INTERNATIONAL JOINT COMMISSION

SUPPLEMENTAL ARGUMENT

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

DETROIT, MICH., MAY 15-17, 1917

WASHINGTON
GOVERNMENT PRINTING OFFICE
1917

INTERNATIONAL JOINT COMMISSION.

CANADA.	UNITED STATES.
CHARLES A. MAGRATH, Chairman.	OBADIAH GARDNER, Chairman.
HENRY A. POWELL, K. C.	JAMES A. TAWNEY.
P. B. MIGNAULT, K. C.	R. B. GLENN.
LAWRENCE J. BURPEE, *Secretary.*	WHITEHEAD KLUTTZ, *Secretary.*

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

INTERNATIONAL JOINT COMMISSION,
Detroit, Mich., May 15, 1917.

The International Joint Commission, pursuant to public notice, met in the Federal Building at Detroit, Mich., at 10 o'clock a. m., Tuesday, May 15, 1917, for the purpose of hearing further argument in the matter of the measurement and apportionment of the water 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.

Present: Obadiah Gardner (presiding), Charles A. Magrath, James A. Tawney, R. B. Glenn, P. B. Mignault, and Whitehead Kluttz (secretary).

Mr. GARDNER. Gentlemen, the International Joint Commission has met here in the city of Detroit for the consideration of several matters of interest to the two Governments. The first matter that will be taken up this morning is an argument to be presented by the chief counsel of the Reclamation Service of the United States. As Mr. Tawney was the presiding officer at the meeting of the commission at St. Paul, Minn., in May, 1915, when argument by others was first heard in this matter, at which time there were developed some questions regarding legal procedure, I am going to call upon him to make a statement at this time with reference to it.

Mr. TAWNEY. Mr. Chairman and gentlemen, the representatives of the two Governments and the representatives of private interests who are present and interested in the Milk and St. Mary Rivers matter will recall that the commission, on its own initiative, held a hearing on this question, and also heard arguments at the city of St. Paul in May, 1915. The hearing and the arguments were at that time closed.

Subsequently the chief counsel for the Reclamation Service of the United States applied to the commission for an opportunity to be heard further on behalf of that service. At the meeting of the commission at Washington in April last this application was formally presented and the commission granted the request, and fixed upon the 15th of May as the time and the city of Detroit, Mich., as the most convenient place for all who were concerned, at which Judge King, chief counsel for the Reclamation Service, was to present his supplemental argument on behalf of that service.

I would suggest, Mr. Chairman, that at this point the secretary of the commission read the order which was made at that time so that all who are present may know just what the terms and conditions of the order are.

Mr. KLUTTZ. In order to make the record complete, I will read first the letter to which Mr. Tawney referred, constituting the application

of Judge King for a supplemental argument. Then I will read the notice and the order accompanying it.

(The application, notice, and order above referred to, together with a list of persons to whom notice was sent, are copied into the record as follows:)

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE,
Washington, D. C., March 21, 1917.

HON. OBADIAH GARDNER,
Chairman International Joint Commission, Washington, D. C.

MY DEAR SIR: On May 24–28, 1915, a certain hearing was had before your honorable commission in re measurement and apportionment of the waters of the St. Mary and Milk Rivers and their tributaries in the United States and Canada, under the treaty of January 11, 1909, beween the United States and Great Britain. I have before me the complete report of the proceedings and briefs filed in said proceedings.

While I do not differ from any of the conclusions reached and announced on the legal phases involved at said hearing by the Representatives of the United States, there are some phases of the question not presented either in the brief or in the report of the oral argument, which I would like to present orally as supplemental thereto.

As you are aware, the United States Reclamation Service, on behalf of the people under the United States reclamation projects, as well as other citizens of the State of Montana, is vitally interested in the outcome of this controversy, and the good citizens of Canada appear to be equally as much interested therein. I take it, therefore, that since the case has not been finally determined your honorable commission will welcome any assistance that may be given by any of those representing the interests involved on either side of the international boundary. The Reclamation Commission is very desirous that I, as chief counsel of the United States Reclamation Service, should be heard on this matter before a final determination of the controversy is reached and announced.

If, therefore, the commission can see its way clear to permit me to be heard in an oral argument in support of our views, it will be highly appreciated. I will be prepared to present the same at your semiannual meeting to be held here April 3. If there should be other business on hand, any time during the week of April 3 will be convenient and agreeable to me, or if the commission prefers to hear the same at a later date any time after May 10 will suit my convenience.

Trusting the commission may see its way clear to grant the foregoing request, I am,

Respectfully,

WILL R. KING, *Chief Counsel.*

APRIL 6, 1917.

SIR: I have the honor to inform you that at its session held in this city April 3 the International Joint Commission appointed Tuesday, the 15th day of May, 1917, as the time, and the city of Detroit, Mich., as the place, for hearing supplemental argument in the matter of the measurement and apportionment of the waters of the St. Mary and Milk Rivers, under Article VI of the treaty of January 11, 1909.

The city of Detroit was selected in pursuance of Article XII of the treaty, which requires that in any proceeding "all parties interested therein shall be given convenient opportunity to be heard." The session will begin at 10 o'clock a. m., in the Federal Building. For further information I inclose a copy of the order of the commission in reference to the aforesaid session for a supplemental argument at Detroit in said matter.

I am, sir, with great respect,

Your obedient servant,

WHITEHEAD KLUTTZ, *Secretary.*

ORDER ADOPTED BY THE INTERNATIONAL JOINT COMMISSION.

WASHINGTON, D. C., *April 3, 1917.*

* * * * * * *

Whereas Mr. Will R. King, chief counsel for the Reclamation Service of the United States, has applied to this commission to be heard on behalf of that

service upon the questions involved in the Milk and St. Mary Rivers matter either during the week beginning April 2 or at any time after May 10, 1917:

Ordered, That the said application be granted, and that counsel be notified that the commission will hear him at the city of Detroit, Mich., on May 15, 1917, in the Federal Building at 10 o'clock a. m.

Ordered further, That notice to all those who have heretofore appeared in said matter be given of the time and place of said hearing, and that at said time they will be given an opportunity to reply to the argument of Mr. King, if they so desire.

* * * * * * *

List of persons to whom notice was sent under dates of April 5 and 6, 1917, of session of the International Joint Commission to be held at Detroit, Mich., May 15, 1917, for hearing supplemental argument in the matter of the measurement and apportionment of the waters of the St. Mary and Milk Rivers under Article VI of the treaty of January 11, 1909:

The Secretary of State.
The Secretary of War.
The Secretary of the Interior.
Hon. Thomas J. Walsh, United States Senate.
Hon. Henry L. Myers, United States Senate.
Hon. Jeannette Rankin, House of Representatives.
Hon. John M. Evans, House of Representatives.
Mr. Manton M. Wyvell, counsel for the United States Government.
Hon. Samuel Vernon Stewart, governor of Montana, Helena, Mont.
The attorney general of Montana, Helena, Mont.
The State engineer of Montana, Helena, Mont.
Hon. Will R. King, chief counsel, Reclamation Service, Washington, D. C.
Mr. Arthur P. Davis, chief engineer, United States Reclamation Service, Washington, D. C.
Mr. W. J. Egleston, counsel for the Reclamation Service, Helena, Mont.
Mr. Morris Bien, counsel for the Reclamation Service, Washington, D. C.
Mr. F. H. Newell, United States Reclamation Service, Washington, D. C.
Mr. N. C. Grover, United States Reclamation Service, Washington, D. C.
Mr. R. M. Conner, United States Reclamation Service, Washington, D. C.
Mr. G. C. Stevens, United States Geological Survey, Washington, D. C.
Mr. George Otis Smith, Director United States Geological Survey, Washington, D. C.
Mr. W. B. Sands, counsel for the Water Users' Association of Chinook, Mont.
Mr. Henry O'Hanlon, counsel for the Upper Milk River Water Users' Association, Chinook, Mont.
Mr. Louis W. Hill, president Great Northern Railroad, St. Paul, Minn.
Mr. E. C. Lindley, counsel for the Great Northern Railroad, St. Paul, Minn.
Mr. R. Budd, assistant to the president Great Northern Railroad, St. Paul, Minn.
Mr. E. C. Leedy, Great Northern Railroad, St. Paul, Minn.

Mr. KLUTTZ. A similar notice was sent out on the Canadian side to the following-named persons:

Lieut. Col. C. S. MacInnes, K. C., Ottawa.
William J. Stewart, chief hydrographer, Department of Naval Service, Ottawa.
E. F. Drake, superintendent of irrigation, Department of the Interior, Ottawa.
William Pearce, Western Canada Irrigation Association, Calgary.
R. J. Burley, Cypress Hills Water Users' Association, Calgary.
F. L. Wanklyn, general executive assistant, Canadian Pacific Railway Co., Montreal.
Hon. William M. Martin, premier of Saskatchewan, Regina.
E. W. Beatty, vice president and general counsel Canadian Pacific Railway Co., Montreal.
George Harcourt, Deputy Minister of Agriculture, Edmonton, Alberta.
Sir Joseph Pope, K. C. M. G., Under Secretary of State for External Affairs, Ottawa.
J. S. Dennis, assistant to president Canadian Pacific Railway Co., Montreal.

