages 6, 7, and 8 there are certain statements of fact which I have had checked by the Canadian engineers, and they inform me that they are not correct and are not in accordance with the record. My learned friend, Mr. Egleston, has, therefore, altered one of these paragraphs so as to read "if the facts are so-and-so."

I would, however, suggest that it would leave the record in a very unsatisfactory position to have a hypothetical statement made with regard to the facts, when already there is a record which could be verified if my learned friend had some argument to base upon the facts. I would therefore ask that before this memorandum is put in, so far as any facts are concerned, that he should have them checked with the record and some reference given, as counsel would do if he were present, to support any such contention which is one of fact, not of law.

Mr. EGLESTON. If your honors please, it seems to me that the memorandum might go in now, with the objection of counsel for Canada, as stated; that is, that the objectionable part might go in for what it is worth, or be stricken out altogether if the Commission agrees with Col. MacInnes.

Mr. MAGRATH. What is the pleasure of the Commission?

Mr. EGLESTON. In the absence of Mr. Bien's authority to change his memorandum, I hesitate to make a change by striking out some matters which might be material to some other matters; but I made a change——

Mr. TURNER. May it please the Commission, I never heard of a memorandum being refused in argument because the other side say some facts are not stated correctly; that is for the tribunal to determine. Mr. Bien has appeared here before, and this is his memorandum, and under the very liberal rule that the Commission has indulged all of us in by receiving anything anyone wanted to put in, I think this memorandum ought to be received, even although my friend, Mr. MacInnes, does question some of the facts.

Sir WILLIAM HEARST. I would suggest that we might receive the argument as presented and that Mr. MacInnes might file a short memorandum challenging the accuracy of the statement of facts.

Mr. MACINNES. As to that, Sir William, the statement is put there as being a statement of certain facts, without any reference whatever to the record in support of it, which, as you know, is the usual way, either in oral or written argument.

Mr. POWELL. How many paragraphs does that apply to?

Mr. EGLESTON. It applies roughly to two pages.

Mr. POWELL. How would it do to put a postscript to that memorandum to this effect: The facts in the last two pages are not admitted by counsel for Canada?

Mr. EGLESTON. That is already stated in Col. MacInnes's objection.

Mr. MAGRATH. Will not the discussion that has just taken place be sufficient for your purposes?

Mr. MACINNES. Yes. I find in this memorandum not only certain arguments but certain alleged facts, which are not supported

by the records. In consenting in any way to the admission of this on the records, I wish to call particular attention to the contention of the Canadian side, that the record does not justify the statement so far as these facts are concerned.

Then another point that I might mention; it is a matter dealing with the record. It may be remembered that at St. Paul and at Detroit there was some reference to the question whether any of these tributaries were in Montana, and in Alberta or Saskatchewan. I think the matter first arose from some question put to the United States counsel by Mr. Justice Migneauly. The matter is again referred to by Senator Walsh and, I think, somewhere by myself. I understand from the maps and from the records that seems to have been an incorrect assumption on the part of everybody concerned that there are two tributaries of the Milk River which are in Alberta, and in Saskatchewan, and in Montana. I do not think it makes the slightest difference to the argument, either on one side or the other, but I just wish to call attention to it.

Sir WILLIAM HEARST. Senator Walsh made that statement in his argument the day before yesterday.

Mr. MACINNES. That is my recollection.

The following is the memorandum referred to by Mr. Egleston:

BRIEF BY MR. MORRIS BIEN ON THE DEFINITION OF BOUNDARY WATERS IN THE TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN, DATED JANUARY 11, 1909.

The contention of the United States is that the treaty confers upon the International Joint Commission jurisdiction of waters which if not interfered with would cross the boundary between the United States and Canada, and to no other waters.

Article VI of the treaty refers specifically to St. Mary and Milk Rivers and their tributaries, and this article is the principal one affecting the interests of the United States Reclamation Service, but no document such as this treaty can be properly construed by considering only one article. This is particularly true in the present case because the treaty as a preliminary in its earlier articles lays down certain general principles which must necessarily govern the interpretation of the entire treaty.

The preamble of the treaty is as follows:

> The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise have resolved to conclude a treaty in furtherance of these ends.

Thus the object of the treaty is definitely stated as the desire of both Governments "to prevent disputes regarding the use of boundary waters" and to settle all questions now pending or hereafter to arise involving rights, obligations, and interests along their common frontier.

The preliminary article of the treaty states:

> For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions

thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters, which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

This article defines boundary waters, which are the subject of the treaty, in substantially the following terms: The waters of lakes and rivers along which the international boundary passes but not including tributary waters which in their natural channels would flow into such water courses or the waters of rivers flowing across the boundary.

Article II provides that each party reserves to itself or to the several State governments on the one side and the Dominion or provincial governments on the other * * * "the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters."

Article VI deals directly with the St. Mary and Milk Rivers andtheir tributaries and in some respects is inconsistent with the definitions of boundary waters as stated in the preliminary article because that article excepts waters flowing across the boundary while the rivers to be considered under Article VI do in fact cross the boundary.

On the other hand, the fundamental purpose of the treaty stated in the preamble that the two Governments desire to prevent disputes regarding the use of boundary waters conclusively points to the fact that St. Mary and Milk Rivers and their tributaries to be considered under Article VI are boundary waters.

Article II contains similar inconsistencies in regard to Article VI, namely, in reserving to the State and provincial governments the exclusive jurisdiction and control over all waters on their own side of the line which in their natural channels would flow across the boundary or into boundary waters, because there are certain tributaries of Milk River which cross the boundary from Canada into the United States and certain tributaries in Montana, such as Swift Current Creek, which flows into St. Mary River, which crosses the boundary. Manifestly both of these classes of tributaries are within the purview of Article VI.

It thus appears that while the purpose of the treaty is to prevent disputes regarding the use of boundary waters and to settle questions along the common frontier, the definition of boundary waters in the preliminary article and the reservations regarding them in Article II are to a certain extent inconsistent with the evident intent of Article VI.

On the other hand, it is also clear that these inconsistencies can not be regarded as changing the fundamental purpose of the treaty which is to prevent disputes regarding the use of boundary waters and to settle questions along the common frontier.

Following the established rules of interpretation, it is evident, therefore, that Article VI must be construed as relating only to boundary waters, and that the definitions in the preliminary article and the reservations in Article II must be modified so far as necessary to relieve the treaty of inconsistencies in the several parts under consideration.

In other words, Article VI must be construed as relating to boundary waters considered in the light of the special conditions arising under Article VI, but in no event would there be authority to construe Article VI as referring to other than boundary waters, or to such waters as bear a direct relation to the boundary.

This is admittedly true in the case of the main stream of St. Mary and Milk Rivers and also of tributaries of St. Mary and Milk Rivers where the waters which they contribute to those rivers become boundary waters but could not be true of any waters tributary to the main streams which do not cross the boundary or which are in no way related to the waters which cross the boundary.