Mr. TAWNEY. Now, gentlemen, we will next take the appearances of those who are present and their addresses, as well as the names of the parties they represent, beginning with the two Governments, as we did before.

(The following appearances were announced:)

Mr. Manton M. Wyvell, counsel for the United States, Washington, D. C.

Mr. Will R. King, chief counsel, Reclamation Service of the United States, Washington, D. C.

Hon. Thomas J. Walsh, United States Senator from Montana, Washington, D. C.

Mr. W. J. Egleston, district counsel, United States Reclamation Service, Helena, Mont.

Mr. E. W. Burr, district counsel, United States Reclamation Service, Denver, Colo.

Mr. F. H. Newell, consulting engineer, United States Reclamation Service, Urbana, Ill.

Mr. John C. Hoyt, hydraulic engineer, United States Geological Survey, Washington.

Mr. G. C. Stevens, engineer, United States Geological Survey, Washington.

Mr. R. M. Conner, engineer, United States Reclamation Service, Washington.

Mr. R. L. Mitchell, assistant attorney general, State of Montana.

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

Lieut Col. C. S. MacInnes, K. C., counsel for the Dominion Government, Ottawa.

Mr. Christopher C. Robinson, assistant counsel for the Dominion Government, Ottawa.

Mr. E. F. Drake, Superintendent of Irrigation, Ottawa.

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

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

Mr. J. S. Dennis, Assistant to the President, Canadian Pacific Railway, Montreal.

Col. MACINNES. Mr. Chairman, Mr. Robinson, Mr. Drake, Mr. Burley, and myself represent not only the Dominion of Canada, but I am informed by Mr. Drake that communication has been received from the Provinces of Alberta and Saskatchewan, from the Western Canada Irrigation Association, and from the Cypress Hills Water Users' Association that they are satisfied with the same representation.

Mr. TAWNEY. Are there any other appearances?

Mr. KING. Senator Walsh will be present to-morrow morning, as I understand, and would like to be heard before this commission on the questions involved.

Mr. TAWNEY. The Senator will arrive, I am informed, this afternoon, but not in time to be heard to-day. He was detained. His appearance may be entered.

Now, gentlemen, in view of the importance of the matter involved in this supplemental hearing, and in view of the absence of one of the members of this commission, who has been unavoidably delayed

in getting here, it has been thought best not to proceed until the absent member of the commission arrives. The commission has some executive work in which it could engage this afternoon, but if it would inconvenience anyone materially to have it go over until to-morrow morning we would go on this afternoon.

Col. MACINNES. I would respectfully urge, Mr. Chairman, that the matter be proceeded with as early as possible, and if it would suit the convenience of the commission to sit this afternoon, I know that it would be very agreeable to Mr. Dennis and others who appear here for Canada to have the matter taken up and disposed of, so that we may be released for other duties. If it is not asking too much, we will ask for permission to proceed not later than this afternoon.

Mr. TAWNEY. Then we will take a recess until half-past 2 o'clock this afternoon.

(A recess was thereupon, at 10.45 o'clock a. m., taken until 2.30 o'clock p. m.)

AFTER RECESS.

The commission reconvened at the expiration of the recess.

Mr. TAWNEY. Judge King, we are ready to proceed.

Mr. KING. Of course, I am ready to follow directions, but, as I understood it, you were to wait until the other member of the commission is present. I should prefer that all be present.

Mr. TAWNEY. We have no word from him and do not know when he will be here, and there are other gentlemen here who want to get away as soon as possible.

Mr. KING. Is it the wish of the commission that I proceed?

Mr. TAWNEY. You may go ahead.

ARGUMENT BY WILL R. KING, ON BEHALF OF THE GOVERNMENT OF THE UNITED STATES, REPRESENTING, AS CHIEF COUNSEL, THE UNITED STATES RECLAMATION SERVICE.[1]

Mr. KING. Mr. Chairman and gentlemen of the commission, I deem it a special privilege to have an opportunity to present the views of the Reclamation Commission as a supplement to the very able arguments of Mr. M. M. Wyvell, Mr. Sands, and others, at the hearing in this matter held at St. Paul. With your permission, I shall take the matter up in what I deem the logical order, and at the outset will say that I shall be pleased to have any questions asked me at any time covering the points which I shall present.

During the session of the commission at St. Paul, Minn., on May 24 to 28, 1915, Mr. F. H. Newell, then Director of the United States Reclamation Service, who is with us to-day, recommended that this commission select two engineers for the purpose of gathering further data before the final submission of the controversy. Some of us agreed that his plan would be a wise one, but, as I understand the position taken by this commission, it was deemed advisable to determine, first, what was meant by the treaty between our two great countries before taking up that feature and before going to the

[1] All italics used herein are Judge King's.

expense of having further water measurements made. Since then it has been decided not to insist upon taking those steps until after the treaty is interpreted.

With your honors' indulgence, I desire to read a part of the treaty herein involved. It may sound a little monotonous to read it, it having been read before and having been presented in the former proceedings, yet I take it that it is well to read it once more before proceeding further with this argument. In Article VI of the treaty it is provided that—

> 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 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.

Now, gentlemen of this high joint commission, before whom I have the honor to appear, permit me to say that I am not altogether certain that I voice the judgment of *all* others representing the United States, the State of Montana, and the citizens thereof, participating in connection with this matter, but I understand this treaty to mean, that if at any time there is less than the 500 second-feet of water in either of the streams in question, the respective countries, as they are designated, may take three-fourths of the water supply then found flowing in that stream, whichever stream it may be. After the 500 second-feet shall have been supplied to either of the countries in either of the streams involved, as designated in the treaty, then the water in excess thereof is equally to be divided between the two countries.

Previously when before this honorable commission on this matter the subject of the interpretation of the treaty was incidentally mentioned by me, but no detailed discussion was had involving the particular question now presented. As I remember it, I indicated something to the effect that in order to reach a proper interpretation of this treaty between our great countries we should take into consideration the *results* eventually that might ensue by reason of the interpretation to be reached one way or the other. One member of this commission at the time indicated that in his view such was not the rule governing the construction of treaties.

To begin with I shall therefore take up that feature, and in doing so I feel safe in saying and assuming as a premise that *all authorities*

concur in holding to the effect that the settled "rules of construction" applicable to private contracts, including the rules governing the admission of extrinsic evidence in the determination of the intent of the parties, with equal force apply to treaties between nations.

On this subject the rule is stated in Chancellor Kent's Commentaries (vol. 1, p. 174) as follows:

> Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals; and they are to receive a *fair and liberal interpretation* according to the *intention* of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained *by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.*

In Whitney *v.* Robertson (124 U. S., 194) it is held that—

> By the Constitution a treaty is placed on the same footing and made a like obligation with an act of legislation * * *.

It will thus be observed that the same rules are applicable to the construction of treaties as to contracts entered into between individuals or legislative enactments, as the case may be, whether such enactments are the result of an act of Congress or of a State. Upon this point I refer to Tucker *v.* Alexandroff (183 U. S., 424, 437); United States *v.* Arredondo (6 Pet., 691, 710); and United States *v.* D'Auterive (10 How., 609, 622).

The principles to which I here refer may appear to this honorable body as being somewhat elementary, but, from the observations made at the former hearing in St. Paul, as printed, and which I have carefully considered, there appears to be some difference of opinion on the subject. My reasons for referring, therefore, to the decisions bearing on that point, I trust, are pardonable.

The rules, gentlemen, are too well settled to admit of doubt that where a latent ambiguity, or whatever term you choose to call it, "open to construction" may appear, whether in a contract, in an act of legislation, or a treaty—all lawyers agree, and I therefore take it for granted that you agree with me—that under such circumstances extrinsic evidence is always admissible to determine what the parties to such contract, the members acting upon such legislation, or the party Governments to the treaty had in mind at the time of the execution thereof. If this premise shall be agreed to then it follows that the treaty under consideration, in order to determine its import, necessarily includes all diplomatic correspondence leading up to and considered in the making of the treaty. Gentlemen, in view of the fact that the former record in this case sets forth all of this diplomatic correspondence, and since you have it before you, I feel that it would be taking up too much valuable time to read from that diplomatic correspondence. However, I call your attention to the inclusion thereof in the record as presented in the hearing in May, 1915; and, in view of the rules which I have annunciated and expect to demonstrate to be the law of construction under such circumstances, I assume that you will give the same your careful consideration. To carry out the conclusion of the premises which I feel that I have laid before you, it becomes incumbent upon us to show that in this treaty there is such an ambiguity as, under all the rules of construction, will entitle the treaty to interpretation; and whatever view may be taken, I am firmly of the opinion we will have to reach the conclusion that this treaty is open to construction—open now to construc-

tion at the hands of this honorable commission. Applying the rule here, very important does it become that we examine the language of the *entire* treaty; yes, every paragraph, every sentence; every clause; and, in fact, examine every word, in order to determine whether there is any room for construction; and, if so, what construction shall be placed thereon so as to make the entire instrument effective, if possible.

Mr. TAWNEY. Judge King, do you contend that any other part of this treaty has any bearing upon or should be considered in connection with the construction of Article VI?

Mr. KING. I do. I think we have a right to take into consideration the treaty in its entirety; the preamble and everything in connection with it. It is our duty, under all rules of construction, to read this treaty as one instrument, and so to read it as to make every paragraph, sentence, and word effective, if permissible under the language of the treaty.

Mr. TAWNEY. That would be true, undoubtedly, as to the parts of the treaty that are dependent. Article VI is entirely independent from all the other articles of the treaty outside of the preamble.

Mr. KING. Well, I am not prepared to admit that, except in a limited way. Generally speaking, such is the position I am taking, but I am not prepared to admit the limited way in which you have stated it, any more than one would be justified in admitting that one section of a statute must be construed independent of another section when they are all included within the one act passed, and overlooking all the sections pertaining to the same subject matter. My position is that every section, paragraph, sentence, phrase, and word must be taken into consideration, in order that, taking the same as a whole, we may be able to determine what was the intention of the contracting parties.

Mr. MIGNAULT. This is a provision for a special case. It has nothing to do with the general policy of the treaty which refers to boundary waters and their uses and obstructions. Article VI is a special matter which does not refer to boundary waters, but to the apportionment of two rivers in Montana, Alberta, and Saskatchewan.

Mr. KING. I agree with you, Mr. Commissioner, on that point, to the effect that the question of boundary waters in its strictest sense is not here involved, as, for example, matters in connection with the St. Lawrence River, or other rivers flowing along the boundary line. The point which I, as chief counsel of the United States Reclamation Service, am trying to make, and sincerely hope to be able to make, providing I am able to make myself clear, is to the effect that the question before us has reference to waters flowing *across* the boundary line and not to waters strictly held to be boundaries. The question of our "boundary waters" as construed by the treaty itself has nothing whatever to do with the case which we are now considering. That much I will concede. But I do not assume to speak for others who may present their views in the interests of the United States in this case.

With your permission, gentlemen, I will now proceed along the line of my argument and in the order I have in mind, by which I will reach and cover the questions here involved.

To begin, let us examine the language of the entire treaty. It is important that we do so in order to determine, first, whether there is

any "room for construction," and, if so, what construction should be placed thereon so as to make the entire instrument, including every paragraph, sentence, and word, effective.

In order to determine the effectiveness of the instrument, involving the interests of our two great united Nations, under the rule of construction which places the interpretation of treaties under the same rules of interpretation applied in the construction of contracts, statutes, and constitutions, there can be no question but that we may take into consideration the *ultimate effect* of the construction to be placed thereon. In doing this we can not, in this connection, overlook the imperative necessity of not giving it a construction that may defeat the very purpose for which the treaty was made. Gentlemen of this commission, it appears to me to be plain that if the *effect* of any interpretation shall prove disastrous to either side of the boundary line of the two Nations, that in itself is sufficiently indicative of the fact that such an understanding was not in mind when the treaty was executed.

In referring to the mode of construing statutes, Judge Cooley, in his unexcelled work on Constitutional Limitations (7th ed., p. 91), says:

> The rule applicable here is, that effect is to be given, if possible, to the whole instrument and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions * * *. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together.

There appears an interesting discussion to the same point in State *v.* Cochran (55 Or., 179; 105 Pac., 888), in which the constitutionality of the appointment of two additional justices of the Supreme Court of Oregon (of which I had the honor of being one) was brought in question under proceedings instituted by the attorney general of Oregon.

I want to emphasize the feature, that if this treaty can be given such construction as will give effect to every paragraph, sentence, and word, such construction should be adopted and, if that rule of construction shall by you be sustained, which is upheld by all of the authorities both in this country and Great Britain so far as I know, I shall then have few, if any, fears as to the outcome of this controversy.

In Jones *v.* Walker (2 Paine's C. C., 705) Mr. Justice Jay, who was afterwards a Justice of the Supreme Court of the United States, held:

> A preamble can not annul enacting clauses; but when it evinces the intention of the legislature and the design of the act, it enables us, in cases of two constructions, to adopt the one most consonant to their intention and design.

Now, gentlemen, I mention this for the reason that I think that, taking the treaty by its "four corners," we are in duty bound under all rules of construction to take into consideration the preamble leading up to the treaty, as well as all of its other parts, in determining

what was under consideration, what was intended, and the purpose for which it was made.

From the proclamation or preamble of the treaty in hand it will be observed that its purposes were:

(1) "To prevent disputes regarding the use of boundary waters," which under the definition of boundary waters later appearing in the treaty, are not involved here;

(2) "To settle all questions which are *now pending* between the United States and the Dominion of Canada"—and I *now* call your honors' attention to the words "*now pending*"—"involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other along their common frontier;"

(3) "To make provision for the adjustment and settlement of all such questions as may *hereafter* arise."

Now, gentlemen, note the word "hereafter"; with reference to controversies which may "hereafter arise" between the two countries. I want to lay especial emphasis on these words. They are also repeated in the succeeding paragraph of the treaty. I call attention to these features as evidence of what was in mind when this treaty was entered into.

In order properly to understand the points hereafter made, the words "now pending" and the phrase "such questions as may hereafter arise," referring to disputes present and future, together with the expression "along their common frontier" in defining locality, should especially be noted. Now, gentlemen, all of this indicates that this treaty was made for the *purpose* of settling controversies with which the two countries were *then* confronted, which questions are, so far as here involved, pointed out in Article VI of the treaty under consideration.

Again, in the preliminary article, "boundary waters" are defined, after which it is expressly stated that the boundary waters do *not* include "*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.*"

You will, therefore, note that it is expressly pointed out that the *boundary waters* do not include the waters *flowing across* the boundary. There is no dispute, therefore, between us on that feature. But the waters which are now to be determined, as I take it, are, impliedly, the waters flowing *across* the boundaries.

In Article II reference also is made to waters of either country flowing "*across the boundary.*" Now, gentlemen, it will be noted that in Article II the words "across the boundary" are used. This clearly indicates that the streams flowing *across* the boundary were in the minds of the high contracting parties at the time of entering into this treaty.

Coming now to Article VI, provision is made for the proportionate amount of water to be used north of the international line from the St. Mary River, and a like provision appears with reference to the use which may be made of the water from Milk River, to which the United States is entitled. This is followed by a provision that the channel of Milk River, in the Dominion of Canada, may be used at

the convenience of the United States for the conveyance of water by and for use in the United States.

Now, when it was indicated that the channel of Milk River might be used at the convenience of the United States for the conveyance of water by the United States and for the return of water to and for use in the United States, it certainly meant something. And before I am through with my argument I expect, at least hope, to be able to demonstrate that if the construction of the treaty contended for by the able counsel who appears and has appeared as the representative of the attorney general of the Dominion of Canada, is adopted, the provision in that treaty to which I refer would certainly be a useless provision and would mean nothing.

It is also provided in that treaty that the waters of the two streams (the St. Mary and Milk Rivers) "shall be apportioned equally between the two countries" and that in so doing the tributaries of the two streams "in the State of Montana *and* the Provinces of Alberta and Saskatchewan" are to be treated as one stream. This feature was touched upon in the argument at the first hearing, but the importance of this matter under present conditions demands that I go into it further.

When it is observed that reference is made to controversies "*now pending*," as to waters flowing *across* the boundary line; when it is made clear in the treaty that each of the contracting parties is to be entitled to the use (by considering them as one stream) of the waters of both streams as they flow through Canada, then under the most favorable light in which this treaty may be viewed with respect to the contentions of the Dominion of Canada as to what is meant by "tributaries" to be considered in determining the quantity of water which may be used on either side of the line, it must be admitted that the treaty under consideration presents an *ambiguity* latent in form, and, whatever may be the form, at least "open to construction." I emphasize this feature, gentlemen of the commission, for the reason that under *all* authorities, as I read and understand them, if a latent ambiguity is here disclosed and under the law such ambiguity is open to construction, then there can be no question as to the right of this commission, and also the duty of the commission, to take into consideration all the correspondence and everything else that lead up to the formation of the treaty.