Therefore, it can not be properly contended that boundary waters can include those which rise in the State of Montana or those which rise in the Dominion of Canada, or its Provinces, and which do not flow into the main rivers at such places that their waters actually cross the boundary, because they have no connection with the boundary or with waters crossing the boundary. Such waters can not by the broadest interpretation be included in the definition of boundary waters in the treaty, and there is no warrant for modifying this definition except so far as necessarily arises from the specific language of Article VI.

It is believed that these inconsistencies exist because Article VI was inserted after the draft of the other articles had been agreed upon.

For fear of misunderstanding, attention is called to Article VIII which contains a reference to a requirement for equal division which may be suspended in certain cases. This provision evidently refers only to Articles 3 and 4 of the treaty because these articles are expressly named in the beginning of Article VIII and moreover the conditions regarding the equal division in Article VI are fully set forth in that article and would be interfered with in vital features, if there could be such a suspension of the equal division or other modifications as contemplated in Article VIII. In fact, other provisions of Article VIII show clearly that it was not intended to apply to Article VI, because the former article contains provisions in regard to the decisions of the commission, whereas Article X, which is not confined in its terms to any particular article and is manifestly intended to be general in application, also contains provisions on this subject.

That Article VI should be confined to waters which would cross the boundary is further shown by one of its essential provisions, namely, that which protects prior appropriations of 500 cubic feet per second of the waters of Milk River and of St. Mary River.

The prior appropriations along Milk River and its tributaries at the time of the conclusion of the treaty, except a few small appropriations aggregating probably less than 50 cubic feet per second, were all in use above where Dodson Dam was afterwards constructed by the United States.

If the main tributaries of Milk River in Montana which do not cross the boundary, referred to as the southern tributaries, enter the river below Dodson Dam, and if the waters of these tributaries are to be counted as part of the water supply to be allotted to the United States under this article, it might frequently happen that the water equal to 500 second-feet would be in Milk River below Dodson Dam on account of water flowing from the southern tributaries, and that

only a small part of such amount would be available for the canals which were entitled to this prior appropriation. In such case, the object of the article would be defeated, because under an interpretation which includes the southern tributaries, Canada could take all the waters of Milk River at the boundary which would otherwise pass to the inlets of those canals and be available to satisfy their prior rights and would leave no water for their prior rights, which the treaty definitely recognized up to 500 second-feet as the legal right of those canals, thus depriving them wholly of their legal water supply.

It is of course recognized that the waters of the southern tributaries below Dodson Dam are so located that it would be out of the question as a business proposition to make them available for the lands which were irrigated under these prior appropriations, because they are very much lower in altitude than the lands to be irrigated, namely, about 130 feet at the mouth of Peoples Creek and about 280 feet at the mouth of Beaver Creek.

Article VI intended to preserve rights which existed and to make available for the lands which had been previously irrigated and which depended upon these prior rights whatever waters there may be in the stream up to the amount of such prior appropriation, subject to the one-fourth deduction specified in the article. It must be remembered that these prior appropriators in Milk River Valley have no relation to the United States Government, as they constructed, operated, and maintained their canals by private funds long prior to the time when the United States Government undertook such irrigation enterprises. Therefore, the treaty must be construed in such a manner as to protect these prior appropriators and to secure for their lands whatever water may be flowing in Milk River at their headworks subject to the specific limitations of Article VI. Stated briefly, the waters which enter Milk River below the headworks of the old private canals can not be used to satisfy their prior appropriations and nearly all the waters of the southern tributaries enter the river below their headworks.

In the laws of the United States regarding the International Joint Commission the treaty is described as the treaty between the United States and Great Britain concerning boundary waters between the United States and Canada.

In the legislation of the Dominion of Canada establishing the International Joint Commission (ch. 28, 1–2 George V) assented to May 19, 1911, the treaty is similarly described.

The third section of that act provides for enforcing the rules laid down by the treaty in regard to interference with waters in Canada to the injury of the rights in the United States. This section defines the waters affected in the following manner:

> Waters in Canada which in their natural channels would flow across the boundary between Canada and the United States or into boundary waters (as defined in the said treaty).

This shows clearly the view of the Parliament of the Dominion regarding the boundary waters affected by the treaty, as being those along the boundary or those which in their natural channels would flow across the boundary.

SUMMARY.

It thus appears that the contention of the United States that the waters to be considered by the International Joint Commission are those in streams or bodies of water that lie along the boundary or the waters which in their natural channels would flow across the boundary is sustained by the three branches of this discussion:

(*a*) The definition of boundary waters in the preamble and the preliminary article as necessarily modified by reason of the terms of Article VI.

(*b*) The provisions of Article VI regarding prior appropriated waters which can not be supplied from any tributaries of Milk River which do not cross the boundary.

(*c*) The contemporaneous interpretation of the term boundary waters by the legislation of the Parliament of Canada.

ARGUMENT IN REPLY BY MR. TURNER, COUNSEL FOR THE UNITED STATES GOVERNMENT.

Mr. TURNER. Mr. Chairman, this is the third argument of this matter before the Commission, and I venture to express the hope that the Commission will be able to take it up at an early date and dispose of it, because of the importance to both sections of the international boundary of having their rights under this treaty determined, so that the enterprises there may not be longer held up.

I also venture to express the hope that in the determination of the questions which are presented here, the members of the Commission will be able to disassociate from the consideration of the questions any feeling of national bias. This is really the first attempt, so far as I know, in the history of nations, in which two nations have established a tribunal, composed equally of their own nationals, for the purpose of determining questions between them, and it would be unfortunate if the Commission were to be divided on questions like this or any other questions involving interests of the two countries on national lines. So far as I am concerned, I would like the American commissioners, if they believe the contention of the United States not to be well founded, to join in a decision to that effect, and from what I know of the character of the gentlemen on the commission representing the Dominion of Canada, I have every confidence that they in turn, in considering the matter, will be able to disassociate themselves from any feeling of national bias.

I read the arguments of Col. MacInnes at St. Paul and at Detroit with a great deal of admiration, and I conceived that he was not only a very able man but a very ingenious and resourceful man, and he certainly proved that in his argument here to-day. To paraphrase the language of Col. Roosevelt, I felt that his spear had no brother; but after hearing my friend Tilley, I think he is a pretty good second to Col. MacInnes. Both of them made very strong and masterful arguments, and I have no doubt that they have pressed them in the sincere belief that they are valid arguments, and that they ought to be conclusive of the questions in this case. Yet I feel that there are very great infirmities in those arguments, and when I call attention to them—and I can only do so in a very few words because my time is limited—I feel that this tribunal will at once

recognize those infirmities and decide this case upon the solid foundation presented in the arguments of the United States.

Col. MacInnes first called attention to the fact that in my argument I had not noticed that provision in Article VI which provides that the two rivers shall be treated as one river. I did not notice that because I did not feel that it threw any light at all upon the true construction of the treaty.