Mr. MIGNAULT. It appears that it is an essential part of your argument that an ambiguity must be disclosed.

Mr. KING. That is one part.

Mr. MIGNAULT. It would, therefore, seem essential to point out where the ambiguity is.

Mr. KING. This is what I have been endeavoring to do, and I am following a line of argument which, I think, does and will demonstrate, before I am through, that the ambiguity exists when it refers to the streams and their tributaries, and, when this ambiguity is once disclosed, then the treaty becomes open to construction, and when once you are satisfied on that feature I will not be worried about the result, for when an ambiguity is disclosed and the treaty comes to be recognized as being open to construction, then all the transactions leading up to the treaty will be open to construction, and it is for that purpose that I am going so extensively into this preliminary feature of the principle upon which I base my argument.

A fair sample of ambiguities in treaties will be found in what is known as the "holy alliance" treaty, entered into after the Battle of Waterloo between the sovereigns of Austria, Russia, and Prussia, in which they bound themselves, under language which may be quoted covering the particular point: "To aid one another in conformity with the Holy Scripture on every occasion." It will thus be seen that as to what was meant by "Holy Scripture" was a matter upon which even those high in the international authority differed. As stated by one author: "By this high-sounding profession they seem to have meant no more than that they would crush the desire for liberty and reform which began to show itself in the several countries." This theory of the *intent* has been demonstrated thousands of times since and is on the map of active operations to-day; it constituted what was deemed by some of the nations parties to the treaty, and others not a party (taking the theory enunciated in the treaty as a basis), a means for the persecution of those differing in religion from the "powers that be" of nations, and has cost the world untold loss of lives and unimaginable suffering. When the treaty was signed it was on the theory that it would merely satisfy a "hobby" of the Czar of Russia, but subsequent events disclosed that there was "method in his madness." Unfortunately, France in her defeated condition could not well refuse to join the alliance; but to the credit and glory of England, she, with the suspicion that its object was the maintenance of despotic governments, refused to join in the alliance. This historical feature, however, has little to do with the matter now before us, but serves as an example of a statement which is "open to construction," whether we call it a latent ambiguity or otherwise. It matters little whether or not the treaty here may be said to contain a latent ambiguity, for whatever may be said *it is at least open to construction*, and when admitted to be open to construction, there can be but little if any doubt as to the final outcome.

Mr. MIGNAULT. The word "tributaries" is not ambiguous.

Mr. KING. The word "tributaries" standing alone is not ambiguous, but when you consider it in connection with the entire treaty; when you take it into consideration in connection with the statement which discloses that there was to be a settlement of controversies "*now pending*"; when you view it in connection with the expression "across the boundaries"; when you consider it in connection with the statement defining what boundary waters are, you will readily see that there is an ambiguity and that it merely takes the boundary waters out of the category of this treaty to be considered, and which treaty is now being considered, and upon which innumerable persons for generations have differed in opinion, which are *not* boundary waters in the sense of flowing along the international line, and leaves for our consideration only those not boundary waters in the sense to which I refer but those which flow from one nation into another.

I think, gentlemen, before I am through I will be able to disclose in my argument that there is an ambiguity entitled to interpretation, and when this is once established, there can be no question as to the right or duty of this commission under all rules of construction to consider all of the transactions, diplomatic correspondence, etc., leading up to the formation of this treaty.

Under the well-established authorities, from which there appears to be no dissent, it follows that in considering a latent ambiguity, each, either, and all of the contracting parties may present *all* data giving rise and leading up to the making of the instrument being interpreted. For example, to consider other tributaries than those of an international character—that is to say, to consider all the tributaries south of the boundary line and which may be wholly within the State of Montana, and make a division of waters on the basis—might, and probably would, result in there being no water to flow through the Dominion of Canada through the channel of the Milk River to be used by the United States.

If it appears, in order to reach any other construction than that for which we are contending, that there will be no water to flow through the channel of Milk River into the United States, that in itself should be sufficient to demonstrate that it was not the intention of the treaty-making powers to divide the tributaries on the basis of figuring, in connection with the tributaries crossing the boundary, any of the tributaries in Montana or tributaries entirely within the United States. This was the feature I had in mind when I said, at our meeting at St. Paul nearly two years ago, that in order to determine the intention of the treaty-making powers we must necessarily take into consideration the *ultimate* results to follow whatever interpretation might be placed upon such treaty. I take it that it will be a waste of words to stand here and assert, or even intimate, that the purpose in entering into this treaty was to give the United States the right to the use of the channel of a river—whether you call it by the name of Milk River or otherwise—through the Dominion of Canada if there was to be no water to flow through it. That, gentlemen, appears to me to be so manifest that it is useless to discuss it. I do not mean by that to say that such was the intention. I am only giving these ideas as a basis of my reasoning later to follow; and, in the end, I hope to be able to convince you that as a logical sequence of the reasoning which I am endeavoring here to give we may be able to reach the same conclusion.

Mr. MIGNAULT. But, Judge King, that article of the treaty seems to provide that the channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance of the water diverted from the St. Mary River. The idea, as I take it, was this: The United States proposed to divert certain waters from the St. Mary River and to bring them down into the valley of the lower Milk River where they were needed for irrigation, and for that purpose the waters were to flow through the channel of the Milk River through Canada, thence into the United States.

Mr. KING. That is my understanding.

Mr. MIGNAULT. But how do the tributaries come in there?

Mr. KING. They will materially figure in this connection when it comes to estimating the amount of water to be divided on the line between the two countries. Before I get through with my argument I trust I may be able to show to the satisfaction of this commission that if the tributaries of Montana and the flow of the water therein entirely within the State of Montana are calculated in the estimate, the United States can not possibly receive the amount of water

to which our Nation is entitled, or intended to be entitled to, under the treaty. When that feature is disclosed, then, the demonstration thereof will certainly show such an ambiguity as to entitle this honorable commission to take into consideration all of the transactions leading up to the treaty, in order to determine what was really intended thereby.

Mr. MAGRATH. Your argument, as I take it, is this, provided I understand it correctly: Taking the tributaries in Montana into account and adding them to all other tributaries and the amount of water flowing therein, then, as I understand it, your contention is that you will not be able to draw water from the St. Mary River at all.

Mr. KING. I have not figured the data out to the extent of being able to say that we would not get any water at all, but only to the extent that by following the Canadian contention the supply is so reduced so as to make the quantity available for reclamation projects in the United States wholly inadequate. But, assuming that the United States would not receive any water under such construction of the treaty—which is true under such circumstances—this fact in itself serves to demonstrate that such *was not the intention of the treaty.* As we frequently take an extreme illustration for the purpose of argument, I am supposing for the sake of argument that there will be no water at all to flow through what is known as the Milk River channel. I do not mean to be understood as saying that it necessarily follows there will be no water at all, but I feel reasonably safe in assuming that the construction contended for by our opponents would result in so materially reducing the supply as to *defeat the very purpose for which the treaty was consummated;* and, gentlemen, when we can demonstrate that the treaty, if a construction is to be placed upon it different from that which we think should be accorded, leads to absurd or disastrous results, then just to that extent we have demonstrated that there is such an ambiguity therein as entitles the taking into consideration of *all* the transactions, whether diplomatic or otherwise, leading up to the making of the treaty.

Mr. MIGNAULT. To what tributaries do you refer? Are they the tributaries below the Eastern Crossing of the Milk River?

Mr. KING. Your inquiry is a little in advance of the order in which I expected to present this matter, but if the word "tributaries" is to be taken literally it must include all the tributaries in Montana south of the international line between our two countries as to which there are vested water rights. For example, assuming that there are a million acre-feet of water—that is to say, sufficient water to cover a million acres 1 foot deep—entirely within the State of Montana, and you should add to that the few acre-feet flowing through St. Mary and Milk Rivers, and equally divide the total of those figures at the boundary line, giving to the citizens of Canada an amount of water equal to one-half after adding thereto the flow of such tributaries, it would readily be seen that by so doing Canada would receive all the water in those two streams before the water flowing through the channels of Milk River would cross the international boundary line into the United States.

Mr. MIGNAULT. I simply put questions to you as I wish to get your contention. Assume that the flow of the Milk River is 1,000 second-feet and the share of the United States is 500 second-feet. The flow of the St. Mary River, we will say, is 1,000 second-feet. They divert 500 second-feet from the St. Mary River into the Milk River. Now, how does the question of the boundaries come in? Your canal leads from the St. Mary River to one of the branches of the Milk River in Montana before it flows into Canada at all. Then these waters follow the course of the Milk River through Canada and go down to the lower Milk Valley into Montana. Now, how do the tributaries affect the extent of the water which is diverted reaching the lower Milk River Valley?