The expression, of course, is metaphorical. The rivers are to be considered as one river for the purposes of division just as if the waters of the two rivers could be turned into one channel. That is all that it means. It does not carry any implication that these waters are to be considered from the standpoint of the watersheds or systems of the two rivers; it is merely an expression used, and a very appropriate expression indeed, to show that the waters were intended to be thrown into hodgepodge and to be divided equally between the two countries except as to the special priorities given to the two countries during the irrigation season.

It is as if the arbitrators had been dealing with only one river; the same question as to tributaries which were appurtenant to that river within the meaning of this treaty would rise just as if no expression had been used about considering the two rivers as one river. I am utterly unable to appreciate anything in the idea advanced, that there is any meaning to be given to the fact that these two rivers are to be treated as one river in fixing what particular tributaries they intended should be included among the tributaries to be divided.

Col. MacInnes also said that I had not noticed in my argument the question of beneficial use. I failed to note that because I could not see that it had any application to the questions we were arguing here. There is only one place in Article VI where beneficial use is mentioned, and that is in this connection:

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

If there is to be daily, or weekly, or monthly division or apportionment, it is provided for in the last clause of the article:

> The measurement and apportionment of the water to be used by each country shall from time to time be made jointly by the properly constituted reclamation officers of the United States and the properly constituted irrigation officers of His Majesty under the direction of the International Joint Commission.

If at any time the reclamation officers see that a beneficial use can be made of the waters in one country without detriment to the other country, they may then apportion for the time being a larger part of the waters to that particular country. It does not mean that we are going to take into consideration the question of the ultimate needs of the two countries for irrigation, it does not mean that we are to look at the amount of irrigable lands on either side of these rivers, and base our judgment as to the construction of this treaty upon that fact. It is merely providing for a contingency which the treaty makers saw might arise, namely, when there might for the time being be a sufficiency of water on the one side, so that it did not need its full quota of water, which would permit a larger quantity to be allotted by these measuring officers to the other side. That is the only connection in which the words "beneficial use" are applied

in this treaty. I am therefore utterly unable to see why I should have made any exposition of that expression in my argument concerning the construction of this treaty.

Mr. POWELL. That is, the expression "beneficial use" is equivalent to the best advantage?

Mr. TURNER. Yes; to apportion from time to time to the best advantage, as it may be more beneficially used in one country than in the other, leaving, of course, the inequality to be made up later by a larger apportionment to the other country when it can de done without detriment to any particular interest.

Mr. POWELL. It might apply the water to power wheels as well as to land?

Mr. TURNER. Yes, sir, it might.

Now, it is undoubtedly true that the use of the Milk River for the conduct of the stored waters of the St. Mary River to the lower Milk River Valley is of considerable value to the United States; but it is not to the detriment of Canada when you consider the fact that the channel of that river is there all the time and that it is empty most of the time; so it is not a very great concession on the part of Canada that the United States shall be permitted to use the channel for the conveyance of stored waters. From Mr. Root's first proposal you will see that in return for the comity which the United States was indulging Canada in in agreeing to a division of these common waters, Canada was asked to permit the passage of the stored waters down the Milk River channel to the lower Milk River Valley. While Canada dilated in a number of its memoranda on the great value of that concession to the United States, it was never denied to the United States, and it was a concession made to the United States out of comity by Canada—just as the concession that these common waters which the United States might have absorbed if she had been regardless of the duties of comity to a neighboring country, might be divided, was a return by the United States for that concession. It is a fact that these waters had no international status, and that the country in which they rise and flow, so far as international law is concerned, might monopolize their entire use. The other country would have a right to complain, as a matter of comity, but would have no right to complain that any principle of international law was being violated to its detriment. Therefore, it was a matter of comity on both sides—comity on the part of the United States in agreeing to a division of the waters, comity on the part of Canada in agreeing that this gash in the earth—which she could not close up if she wanted to—be used for the transmission of these waters to the lower Milk River Valley.

And so far from that imposing any great obligation upon the Dominion of Canada, I think that the banks and channels would be preserved in a better condition by a stream flowing down there constantly than to permit them to become friable under the influence of the sun for three or four months, and then to be filled by a tremendous flood stream and scoured out. The constant flow of water in the channel of the Milk River is beneficial rather than the contrary to the Dominion. The bed of the river would suffer less than if the flood waters were permitted to go down there and scour it out and erode the banks every spring.

Now, both Col. MacInnes and my friend Mr. Tilley have undertaken to show by a reference to the historical records here that these Montana tributaries were necessarily and impliedly considered by both parties as within the waters to be divided. I think the idea that they were to adopt the plan of considering all the waters flowing from all the watersheds on either side of the boundary into these rivers is a new idea. I do not remember that it was broached either at St. Paul or at Detroit. It is a new argument, but an untenable argument, because the documents referred to by them do not bear out that contention. Almost every document referred to by either one of the gentlemen in support of that bears upon its face irrefragible evidence that the parties were considering only these waters that flowed across the boundary and were common therefore to the two countries.

My learned friend tried to make something out of Secretary Hay's letter found on page 61. In order to understand what Secretary Hay is talking about, we must understand what he is addressing himself to, and he was addressing himself here to a complaint by the Privy Council that the United States was considering a project to divert the waters from the St. Mary River to the detriment of the settlers on the other side of the line, and a part of his letter quoted by my friend had reference to that matter. The Secretary said:

> In the present case the intention is clearly expressed to avoid all interference with the amount of water to which the Canadian canal on the Milk River may be entitled. The engineer in charge of the work in Montana made a careful investigation of the river with a view to determining the amount of water to which claim might properly be advanced in Canada, and it is the intention of the Reclamation Service, in its recommendation to the Interior Department concerning this project, to make as full provision for the protection of any prior vested rights to water along the Milk River in Canada as it would make if the river were wholly within the boundaries of the United States and the rights of the citizens of this country only were under consideration.

Now, counsel deduces from this language of Secretary Hay that they were to throw all these waters into a common pot and consider all of these prior rights on either side of the boundary. All Secretary Hay is referring to here is that in the diversion of the St. Mary River made by the Reclamation Service under its project they would scrupulously respect the rights that had grown up on the other side by not taking all the water, but by leaving enough water to flow across the boundary to meet the engagements of Canada with respect to those private rights. It takes a very ingenious mind indeed, one that is exceedingly resourceful, to find in this language of Secretary Hay any indication that the United States intended to join with Canada in considering all of these water systems, as common waters, to be applied to the appropriations in the two countries according to their respective priorities.

Then counsel referred to a further letter from Secretary Hay on page 63. Secretary Hay in this is the objecting party; he is now objecting to the canal which Canada had made for the diversion of the waters of the Milk River, and speaking about that he says:

> The engineers of the Reclamation Service of the Interior Department of the United States believe it possible for the two Governments to make an arrangement whereby the rights of the settlers within the domain of the United States will be preserved and at the same time the water necessary to supply the canal built by the Canadian Northwest Irrigation Co. will be provided.

The engineers report that the waters of the St. Mary River which flow northward into Canadian territory are now being utilized to only a small extent, and they state that it is practicable to store these waters in the United States, conduct them by a canal on the southern side of the international boundary line to the head of the Milk River, and there turn them into the Milk River, so as to increase the ordinary flow of that river and furnish a supply of water for lands in the Milk River Valley in the United States. Under this arrangement the prior rights of the Canadian settlers on the St. Marys River would be protected by permitting its ordinary flow to continue to pass into Canadian territory, and at the same time the great volume of flood water which passes down that river destroying property along its banks would be restrained within the United States and diverted to the head waters of the Milk River, and be put to beneficial use in the lower Milk River Valley in the United States.

Now, I do gather from this language that Secretary Hay at this time had a much more generous view with respect to the sharing of the waters of the St. Mary River than was later entertained by the officers of the United States, because he says that outside of the flood waters, which the United States are to store, the ordinary flow of the St. Mary River is to be permitted to cross over into Canada for the benefit of the settlers. But where can there be found any indication on the face of this letter of Secretary Hay of an intention to treat these entire two rivers and their systems from the source to the mouth as one system to be divided for the benefit of both countries, equally between the two countries? It is utterly impossible for me to see any such implication, and I think when the commissioners come to read this letter for themselves, they will find there is not any implication of the kind.

The next document dealt with is Secretary Root's proposal for a treaty, and my friends find all sorts of inferences in that of a purpose to throw both these rivers, and all their tributaries, from the source to the mouth into one common pot. If there is any document in this case that evidences directly the contrary, it is this letter of Secretary Root's. The letter starts out with a statement which qualifies every proposal made by Secretary Root. In the first paragraph he states:

With a view to bringing to a determination the questions so long discussed relating to the use of the waters of the St. Mary River and the Milk River which flow across the forty-ninth parallel boundary between the United States and Canada, I beg to offer the following suggestions for a basis of a treaty for the equitable apportionment of those waters.

Now, everything that Secretary Root is talking about later refers to those waters that cross the forty-ninth parallel boundary between the two countries. Yet our friends have gone through this draft and picked up a stray allusion to the river here, and a stray allusion to the river system there, and, because the Secretary did not again qualify those allusions by saying, that his reference was to waters that cross the boundary, they stretch those allusions into an implication that he considered the flow of all of the waters of the two river systems and proposed the division of them between the two countries. They find that particularly in the ninth clause, in which Senator Root says:

The share of the United States shall in any event include so much of the available natural flow of the Milk River as shall be judicially determined as having been applied to beneficial use on or before November 1, 1905, by the canal systems taking water from the lower Milk River in Montana, the same to be measured at the intakes of said canal systems; and whenever one-half of the natural flow of Milk shall be less than such amount, measured as aforesaid, the share of Canada shall be diminished so

that said country shall receive of the natural flow of the entire Milk River system only the excess, if any, beyond such amount of decreed beneficial use.

Great stress is laid upon the use here by Secretary Root of the "Milk River system," as if this were an alternative situation in which, first referring to the waters that cross the boundary, he had then thrown down all the bars, and in this particular situation had proposed that they divide up all the waters between the two countries, common as well as those belonging wholly to the United States. But fortunately we have that same expression used by Secretary Root in the second paragraph here. After having offered this plan for a treaty for the equitable apportionment of those waters—that is, the waters that cross the boundary—the next clause says:

It is hereby agreed between the Governments of the United States and Great Britain that the waters of the Milk River and the St. Mary River and their tributaries shall be apportioned in perpetuity for use in the two countries according to the following stipulations and agreements:

1. That for the purposes of this agreement the St. Mary River and the Milk River and their tributaries, which are now separate and independent river systems, shall be treated as though they were the waterways of a single drainage system.

Certainly, that is as large an expression as the expression used in section 9 where he speaks of the Milk River system. He speaks there of the Milk River system, and in the second paragraph he speaks of the waterways as a single drainage system. Now, manifestly, where he uses the expression he uses it with reference to the waters that cross the boundary, because he had just before spoken about his plan as being one for the division of the waters crossing the boundary between the two countries.

Lawyers and statesmen drawing legal documents and statutes and treaties would never get through with the wording of a statute, or a contract, or a treaty, if they were to undertake to qualify the same expression every time they used it—their work would be interminable. Having expressed in the first paragraph here that his plan was for the division of these waters that crossed the forty-ninth parallel boundary between the two countries, Secretary Root naturally had a right to assume that everybody would see that in what he said later about these rivers and river systems he referred to the waters described by him in the first paragraph of his draft plan.

But, gentlemen, when you come to look at the apportionment of these waters, made by Secretary Root in paragraph 5, you will see that he expressly mentions every character of water to be divided, including the rivers and tributaries, in the United States before the rivers cross the boundary, the tributaries in Canada, the Milk River before it crosses the boundary, the tributaries in Canada that themselves cross the boundary before they join the Milk River; but nowhere does he provide for the division of these intrastate Montana waters. There could not be a clearer and more explicit statement of his purpose than is found in the method in which he proposes to divide these waters. He proposes that the United States shall take:

(*a*) All water of the St. Mary River and its tributaries diverted in the United States for use in its territory and not delivered into Milk River or its tributaries.

(*b*) All water of Milk River and its tributaries diverted in the United States for use in its territory above the crossing of such streams into Canada.

(c) All water of Milk River (including stores water of the St. Mary River turned into it), not in excess of 2,000 cubic feet per second, flowing into the United States at the eastern Milk River crossing of the international boundary.

These are all the waters that the United States is to get under this proposed division by Secretary Root, and he describes all of the waters which the United States now say are within this treaty, and these do not include the tributaries of the Milk River rising and flowing in the State of Montana. Nor are they mentioned in the portion of the waters given to Canada:

The share to which Canada is entitled shall be the total of the following items:
(d) All waters of St. Mary River crossing the international boundary into Canada, not in excess of 2,000 cubic feet per second.
(e) All water of Milk River and its tributaries diverted in Canada for use in its territory, excluding any waters of St. Mary River turned into Milk River by Canada and which has been measured under item (d)."

These are all the waters that Canada is to get. By no possible implication can it be said to include these intrastate Montana tributaries. We have here all the waters that Secretary Root proposes to divide, and he proposes to divide all the waters except these intrastate Montana tributaries. How in the world is it possible to take this letter to Secretary Root and read it, forward or backward or crosswise or in any other way, and find any kind of an implication from it that Secretary Root intended to turn all of the waters of the entire drainage system of these two rivers into a common pot to be divided between the two countries?