Mr. KING. They could not affect it because the tributaries involved *and* under consideration are all in Montana below the international boundary line.

Mr. MIGNAULT. I do not see how they could.

Mr. KING. If it is conceded that they could not affect it, then there is nothing to argue; but if we take all the tributaries in Montana and add their entire flow to the flow of those in Canada and then divide the total by two it will readily be seen that it makes a fatal difference to the United States in the result as to the division of waters on or along the boundary line above the tributaries in Montana.

Mr. TAWNEY. Judge King, I assume that neither of the parties to this treaty knew the aggregate flow of either of these two main rivers or their tributaries. Now, suppose that the aggregate of the St. Mary and the Milk Rivers at the boundary were less than one-half of the combined waters of these two rivers at their mouths, including the tributaries that are wholly in Montana, how could Canada get the remainder that it would be entitled to? It could not flow upstream, could it?

Mr. KING. That is a good illustration. Gentlemen, the purpose of my argument is to try to find out under what rules of construction Canada could get the water claimed under the circumstances here contended. There are points in the arguments of each of us upon which all must agree. It will be conceded that the laws of gravitation will not permit this water to flow back into Canada—water will not flow uphill. You see, we must agree upon that at least. If we must disregard the laws of gravitation and take into consideration the hundreds of thousands of acre-feet flowing into Milk River *below* the boundary line and use that as a basis upon which to divide the waters, you will readily grasp the result. As I take it, that is the principal question here presented and under consideration.

Proceeding with the view which I am here to present along this line, again let me suggest to you, gentlemen of this honorable commission, that the provisions to the effect that the water may flow in the channels of Milk River through Canada, returning to the United States to be used under its appropriation would, under the construction contended for by the very able counsel representing the Dominion of Canada, wholly be surplusage and an entirely useless provision. That is to say, if we carry out the technical construction as to tributaries, it must necessarily follow that that is a useless provision. There would be no necessity of referring at all to the use of

the channel of Milk River under such circumstances. In fact, to get more to the point, there would be no occasion for having any treaty and the entering into it would necessarily follow as an indication of an action on the part of the two Governments which might be considered as useless. When, then, we come to figure up the amount of water in the tributaries, as will later appear in my argument, there will practically be no water to flow through Canada into the United States. If that is true, the use of the language in the treaty with reference to the Milk River and the use of the channel as a conduit through which to convey the waters of the United States necessarily must be held to be mere surplusage, and when we admit the "surplusage" the ambiguity to which I here refer is disclosed, as it surely was not the intention to employ useless terms.

Mr. MIGNAULT. Now, Mr. King, the United States proposed to divert a certain quantity of water from the St. Mary River. Was that water to reach the lower Milk River Valley, or not?

Mr. KING. It is contemplated that that water is to reach there through the Milk River Channel, providing there is any water to go through, but if we are not permitted to take any water through the channel, of course——

Mr. MIGNAULT. Why?

Mr. KING. For the reason that if you take the hundreds of thousands of acre-feet arising in Montana *and wholly in Montana* and add that to the water above Montana flowing through Canada, and if you are to get half of it along the Canadian line, or where it crosses the line, there would not be any left to reach the United States and for use by the United States for the projects for which millions of dollars have been and are to be expended. That in itself should be sufficient to demonstrate that the construction of the treaty contended for was not in fact intended.

Mr. MIGNAULT. I do not quite follow that.

Mr. KING. I will reach that a little later; I have not the figures here now, but, gentlemen, I think you will find them on the map which I have placed upon your desk. Now, an examination of that map, I think, will disclose that no water will return to the United States, provided the construction insisted upon by the very able counsel for the Dominion Government is adopted.

Col. MACINNES. On what facts do you base that statement?

Mr. KING. On mathematical facts.

Col. MACINNES. That statement is entirely hypothetical, as I take it.

Mr. KING. As I have said and now say, while based on mathematics, I shall get to that later and hope to be able to give you the exact figures. Here [disclosing the map] is a map, Colonel, from which you will be able to figure out the exact acre-feet.

Col. MACINNES. I was speaking of the foundation for it in the evidence, because I am not aware of it.

Mr. KING. If I am not mistaken, I found it in your able argument presented at St. Paul and in the evidence taken at the former hearing at St. Paul. Possibly I misunderstood the report of your views there presented. I will not assert that that was the conclusion which you reached under the views so ably presented, but must say that such is the conclusion I reached from the argument which you advanced on that particular occasion.

Col. MACINNES. What I was seeking was information as to whether there is a record of any facts upon which the hypothesis which you have mentioned is founded.

Mr. KING. My good friend from the Dominion Government, take the "tributaries" as disclosed on that map, which is in effect a summary of the contents of the record on the subject, and figure out the "acre-feet." If you give Canada one-half of the water as you are contending, Colonel, plus the water in the United States which never came across the boundary line, I want to ask, how much will reach territory in the United States, flowing through the Milk River Channel?

Col. MACINNES. You say, figure up the acre-feet. Where are the acre-feet of these tributaries?

Mr. KING. You will find them right here [indicating on the map]. Here you will find the tributaries wholly within Montana. Now, if we take into consideration the flow in acre-feet of the water coming into Milk River, not arising north of the line, then I will ask, if Canada receives one-half of the total, how much water will return into the United States, if any?

Col. MACINNES. Quite true, but what I am asking is reference to evidence on these figures. Including tributaries wholly within Montana to which you refer and on the other side of the boundary, including those wholly within Canada, the result would appear to be that the two rivers, on an average, would be approximately equal. That is the evidence as it stands on the record.

Mr. KING. Well, my recollection is that the evidence discloses how many acre-feet there are in Montana; also in Canada. If it is not there it should be there. I procured the data from the record.

Mr. TAWNEY. According to your statement, Col. MacInnes, the acre-feet in Canada is 804,690 and in the United States 734,762. That is from your brief, is it not?

Col. MACINNES. Now, the only other reference to anything else I can remember in the record were certain statements made by Mr. Sands regarding a number of small tributaries, as he calls them, in the Bear Paw country. He admitted that there was no information on the subject at all, but he spoke of them as if they might be large. My learned friend, Mr. Wyvell, who is now present, said he concluded they were too erratic; that they could not be counted; in other words, that they might seep away before they could be used; that they could not be conducted through channels.

Mr. TAWNEY. I think you had better let Mr. King proceed with his argument.

Col. MACINNES. I thought Mr. Mignault was led astray upon the point and, for that reason, I thought it well that there might be some evidence on this subject.

Mr. KING. It is possible I am mistaken about the evidence, but I think there is sufficient in the record to disclose that there is a very large amount proportionately of the water entirely within Montana. Now, as to just the number of acre-feet, that presents a different and more complex question. I have here also a larger map, which I have placed on the desk. By the way, this map is taken from a map prepared in Canada and I have the original map here if the commission desires to look it over. At this time I wish to offer that

map in evidence and leave it with the commission, together with these copies which I have handed to your honors. I wish to leave that particular map with the commission for reference.

Mr. TAWNEY. We will retain this for reference.

Mr. MIGNAULT. Judge King, if you have any explanation to make of the map, it would be well to make it. There are certain figures on the map.

Mr. KING. I expect to call attention to that later in my argument, but the figures are all on the map and I trust that they be given due consideration.

Mr. TAWNEY. You may proceed "on your way," Mr. King.

Mr. KING. As each and all of you are doubtless aware, the best constituted courts frequently anticipate the argument of an advocate before them. Overlooking the fact that if those of us who present our arguments would only be permitted to proceed along regular lines, or what I intended to say, along the logical lines that we have in mind, such procedure, if left to the one who makes the argument, would very materially facilitate matters. But through earnestness those on the bench sometimes assume that they are aiding the one making the argument and, as a result, they not only anticipate what they think the argument should be, but, in the end, impair its efficiency not only from the standpoint of time but as to the effect of what the argument will be if left alone.

I mean no discourtesy by these remarks, but I want to assure you, gentlemen, that I shall certainly proceed—if I may be permitted by your generosity to proceed along the lines that I have in mind—to present my views in what I, however erroneous I may be in my own judgment, consider the most efficient, logical, and methodical way even if the presentation of the same in my way may prove to be tedious. After this is all over, the more tedious I can recall that I was in my argument, you may rest assured, gentlemen, the more I will appreciate the fact that you permitted me to proceed along in my own manner. There is one thing that I pride myself upon in the argument of the case this way, whether I am considering the best method or not. It is that, since I am selected to present our side of the case, it is my duty to present it according to my best judgment and in the manner I deem most conducive to a clear presentation. I assure you, however, that it should be understood that I invite any questions and criticisms that may occur to any member of this court.