The eagerness with which our friends just jump onto a little expression like "the drainage systems of the two rivers" or "the entire water system of the two rivers" and oppose it to every positive statement made in the letter concerning the character of the waters intended to be divided, and the particular description of the waters, is a little remarkable to me, and shows the extremities to which they have been compelled to resort to to maintain the contention which Canada has made here, that it is entitled for the purposes of the division of these waters to have these tributaries included in the waters to be apportioned and divided. It made me think of the famous case of Bardell *v.* Pickwick. Mr. Pickwick, intending to come here late at night, telegraphed his landlady, "Home to-night. Chops and tomato sauce." Mrs. Bardell afterwards sued Pickwick for breach of promise of marriage, and this telegram is the principal evidence in the case, and Sergt. Buzfuz at the trial addressed the jury in this way, "Gentlemen of the jury, look at this telegram, 'Chops and tomato sauce.' Gracious Heavens, are the affections of a lone and unprotected female to be trifled with in this manner?" Here our friends say "river systems, river drainage systems"—"My God, is Canada to be done out of water that it is entitled to by this declaration of Root's, that the waters to be divided are those that cross the boundary? Can it be that he meant to include only the specific waters that he named when he used the expression "the drainage systems of the two rivers"? It is impossible for anybody to read this letter of Secretary Root's with an honest mind and reach the conclusion that he meant anything else.

Then my learned friend, Col. MacInnes, found something in Mr. Walcott's letter on page 75, which satisfied him of the purpose to

include all the waters of these rivers and their tributaries from the mouth to the source. Mr. Walcott said in this letter:

I have the honor to acknowledge by reference from the department dated March 3, for report in duplicate and return of papers, a letter from the Acting Commissioner of the Office of Indian Affairs, dated February 29, transmitting a communication from W. R. Logan, United States Indian Agent, dated February 19, and a letter from Mr. W. B. Sands, dated February 7.

This correspondence calls attention to the fact that the Canadian canal is being constructed to divert water from Milk River, and this will injure the property of the Government, particularly the irrigation system upon Fort Belknap Reservation. The matter is one of great importance to the Government, as well as to the people of Montana, and I respectfully recommend that, as suggested in other letters, the matter be taken up through the Department of State.

This is simply one of the stock letters which are written upon both sides by Government officials when complaint is made to them by settlers on contemplated diversions which may operate to their detriment. How it carries any implication for the purpose for which it is read passes my comprehension.

Mr. MACINNES. I do not want to interrupt my learned friend, but he will remember that I stated to Mr. Commissioner Powell, who was asking me in regard to this letter, that I was reading that particular letter more as a matter of interest and in connection with those points of intake in southern Montana than in connection with the argument as to the inclusion of all the rivers and tributaries.

Mr. TURNER. All it relates to is the receipt of letters from private parties fearing they will be injured by the diversions which Canada contemplated taking out of the Milk River. It says nothing about Montana tributaries, but shows a lively interest in the waters flowing down from Canada, which Canada might very well have said she would take, if she could, and which she was prepared to take by her diversion of the canal.

Then he passes on to Mr. King's first communication on page 81, after he had been appointed.

Mr. POWELL. Before you go there, Senator, I would like to ask you a question. Taking the Root proposal, in paragraph 1 of page 65, Mr. Root propsed:

That for the purposes of this agreement the St. Mary River and the Milk River and their tributaries, which are now separate and independent river systems, shall be treated as though they were the waterways of a single drainage system.

Do you treat "river systems" there as equivalent to the term "Milk and St. Mary Rivers and their tributaries which cross the boundary"?

Mr. TURNER. That is what Secretary Root said in the paragraph immediately preceding the paragraph you quote.

Mr. POWELL. You carry that back?

Mr. TURNER. It is impossible that Secretary Root could have written that paragraph in any other sense, because it follows the one in which he says:

I make this proposal for the purpose of settling the division of the waters which cross the 49th parallel boundary between the two countries.

Then he goes on to say that they shall constitute one drainage system.

Mr. POWELL. And your idea is that whenever the term "river system" is used it has as its antecedents "the waters of the rivers crossing the boundary"?

Mr. TURNER. Manifestly that must be so, unless you expect Mr. Root to qualify that expression every time he used it, and that is unreasonable; nobody does that.

With a view to bringing to a determination the questions so long discussed relating to the use of the waters of the St. Mary River and the Milk River which flow across the forty-ninth parallel boundary between the United States and Canada, I beg to offer the following suggestions for a basis of a treaty for the equitable apportionment of those waters.

Everything he offers later on is for the equitable apportionment of those waters, and those are the waters that cross the forty-ninth parallel boundary. I fortify that by showing that he then proceeds to describe the particular waters which he has in mind, and he describes all of the waters here except these intrastate waters flowing in the State of Montana.

Now, in this letter of Mr. King's of April 27, 1908, after speaking of the necessity of some agreement, he says:

Such agreement, it is believed, to secure acceptance by the people of both countries, and to fulfill its purpose of obviating all possible future contentions, can best be based upon the principle of equal sharing of benefits to be derived from these international rivers, due regard being had to existing rights.

Was Mr. King here speaking about throwing these two rivers and their tributaries into a common system from their mouth to their source to be divided between the two countries? What does he mean by "these international rivers" unless he means the rivers that cross the boundary? But our friends did not read that. They read other portions of his letter from which it was thought that a deduction might be made that he understood that these Montana tributaries were included. But I find another evidence that Mr. King did not have any such idea in his mind in the third paragraph on the top of page 82. Speaking about the proposal of Secretary Root to give each an equal amount of water, one of them from the Milk River and the other from the St. Mary River, he said that that would not be an equal division because:

The average five years' flow during the storage period of the proposal (Oct. 1 to Mar. 1) of the St. Mary River at the international boundary was 132,629 acre-feet, while the average of nine years' flow of Milk River at Havre was 47,789 acre-feet. (The amount at the intake of the Canadian canal would be much less than this.)

He refers there to the measurement at Havre, because evidently that was the only measurement then of which they could get any idea of the flow. To show he was only referring to the amount of water that could be taken out while the Milk River was in Canada, he says, "The amount at the intake of the Canadian canal would be much less than this." If he had in mind this 422,000 acre-feet, that is the flow of the intra-State tributaries of Montana, he would not have found this inequality between the St. Mary River and the Milk River, and he objects to this apportionment of quantity of water from the two rivers because he says that the 2,000 feet given to Canada in the Milk River is not there, that there is not over a quarter as much there as flows in the St. Mary River. But that inequality would be wholly made up if, when he was talking here about the division of these waters, he had in his mind the 422,000 acre-feet flowing entirely in the State of Montana.

Mr. POWELL. How much was it that year?

Mr. TURNER. 47,789 as against 132,629 feet flowing in the St. Mary River.

This, I believe, is the part of Mr. King's letter to which particular implication is attached:

As is set forth in the minute of council previously referred to, the operations of the Alberta Railway & Irrigation Co. have been in pursuance of a consistent plan dating back many years. Their project contemplates the application to a certain tract of the water which they have been authorized under the irrigation act to take.