Coming back again to the seriousness of this question, I want to advert to the further provision in Article VI of this treaty, to the effect that the waters of the two streams (the St. Mary and Milk Rivers) "shall be apportioned equally between the two countries," etc. This would, under the circumstances presented, be an entirely useless provision if it should be held that the waters should be distributed in the manner contended for by the Dominion of Canada: and why? Because it would be impossible to distribute the waters in that manner. If they can not be distributed in that manner, it must necessarily follow that it is a useless provision, the fallacy of which should indicate to anyone familiar with the ordinary rules of construction of contracts, statutes, constitutions, and treaties, that such was not the intention of the treaty-making power between our two great Governments when entered into.

But coming down to the rule of law regarding such matters, I assume that it will not be questioned that, "*surplusage in treaties is never presumed.*" "No word, clause, or provision is presumably redundant; and effect is, if possible, to be given to each of them." (Crandall on Treaties, p. 401.)

The question presented, then, is whether it was the *intention* in the treaty under consideration for the United States to place itself in the ludicrous position of totally being deprived of the water of these two streams *flowing across the international boundary line*, for use of which it appears that millions of dollars *were* and *are* being expended by the United States, under the confidence and belief and on the strength of having the right to the use of sufficient water in the respective streams, by reason of appropriation permitted under the reclamation act of the United States, to satisfy the needs for which the reclamation project of our Government, south of the line, was initiated. This, gentlemen of this, the highest commission in the world, is a matter for serious consideration and I hope, trust, and believe that it will be carefully examined in determining what was the intention of the treaty as signified in the first instance.

Taking into account, therefore, all the proceedings leading up to the treaty, we find that at no time was there presented any question of the water supply and settlement of the respective rights between the two nations with reference to any stream or tributary other than St. Mary and Milk Rivers, including the tributaries now being the bone of contention, *flowing across the line*, in one direction or the other.

My point is further made plain, I hope, by the fact that the word "and" is used in referring to the tributaries in Montana *and* Canada which flow into the St. Mary and Milk Rivers. An examination of the maps and topography of the country discloses that the only tributaries flowing from Canada into the United States are those tributaries rising in Alberta and Saskatchewan, and that in every instance they flow across the boundary line into one or the other of these rivers. It is, therefore, apparent that these two Provinces were treated as *one* territory so far as the questions of water supply and diversion of the waters and "apportionment" under the treaty are concerned.

That is to say, while it referred to these different Provinces in Canada, it clearly intended to refer to them as a whole, or as one territory, as one watershed, etc. For example, if we should refer to streams flowing from Oregon into the State of Washington—mention two or three counties in one State and two or three counties in the other—as flowing from one State to the other, although we might mention two or three and use the word "and," it should be clear to anyone familiar with the subject that it was intended to treat the particular section referred to as one territory. Especially is this true when you take into consideration the watersheds under consideration at the time of making the treaty, and at the same time take into consideration that there were watersheds in Montana where the streams did not flow across the boundary line between our two nations. When you do this it would seem clear that at no time was it considered that the communications between our two Governments in these particular matters were not in mind.

An inquiry made of this commission at the hearing in St. Paul as to the significance of the word "and" as used in the phrase "Provinces of Alberta *and* Saskatchewan," appears to indicate that it was then thought that the use of the word "and" in that connection has the effect of materially weakening our position as to the word "and" used in the phrase "State of Montana *and* Provinces, etc., etc." Supplementing the response on that point made during the former argument at St. Paul, and considering this feature in connection with the topography of the country (especially when taken in connection with the matters involved leading up to the treaty), clearly is it disclosed that those having the consummation of the treaty in hand as the representatives of our respective nations, for the purposes of the treaty were considering the two Provinces of Canada, as I have indicated, as one territory and only had reference to that portion of the Dominion of Canada embracing the watershed of the St. Mary and Milk Rivers, all of the waters of which, including the tributaries flowing into each of the respective streams across the boundary line, flowed into one or the other of the streams under consideration, and the flowing of which brought up the controversy giving rise to this treaty.

Now, gentlemen, of the commission, by looking at the maps lying on your desk it will be observed that *all* the water involved flows through one or the other of these two rivers. I might further add that the principal point here involved is that they flow *into* one or the other of these two rivers; in other words, they are tributaries thereof. With respect to this very essential feature, I feel safe in saying that nothing else was considered or thought of until after the treaty here involved was written and signed, when, as a result of such *change* from a draft drawn by those most familiar with the subject, it historically appears that in order to make the lines of the treaty as brief as possible, an ambiguity, not unusual under such circumstances, crept into it. It is such ambiguities, which, as a rule, constitute the breeders of lawsuits, not only with respect to parties, States, etc., but nations as well.

The meaning which was intended by this treaty, gentlemen, would have been clear had those who were parties to it made the same read:

> The high contracting parties agree that the St. Mary and Milk Rivers, and their tributaries in the State of Montana *and* the Dominion of Canada, together with the tributaries of the St. Mary and Milk Rivers north of the boundary line, but which flow from Canada into the said rivers in the United States, and from the United States into Canada, etc.

Now, gentlemen of the commission, with reference to the tributaries in Montana, it must necessarily be conceded that the only mention made of them in any of the proceedings leading up to the execution of the treaty, was with regard to those tributaries flowing across the line from one nation or the other into one or the other of the rivers involved, as to which both nations were then interested. The question of State streams, or *those situated exclusively within the State* of Montana, flowing into Milk River, which never could in any way reach the territory north of the line, the disposal and use of which could in no manner affect that country, *was not at any time mentioned* nor was the same considered, and it was totally foreign to the controversy "now pending" or *then* in hand.

The reason, therefore, for using the word "and" in reference to the tributaries in Montana *and* the Milk River watershed in the Dominion of Canada is clear. So far as Montana is concerned, it could only have meant the waters rising in Montana and flowing into one or the other of the streams in Canada or across the boundary line. This may sound like repetition, but, gentlemen of this high commission, permit me to run the risk of "repeating" in order to make myself understood. If "repeating" means justice—I pray, let me repeat.

The use of the word "and" under the circumstances mentioned appears to have a well-established meaning, when applied in the interpretation of contracts, legislation, and treaties. The words "and" and "or" are not treated as interchangeable under such circumstances unless the intention of the parties clearly so requires. The context of the contract, statute, or treaty, as the case may be, may make such interchangeable use essential to a proper understanding and determination of the intention therein.

Now, gentlemen, let me call attention to the fact that as a further evidence of the ambiguity which exists in this treaty—and when it is once conceded that there is an ambiguity permitting of an interpretation, that is to say, an ambiguity which will permit the introducing and consideration here of the diplomatic correspondence taking place between our two nations—then it must follow that there is nothing further in doubt in connection with this case. Hence my reason for dwelling to some extent upon the ambiguous feature of this treaty, and on this feature I cite the following cases: Merchants & Farmers' Bank *v.* McKellar (11 So., 592, 596); Commonwealth *v.* Kilgore (82 Pac., 396, 398); Miller *v.* Jones (80 Ala., 89, 95); In re Steinruck's Insolvency (74 Atl., 360; 225 Pa., 461); James *v.* U. S. Fidelity Co. (117 S. W., 406, 409, 410); Dumont *v.* The United States (98 U. S., 143).

In the case of Dumont *v.* The United States (98 U. S., 143), request was made to construe the word "or" to mean "and," but the court, after stating the rule, held that such construction clearly would disclose a condition contrary to the intentions of the parties and would greatly increase the burdens beyond the manifest intention. A like request is here made. It is, in effect, contended that *all* the tributaries of these two streams, whether in Montana *or* in Canada, *must necessarily be taken into consideration* in order to determine the rights between the two Governments; that is to say, they must be taken into consideration regardless of their location and without reference to the effect upon the final outcome of the controversy intended by the treaty to be settled. Is that not your contention, Mr. MacInnes?

Mr. MacInnes. Well, would you mind stating it again, Judge King?

Mr. King. The request, as I understand it, is made here—that is, it is, in effect, contended—that *all* the tributaries, whether in Montana or in Canada, shall be considered, regardless of location, without reference to the effect it might have upon the final outcome of the controversy intended to be settled. That, as I understand it, is your position, Mr. MacInnes?

Mr. MacInnes. Yes; I think that is right. That is practically our position.

Mr. KING. I wanted to be sure about it. The result to follow would, as in the Dumont case, although in a different way, materially, yes, *very materially* add to the burdens of the United States; *why?* Because its appropriation of the water from Milk River and the millions of dollars invested on the faith thereof and upon the faith of an adjustment of the controversy in accordance with the *intention* of the parties, providing the contention of the learned legal gentleman from Canada should be upheld, might become a total loss.