This authorization was not an improvident one, nor given without previous careful consideration. Before it was given, the fact had been ascertained by surveys made by the Government and the company that the authorized quantity of water could be applied beneficially and without waste. The company have prosecuted their works under their authorization with due diligence.

In these circumstances it is believed that under the laws as to reclamation of arid lands in force in Canada, as well as in many States of the Union, including Montana, the beneficial use by the company would begin at the initiation of the project, and that the amount of water beneficially used would be determined by the courts as equal to the amount authorized, and thereby recorded against the stream.

Again, I am unable to see anything in this language indicating that Mr. King intended to take in these Montana tributaries. It is true he refers to the prior rights of those appropriating waters in Canada and believes they would be recognized by the courts of the United States as well as the courts of Canada if they were in the United States; but it is the greatest stretch of imagination to say that these letters bear at all upon the question which we are now discussing. So far as it bears on it at all, it shows that Mr. King was talking about what he calls international waters, and proposing a division of those waters on a basis that would not include the Montana tributaries.

Then by some dexterity which I am unable to follow in reading this letter of Mr. Newell's—his first reply to Mr. King—they find some implication in that letter that Mr. Newell had an idea that all these waters were to be thrown into a common system and divided without reference to where they rise or where they flow.

Mr. Newell is discussing the proposition made by Mr. King. Mr. King's first proposition was:

That the excess flow of St. Mary River during the last-mentioned period above 1,400 second-feet shall be divided equally between the two countries.

And Mr. Newell said:

This can not be accepted, as it practically amounts to saying that after Canada has taken the best part of the stream—in all, four or five times the amount now being used—then what is left, if any, may be divided. The only proposition that seems fair is that the flow shall be divided and then Canada may fill the vested priorities out of her half.

The fourth proposition of Mr. King was—

That the United States shall be entitled to all the water in Milk River during the months of January, February, March, August, September, October, November, and December of each year.

Mr. Newell says:

These are the months when the river is frozen in whole or part or is nearly dry following the spring flood, and is the period when irrigation is practically impossible. This concession is therefore of little practical value.

Mr. King's fifth proposal was—

That Canada shall be entitled to divert from the natural flow of Milk River to the present capacity of the Canadian Milk River Canal, agreed upon as being 330 second-

feet, during the months of April, May, June, and July in each year, subject to the rights of appropriation from the Milk River within the territory of the United States as existing at the date of the Canadian company's appropriation on Milk River (23d Oct., 1902) and now being judicially determined in the courts of Montana.

That shows very conclusively what Mr. King is referring to, and that he referred to nothing but the waters that cross the boundary. Canada is to be permitted to divert at its canal in Canada 340 second-feet, subject to the vested rights of prior locators in the State of Montana. Now, if this 420,000 acre-feet was in his mind, it would furnish ample water for these local proprietors in Montana without making this right of Canada to divert 340 second-feet from the Milk River in Canada dependent upon the prior rights of the American appropriators. And Mr. Newell very properly says in reference to that:

This proposal, as understood, gives the United States, during April to July, inclusive, 360 second-feet, then Canada 330 second-feet. This seems to be fair and in line with the principles which it is desired to follow.

That is, this 330 second-feet which Canada is to have is to be after the waters of the river coming down from the boundary have supplied the prior rights in the Milk River Valley, because it is subject to the prior rights of the settlers in the Milk River Valley.

Now, Mr. Newell makes his new proposal:

Referring back to proposal No. 2, it is assumed that the Canadian St. Mary Canal has now a capacity of, say, 385 second-feet of water which it is putting to beneficial use. Calling this 400 second-feet, this may be considered a prior appropriation which is now earned. Let this amount be conceded, and after this is assured let the United States have an equal amount. Then Canada take, say, 200 or 400 second-feet more and the United States an equal amount, and so on, until the available flow is absorbed, by recognizing the rights first of Canada and then of the United States to an equal amount. This will protect the prior rights in Canada in the same way that proposal 5 protects those on Milk River in the United States.

Then my friend comes to Mr. Campbell's draft. And how it is possible to read that draft and make out any implication that Mr. Campbell had any waters in his mind except those crossing the boundary, it is impossible for any one to see. In all of the five paragraphs he speaks about waters crossing the international boundary, in every one of them, and in all of the paragraphs wherein he speaks of the division, he speaks of the division of those waters being equal between the two countries. And Mr. Newell in his preceding project, dated on the same day as Mr. Campbell's, is equally definite in that matter. He states:

That the waters of each stream flowing across the international boundary shall be divided equally in quantity as nearly as practicable between the two countries; that is to say, the waters of St. Mary River and its tributaries crossing the international boundary shall be measured as they cross the boundary and an equal amount apportioned to each country, due allowance being made for the quantity stored above the point of measurement in reservoir or reservoirs constructed by the United States; also the waters of the north and south branches of Milk River shall be measured where they cross from the United States into Canada, and the main Milk River and its tributaries measured where they cross from Canada into the United States, allowance being made for any water diverted or stored in either country before reaching the points of measurement.

Mr. POWELL. What date is that?

Mr. TURNER. December 29, 1908.

That brings us up to the two drafts, one by Mr. Gibbons and the other by Mr. Anderson, the draft of Mr. Gibbons being general and

not qualifying the use of the word "tributaries" as is done in all of these other drafts and communications, and that of Mr. Anderson practically qualifying it in identically the same way.

After having read these particular communications to which I have referred, Mr. MacInnes addresses himself to the question of the right of the Commission to consider the evidence of the negotiations which is here found in the record, and he takes issue with the proposition that the result of the Canadian contention is absurd, extraordinary, and inadmissible. I showed the Commission by references to the testimony that this contention would lead to giving Canada three-quarters of these international waters, and the United States one-quarter, and considering the idiosyncracies of the Milk River that it would lead to giving Canada four-fifths of the dependable waters of these streams and the United States one-fifth.

If that is not a most remarkable, and extravagant, and absurd result to be brought about out of a convention intended to secure to the two countries an equal division of these waters, then I do not know what is extravagant, extraordinary, and absurd. And what I say is based on what the evidence shows as to the waters actually flowing into the Milk River from these Montana tributaries. When you take the testimony of Mr. Sands and Mr. Bien and find that a great volume of waters originate on the watersheds of these mountains and is absorbed by the settlers in the valleys of those mountains, not one drop of which ever enters into the Milk River, and that those waters, added to the waters that do actually enter into the Milk River, would amount to more than the entire flow of the St. Mary and the Milk River without them, we have a still more extraordinary and absurd result reached by their contention, because if their contention is good, it must take in all of the tributaries of the Milk River in the State of Montana, and all these tributaries in the upper reaches which are diverted and used by settlers must be computed as a part of the flow of the Milk River to be divided between the two countries. Mr. Sands presented that very graphically when he said that if that contention were sustained it would be necessary for the United States, if it carried out this idea of an equal division of the waters of these two rivers, to get some of this water back uphill into Canada in order to make the position even. That is an actual fact.