The point involved and which I here intend to make is this: Upon taking into consideration the results to follow if we construe the word "and" to mean "or"—in this connection I am referring to the word "or" between Alberta and Saskatchewan—if the word "or" is to be read as meaning "and," then it would seem clear that the tributaries must be in both of the Provinces of Canada. However, if you consider it as "or," it has a different meaning. If you take the word "and" after the word "Montana" and replace it by the word "or," then the result must prove disastrous to the United States, and under the rule laid down in the decision which I have just quoted, such construction would not be permissible.

Mr. MIGNAULT. Judge King, do you pretend that unless a tributary is in Montana *and* Alberta and Saskatchewan, it can not be taken into consideration?

Mr. KING. No; that is not my position. I think so providing that it might be in any one of these places and flows across the boundary line.

Mr. MIGNAULT. You say that unless a tributary is in all three of these particular territories that it can not be taken into consideration.

Mr. KING. No; I do not so contend. My position is that if a tributary is in Alberta *and* Montana or if it is in Saskatchewan *and* Montana or Saskatchewan *and* Alberta, or in either, *and* flows across the line from one nation to the other, regardless of the direction, such tributary or tributaries must be taken into consideration. Our position is that that was what the parties had in mind at the time of entering into the treaty.

Mr. MIGNAULT. Then, Judge King, as I take it, your argument is this, that the *tributary* must be in either Alberta and Montana or Saskatchewan and Montana.

Mr. KING. Yes. My contention is that no tributary is entitled to consideration which does not flow across the boundary line between the two nations. When you study the map, it so happens there is no occasion to consider any tributary except those which do flow across the line. Of course, I mean by that that while there may be some that flow across the line between these two countries, there may be many that do not do so. Now, gentlemen, I have gone to a good deal of trouble to have a map made, which is now before you and which will very materially aid the commission in studying out these questions.

Leading up to the next position, the word "and" under the authorities cited clearly settles the controversy in accordance with our contention, but, gentlemen, it is not essential that we adhere to the meaning here invoked with reference to that word in order to support the *conclusion* for which we are contending, to the effect that only the tributaries flowing across the boundary line between our

respective nations were intended to be covered by the treaty. And why? I trust that I may be able to make myself understood as to "why." It is because when the treaty is considered as a whole, together with the questions now in hand and at and prior to the time of the consumation of the treaty, which becomes necessary under the well-settled rules of construction, the conclusion for which we are contending is inevitable. In other words, our position is that if through some inadvertence, the high contracting parties used the word "and" instead of the word "or," even then there is sufficient language in the treaty to support our contention, but the word "and" as used, when taken in connection with the matters under consideration, is in itself, although but a small word, sufficient to justify the holding to the effect that the treaty only had reference to the tributaries which flow *across the international boundary line.*

It is evident that the high contracting parties, when this treaty was entered into, had in mind only such tributaries rising in Montana as flow across the boundary line into one or the other of the two rivers named. Also, that they only had in view such of the tributaries flowing from the various watersheds on each side as cross the boundary between the two countries.

I am coming now, gentlemen, to what I deem a more important point and which would seem to be conclusive of the outcome of this case in accordance with our contentions.

(Commissioner Powell here entered.)

Mr. KING. Gentlemen, I am gratified to see that the other honorable member of this commission is now present, because I am reaching what I deem one of the most important questions of law here involved, and it is indeed gratifying to me to have the opportunity of presenting the same to the full commission.

Mr. POWELL. I am sorry to say that there was a smash up on the railway which prevented me from arriving in time.

Mr. KING. Gentlemen, in my very defective way I have endeavored to present what I deem sufficient argument to the effect that this treaty should be construed so as to include only those tributaries flowing across the Canadian boundary line in connection with the two rivers involved, and only those tributaries. In discussing that feature, Mr. Commissioner Powell, I have just concluded a discussion of the meaning of the words "and" and "or" as used in the treaty. In that connection, I have argued that the words "in the State of Montana and the Provinces of Alberta *and* Saskatchewan," refer only to those streams flowing from the particular watersheds reaching the streams involved. In studying this map, a copy of which I have placed upon each of your desks, it will be observed that those watersheds, and they alone, include the tributaries which flow across the boundary line, and that accordingly the tributaries wholly within Montana were not in the minds of the contracting parties when this treaty was entered into.

Coming now to the other question: In this connection the fact should not be overlooked that a condition prevailed and still prevails in Canada, when measured from a legal standpoint as well as in other ways, different from that in this country. In the Dominion the appropriation of water under which water rights are claimed does not appear to have been made by the Government in its sovereign

capacity. It was made by individuals and corporations making appropriations under the authority of law granted by the Provinces of that Government. In the case of the United States the appropriation claimed by the United States is made by and on its behalf and has no reference whatever to any appropriation previously made by citizens in Montana where the streams are wholly within the State of Montana, except in so far as it might affect the vested water rights of the citizens in Montana and to the extent that such vested rights might conflict with a subsequent appropriation made by the United States for and on behalf of the citizens to be included within the Government project, or by citizens in Canada upon streams wholly within the boundaries of the Dominion Government.

I fear I have not made myself clear, hence let me repeat that the appropriations made and here involved, and which gave rise to the treaty under consideration, were not, so far as those in Canada may be concerned, made by Canada in its sovereign capacity for the purpose of reclaiming Government lands in Canada but were made by individuals and corporations by and under the authority of the laws of the Provinces and the general government of the Dominion of Canada. I am not absolutely certain that I am right in that regard, but I am under the impression that the interests involved in Canada represent only the interests of individuals and corporations by reason of appropriations made by them under the laws of the Dominion Government. If I am not right I would like to be corrected.

The appropriations made by our Government were made under exclusive congressional authority and by the United States acting in its governmental or sovereign capacity in a manner which might be termed as quasi agent or in trust for those procuring water rights within the Government reclamation project, being people not previously possessed of any vested water right.

The appropriations made by the United States in this capacity had no reference whatever to appropriations made by individuals outside of the Government project, nor to vested rights of individuals south of the boundary line not within the reclamation project.

While the conditions may have been different north of the boundary line, they were certainly not the same south of the boundary line between our two Governments, and the rights of individuals and corporations which had previously made appropriations south of the boundary were in no way involved in this treaty, so far as I can ascertain, either as a matter of fact or as a question of construction of the treaty.

Mr. MAGRATH. Hadn't the Federal authorities taken steps to protect the rights of private individuals?

Mr. KING. It had, and the appropriation was made in that manner and with the view of recognizing the previously vested rights, but the Government, as such, was only interested in the broad controversies involved between the two nations.

Mr. MAGRATH. It was only interested to the extent of private individuals in the States.

Mr. KING. Yes; in so far as it was necessary to protect those vested rights and at the same time acquire sufficient water rights to water the lands on the proposed project. There was no contro-

versy between the citizens of Canada and the citizens of Montana respecting the vested water rights in Montana, but the question arose as to whether this immense appropriation which the Government proposed to make in order to make cultivable the 200,000 acres of land at that time uncultivated in Montana may or may not be in conflict with the rights of the citizens of Canada. To settle that point this treaty was made, not for the purpose of settling any controversy between the citizens of Canada and the citizens of Montana but between the citizens of Canada, through Government functions, and the United States respecting the waters theretofore unappropriated by the citizens of Montana. That I deem to be a very material point for consideration in the interpretation of this treaty, but, in view of the difference between the governmental functions under the law on each side of the line, it is not easily explained.

Mr. TAWNEY. Would it not be fair to assume that the only phases of this question that we have to deal with are the international features?

Mr. KING. That is true; and when you treat it as an international question, and international only, there is not much left for consideration; but when you treat it as an international question and take into consideration that you must at the same time deal with the vested interests of the people of the State of Montana, or any other State, different and more complex questions arise.

Mr. MAGRATH. Is there any difference between the private applicants in Canada for the right to use water and the public applicants in Montana for the right to use water? I take it you are trying to make a difference.

Mr. KING. Well, in a sense there are two strings to my bow in that regard. One I refer to for the purpose of disclosing what the intentions of the parties were when the treaty was made. In that connection I take it that the United States in making this treaty had reference only to the appropriation which the United States, acting in its sovereign capacity and for its especial purposes, expected to make.

Mr. TAWNEY. Appropriation of what?

Mr. KING. Appropriation of water of the streams flowing across the boundary line. There was the St. Mary River, flowing into Hudson Bay, and, being on the summit of the North American Continent, the United States by a scheme of engineering was able to divert, and by its works is proposing to divert, the water of that stream into Milk River, so that, if uninterrupted, it would eventually flow into the Gulf of Mexico; that is to say, that it would not necessarily flow into the Gulf of Mexico but would possibly do so, as it is expected that it will be taken up and used in the irrigation of about 200,000 acres of land, for which the Government in its national capacity was to build a reservoir in order to conserve it for use by building canals, etc., to the 200,000 acres of uncultivated land. This would be an appropriation which would be very large and require an immense volume of water supply. The question then arose as to what would be the effect upon the irrigators on the Canadian side if the St. Mary River should be diverted into the Milk River and the waters of Milk River used to irrigate the lands in the United States, not the question so much as to those who had already ac-

quired vested rights, yet the protection of these vested rights, without reference to any action taken by the Government of the United States, raised a very important question. It was that which gave rise to the treaty which was entered into in order to settle that controversy, and which is now under consideration.