Now, I want to say a word on Mr. MacInnes's proposition that these prior appropriations to be given to each of the two countries are exclusive and to be read in the sense of a prior appropriation made by settlers upon one of these rivers or the tributaries, who is entitled to that water and not required to make compensation to anybody else for the water thus appropriated by him.

The provision is, of course, that each country shall have a prior appropriation of water during the irrigation season for a certain amount. Manifestly, the gentlemen who wrote the treaty did not have in mind any question about priority of rights by reason of location. They used the term "appropriation" as in the sense of a prior right of so much to this Government and so much to the other Government, and that was an exceptional provision which necessarily did not displace the prior provision providing for an equality in the division of these waters. The very first command in Article

VI is: "And the waters thereof shall be apportioned equally between the two countries." Then they go on to make provision for this prior right of water in each country in the two streams during the irrigating period. Manifestly, that does not displace the command that the waters shall be equally divided; and after that priority has been provided for, then necessarily the other country is entitled to an equal amount of water in order to restore the equality of division. What was this priority given for? It was given with the idea that there might be a shortage of water at some time, particularly during the irrigation season, and that therefore the country should have a right to the first use of so much of the water. That is the sense in which appropriation is mentioned, a right to the use of so much of that water during the irrigating season, a right, however, which did not displace the command of equality. Therefore, after that prior right had been filled, the equality required by the treaty must be restored by giving to the other country enough water to equal this prior use provided for during the irrigating season.

In this connection I want to advert again to the question of the quantity of water which this priority gave. The treaty says that they shall have this—

prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow.

What meaning is to be attached to the word "or"? They shall have "a prior right to 500 second-feet of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow." The natural meaning of "or" is that it is an alternative particle, and the first thought in connection with its use here is that it is used in the alternative, that they shall each of them have this 500 second-feet in the respective rivers, or, if there is not that much, then they shall have three-quarters of whatever there is.

But that leads to a manifest absurdity. If there is 499 second-feet, under that reading of the word "or" the water is to be divided, three-quarters to one and one-quarter to the other; whereas, if there is 501 second-feet, Canada would get the entire 500 second-feet and the United States 1 second-foot. So I say that to consider the word as an alternative would be to make it result in an absurdity.

There is another meaning which the courts give to the word "or," as meaning, "to wit," "that is to say," in explanation of the part of the sentence that has preceded it, and a sense which brings that which has preceded it into consonance with that which followed it. I insist that we must read it in that way here: "Shall be entitled to 500 second-feet; that is to say, to three-quarters of 500 second-feet."

If that be true, then Canada's priority is 325 second-feet, or three-quarters of 500 second-feet; the United States is entitled to the other 125 second-feet. Then if the equality is to be restored by giving the United States as much water as Canada has got, as the result of this priority, you must give the United States 250 second-feet more, which gives her 375 second-feet, thus equalizing the 375 second-feet given to Canada. It seems to me that that is the logical application of the words used by the treaty makers.

It is rather an absurd situation altogether for these great men who write such splendid English to put an involved and obscure clause

like this in the treaty. "Five hundred second-feet or three-quarters of 500 second-feet." What would any ordinary man think that meant? He would think that that meant an alternative. But the alternative leads to the absurdity, as I say, that if there is 500 second-feet Canada gets it all, whereas, if there is only 499 second-feet Canada gets three-quarters and the United States one-quarter.

Mr. POWELL. You are overlooking, I think, Senator, some words that are there.

Mr. TURNER. No; I do not think so. I am eliminating some words that I think are unnecessary.

Mr. POWELL. "Shall be entitled to a prior appropriation of 500 second-feet, or so much of that quantity as shall equal three-quarters of the natural flow of the stream."

Mr. TURNER. Or so much of the understood amount——

Mr. POWELL. Yes.

Mr. TURNER. As constitutes three-fourths of the natural flow. That can not mean anything else than three-fourths of the natural flow if it is less than 500 feet, can it?

Mr. POWELL. It is what the man is entitled to. That means that the country is entitled to three-quarters of that flow up until the preference reaches 500 feet, and then it ceases.

Mr. TURNER. I do not know where you get that, because that means that Canada shall be entitled to three-quarters of 667 feet.

Mr. POWELL. That is it, exactly.

Mr. TURNER. Whereas the treaty says that Canada shall be entitled to three-quarters of 500 feet, which is 375 feet.

Mr. POWELL. It does not say three-quarters of 500 feet.

Mr. TURNER. I can not read it in any other way. "The United States shall be entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount"—so much of 500 feet—"as constitutes three-fourths of its natural flow."

Mr. POWELL. That is, that portion of the 500 which equals three-quarters of the flow.

Mr. TURNER. I want to find out where anybody takes 667 as the starting point for the computation. You have 500 feet as the starting point for dividing the waters. In that case one gets 375 and the other 125. But where you get 667 as your starting point it is impossible for me to say, except you get it as an arbitrary figure.

Sir WILLIAM HEARST. Read it the other way, Senator Turner, that the prior appropriation is three-quarters of the natural flow, but limited to 500 feet—that is the maximum.

Mr. TURNER. Suppose we strike out the 500 feet and say, three-quarters of its natural flow up to 500 feet?

Mr. POWELL. Not a flow of 500 feet, but the apportionment of 500 feet.

Mr. TURNER. They shall be entitled to a prior appropriation of three-quarters of the natural flow up to 500 feet.

Mr. POWELL. Such appropriation not to exceed 500 feet.

Sir WILLIAM HEARST. Such appropriation in no event to be more than 500 feet.

Mr. TURNER. It does not say that. It says that it shall be three-quarters of the natural flow, 500 feet. They do use the term "500 second-feet" in the first part of this sentence, but it is qualified, as

I say, by the use of the word "or," which must be read as a qualifying particle rather than as an alternative particle, and means that up to 500 feet each of the two countries is to have its share, the United States one-quarter and Canada three-quarters.

Mr. CLARK. Take this construction, that they are entitled to a prior appropriation of 500 cubic feet, provided three-quarters of the natural flow amounts to 500 cubic feet.

Mr. TURNER. It is possible to give it that construction, although it is a very strained construction. But I pass on.

Now, my friend Mr. Tilley spent a great deal of his time in reading the correspondence concerning the private irrigating enterprises initiated in the Dominion of Canada, and showing the authorization for those enterprises and the amount of water apportioned to them. That undoubtedly would have been a very moving argument on the part of Canada for a larger portion of these waters than she got, but I can not see that it bears at all upon the question of the construction of the treaty as to how much water she actually did get. We find that from the wording of the treaty. No doubt Ambassador Bryce and Secretary Root, if these matters had been brought to their attention, might have considered them in the division of the waters, but evidently they were not brought to their attention because they provided for an equal division of the waters.

How can it be said that at the time these papers came into the possession of Mr. Root and Mr. Bryce and Mr. Anderson and Mr. Gibbons, that there was any idea of Canada getting more than one-half of these waters, and that the waters were other than those crossing the boundary from one country to the other? It is impossible for me to see how that can be contended, when we observe the practical agreement between Mr. Newell and Mr. King, reached on the 23d of December, 1908.

Mr. Newell in his communication said to Mr. King, "It is impossible for the United States to consent that Canada shall have more than one-half of these waters;" and he referred to the waters and described them as the waters crossing the boundary. Mr. King comes back with his communication of December 23, and says that inasmuch as there has been difficulty in the basis of the division, although the equality of division had been understood all along, that he will propose, as a general principle, an equal division of the waters of these boundary streams. Mr. Newell had said that that equal division was all that could be accorded to Canada, and Mr. King comes back and says that he accedes to the principle of an equal division of the boundary streams.

I said that there had been entire concurrence between them at that time, and I maintain still that there was entire concurrence between these two gentlemen who had been appointed by their two governments to agree upon a scheme for the division of these waters. This letter, however, of Mr. King is commented on. Mr. King says, before accepting the principle before referred to:

> The principle of equal sharing of benefits, with compensation by quantity of water, suggested by the undersigned, doubtless has a disadvantage in depending for its application upon agreement as to details.

What Mr. King was referring to there was that while this proposition had provided for an equal division of waters, his proposition also provided for an arbitrary giving of certain waters to one country

and certain waters to the other country, and he says that that had the disadvantage in depending wholly for its application upon agreement as to details. Then he says:

> A principle which is free from this objection and is, moreover, a simple one is that of equal division of water on the boundary streams (each country providing for its existing interests out of its share of water).

Now, was not that concurrence between Mr. Newell and Mr. King upon an equal division of these boundary waters, referred to by Mr. King? Did not Mr. Campbell, when he came upon the scene, make identically the same proposition? Was not his proposition for equal division of the waters crossing the boundary, repeated time after time in five different paragraphs? Was not there an entire understanding and agreement between these negotiators, at the time the papers came into the hands of Mr. Anderson and Mr. Gibbons, that the waters to be divided were the boundary streams, and that the waters were to be divided equally between the two countries?

Mr. POWELL. Accepting what you state to be correct, Senator, could not this view be taken of it, that they both regarded prior appropriations not as a matter of division or settlement at all; that had already been accepted and the fight was over the balance. Might we not say that the proposition was: We will divide waters crossing the boundary after the prior appropriations are provided for?

Mr. TURNER. That is utterly impossible. Mr. King says that his proposals for that and the several proposals—Root's proposal—for getting certain quantities of water out of one river and out of another river, and certain quantities during certain seasons, had produced difficulties. Therefore, he proposed the principle of an equal division of these boundary waters, each country taking care of its commitments to its own prior private appropriators. Mr. Newell did not dissent from that. He proposed the same thing, only he proposed, instead of recognizing the prior private appropriations, to give each country priority, one country in one river and the other country in the other river, out of which each country, if it chose, might regard rights of the prior appropriators within its boundaries.

I say again, it is reasonable to suppose that when the papers came into the hands of the gentlemen who were to put this treaty into shape, that they intended to write a treaty which would carry out and effectuate the practical agreement reached by the technical negotiators, and which was undoubtedly before them at the time they wrote the treaty.

Sir George Gibbons wrote a very broad tentative draft, which did not evidence that he understood that the treaty was about the waters that crossed the boundary; but it did not evidence the contrary; and I say that the natural conclusion to be reached is that he either did not understand the importance of the qualifying word "tributaries," or if he did that he concluded it was not necessary to qualify the word because the history of the negotiations showed conclusively that the parties never from first to last had in contemplation anything except these waters that crossed the boundary.

I shall not follow Mr. Tilley in his discussion as to the effect of the prior appropriations in Canada. My recollection is that this canal which was built for taking out the St. Mary waters accommodates about 400 second-feet, while the purpose of the builders of that canal

was to take out ultimately the full quantity of water granted to them, 500 feet at the low flow and 1,000 feet at the high flow, and that may be binding on Canada.

Mr. MACINNES. Two thousand.

Mr. TURNER. Two thousand, I should say. Manifestly, it was not binding on the United States, and in making a decision based on the principle of equality the United States had a right to say, and did say, "We are willing to recognize the prior appropriation to the extent that it had been put to beneficial use, but no further." And it is upon that basis that Mr. Newell proposed this prior right to Canada of 400 second-feet, of the waters of the Milk River, compensating for it by a like quantity to the United States from the waters of the Milk River. But I should doubt exceedingly, whether, as I understand the laws of Canada, as explained, the right to this water by this canal company had ever developed into a vested right prior to the building of a canal sufficient to divert the entire water granted to them. It would not in the United States. From what I understand, they are to make their beneficial use within 10 years, and if they never make it they never get the waters. Up to the time the treaty had been made, they provided for taking 400 second-feet. The treaty recognizes that and gives Canada that 400 second-feet for the purpose of meeting this commitment to this canal company.

My friend Mr. Tilley's argument is confined to endeavoring to persuade the Commission that it was the purpose of both countries to combine all of the waters of the entire drainage system of these two rivers, and to divide the amount thus reached equally between the two countries. I submit that he offers nothing, either in the treaty or the history of the negotiations, which can bear out any such contention. He claims to find that in the history of the negotiations. I ask the Commission to read those negotiations again, when not under the influence of his very persuasive eloquence, and to see if they can find any understanding of that kind. If they can do so, they can do more than I have been able to do.

Indeed, this argument of Col. MacInnes and Mr. Tilley, if I may be permitted to say so without offense, is wholly an afterthought. Col. MacInnes did not make it at St. Paul. He did not make it at Detroit. On the contrary, he impliedly admitted at Detroit that the historical evidence pointed conclusively in favor of the United States, when he said that the negotiations had come to a block in Washington, and therefore that Senator Root and Mr. Bryce were compelled to disregard what had gone before, and to make a treaty based on entirely different lines. But it hardly is necessary to say all this. The historical evidences are all in favor of the United States, when read according to their plain and obvious meaning. In the effort to read them otherwise, my friends have been compelled to drop out controlling words and expressions, to wrench words from their context, and to give to words and phrases strained and hypercritical meanings that they will not reasonably bear. They have done this with great adroitness and skill, and I confess that I was lost in admiration of their effort as an intellectual exercise. But it will not stand the test of cold examination and analysis. It is strained and unnatural and can not carry conviction.

I thank you, gentlemen, for the courtesy of permitting me to conclude my argument to-night to enable me to get away to-morrow.

I wish to present to the Chairman the findings which I read the other day and which I asked permission to file. I want to call the attention of the Commission to the necessity of making one change in the findings. I provide for measurements at the international boundary only. That should be extended to measurements at the boundary, at the points of storage, and at the points of diversion, in order to make the measurements complete.

Mr. MAGRATH. The argument is concluded, gentlemen.

The Commission then adjourned.

INDEX.

○