Notice accordingly was taken of the hundreds of private water users several hundred miles down the river south of the line near the Missouri River in Montana. These water users had vested rights which were not specifically mentioned in the treaty; that is to say, there is no specific mention made of these particular persons. There is nothing in the treaty to indicate that it ever entered the mind of anyone to take into consideration the waters used by these men in Montana, *which waters rose and flowed entirely within the State* and which did not flow into either the St. Mary or the Milk River, except within Montana. This is one feature to be considered.

Another feature, which I will reach later, is that if it was contemplated that such a thing was to be done—that is, to take such a course as would affect vested water rights in Montana—it must be remembered that those making the treaty, that is to say, neither of the Governments, had any legal right, under the form of Government under which the United States was created and existing, to enter into such a treaty. Consequently, since a treaty to such effect would be unauthorized, it follows as a matter of course that no such intention was contemplated by the high contracting parties.

A treaty can be made by the British Government, as I shall disclose later, that can not be made respecting the United States. We can not presume for a moment that it was ever intended that the congressional or treaty-making stream would rise higher than its source by the Senate approving a treaty forbidden by the Constitution of the Government creating such Senate. It may be said that I am begging the question; temporarily I am. I am merely laying down now some premises upon which to base my reasoning for the purpose of demonstrating the error which I think the representatives of the Canadian Government have fallen into, even though it might at first blush have the appearance of being ahead of my argument.

Mr. POWELL. Your argument is that we should withdraw from the operation of the treaty all those waters which were appropriated previous to the passing of the treaty.

Mr. KING. That is the case so far as the United States is concerned.

Mr. POWELL. That is your argument.

Mr. KING. That is my argument so far as the United States is concerned but not necessarily so far as concerns Canada, because the treaty-making powers of the two countries are not identical. But I will come to that in a moment. One condition that gave rise to this treaty was that there were vested rights in Canada, but the United States was and is acting as a quasi agent for citizens of Montana in making appropriation for the reclamation of 200,000 acres of land, which is to be irrigated by waters diverted from the St. Mary River into the Milk River carried 210 miles through Canada, returned to our side of the line and eventually conserved in a reservoir below the line for the reclamation of the heretofore unirri-

gated area mentioned. Now, of course, the people on the north side of the boundary line might prevent that by not allowing the United States to convey the water through that country in the Milk River channel, but it was never taken into consideration that the people down in Montana where the streams were entirely within the State and had their vested rights, and which in a manner difficult to explain may have disturbed the "even tenor of the way" of the people across the Canadian line, should be considered in the treaty. The interference with the use of the water by individuals north of the boundary line made it necessary for some kind of a treaty to be entered into before the United States should spend these millions of dollars for the reclamation of the land mentioned.

Hence, I feel safe in saying that the private rights of the people on the Canadian side were involved but the private and vested rights south of the boundary, which in no way affected Canada, were not involved. I trust I have made myself clear on that feature.

Mr. POWELL. Then I understand your idea is not to take into consideration the watersheds which are not international.

Mr. KING. Yes; that is my position, but there are watersheds international in a sense but with regard to the use that the United States as well as Canada are making of them, this use was national in the sense that the Government of the United States was and is making appropriation for these 200,000 acres of land. Some of the land is about 240 miles from the St. Mary River.

Mr. POWELL. What appropriation are you referring to now?

Mr. KING. The appropriation for that Government work. I am not referring to any appropriations that may have been made by the people down in southern Montana; I refer only to the large appropriations that the United States Government proposed to make for the reclamation of this large area of land. I submit that it is evident that this is what was in the minds of the makers of the treaty, inasmuch as no controversy whatever existed between the individual users on the Canadian side and the individual users on the American side. That is one of the points in my argument. However, as I said before, I am, it appears, a little ahead of my line of argument as laid out, and I would like to take that feature up later.

It must follow, therefore, that under all of the rules of interpretation which permit extraneous facts to be presented in order to ascertain the intention of the parties (included therein being the controversy which grew out of the appropriation made by the United States in its governmental capacity and which was from time to time discussed by both the high contracting parties with that object in view), that only those tributaries and streams which cross the international line were intended to be taken into consideration, or can either legally or equitably be taken into consideration, in the final determination of *how* the waters between the two Governments may be "apportioned."

The Government north of the boundary line is entitled under this treaty to take three-fourths of the waters of St. Mary River, not exceeding 500 second-feet, as a first right. The Government south of the line is given a like privilege of diverting as a first right a like number of second-feet from Milk River, the two streams being considered as one for the purpose of apportionment for irrigation and power.

After the specified appropriations mentioned from the two streams by our respective Governments are satisfied, the total surplus of the two is, under the treaty, to be "apportioned equally" between the two countries; but should the construction insisted upon by our learned counsel from the Canadian Government, and those representing other interests therein, prevail, it is then more than probable that during the low-water seasons of the year, or the times when water is most needed, no water would be flowing through the Milk River channel from which the diversions, by its direct appropriation provided for, could be made by the United States, acting in its sovereign capacity, for the benefit of the people under its proposed, and already largely completed, project.

There is room for some difference of opinion as to how this apportionment is to be made, but I assume the engineers will be able to settle that in a practical manner. However, as I understand it, each Government is to take a certain appropriation up to a flow of 500 cubic feet per second in the respective streams, and whatever surplus there may be in addition to that must be divided equally. This language, I must admit, is a little puzzling. However, I do not anticipate any difficulty on that line when we settle the question as to what is meant in the treaty by the use of the word "tributaries."

Mr. MIGNAULT. Do you take the ground, Mr. King, that the United States did not stipulate in the treaty for the benefit of the people in lower Milk River Valley with the exception of the stipulation for a prior appropriation of 500 second-feet in the Milk River?

Mr. KING. Well, my theory about that is this: That their interests were not involved at all, so far as what was in mind about the "tributaries," when the treaty was entered into.

Mr. MIGNAULT. Then why did the United States stipulate for a prior appropriation of 500 second-feet out of the Milk River?

Mr. KING. I take it that that was for the purpose of insuring an available water supply for the land which had been reclaimed, where vested rights had accrued, and at the same time give to the United States an adequate supply for the 200,000 acres of land to be reclaimed.

Let me pause for a moment to make this suggestion: If the Government had not been intending to build a reclamation project, and there had been a dispute between the two countries over vested water rights, and a treaty was entered into, and, in entering into that treaty there had been taken into consideration that the appropriations being made on the Canadian side were interfering with the vested rights in Montana, the argument concerning the treaty would present a somewhat different aspect. But here we have a treaty in which there was no disturbance between the vested rights in Canada and the vested rights in Montana, and the construction of this project, for which millions were to be spent, clearly indicates that since the Government of the United States must recognize the vested rights below on the streams, that if it should take an extra water supply essential to the irrigation of 200,000 acres of land there might be some conflict, and the irrigation of these lands and the extra water supply to be used therefor necessarily gave rise to this treaty.

Mr. MIGNAULT. Where was that?

Mr. KING. In Montana.

Mr. MIGNAULT. Well, where in Montana?

Mr. KING. In the lower Milk River Valley. For the purpose of making certain that this money would not be wasted in an investment by means of never having an adequate water supply, this treaty was entered into in advance so as to settle the whole question, and in settling this question the vested rights below were taken into consideration by the United States, but the tributaries there had nothing to do with this controversy, so far as the language of this treaty is concerned.

Mr. MIGNAULT. We were given to understand, Mr. King, that the reason was that these people had certain water rights, and the intention was to secure, so far as possible, a proper appropriation to be made for the benefit of the people in the lower Milk River Valley.

Mr. KING. Well, some may have had that in view; some may have misunderstood the situation; and, in fact, that feature is impliedly involved; but as to that, it would not have required any treaty, because the water then used is practically all in Montana, and under the laws of gravitation could not have possibly flowed into Canada; and, secondly, Canada, for the reasons which I have mentioned, could not interfere with it. You will find by looking at the lower watershed, disclosed by the map before you, that practically all that water is in Montana and never reaches Canada at all. Hence, there certainly could have been no occasion for a treaty with respect to the water in the tributaries wholly within Montana.

Mr. MIGNAULT. But the only case where there could be any irrigation in Montana is in the lower Milk River Valley—I am referring to this watershed. It seems to me that any stipulation made by the United States for a prior appropriation was certainly for the benefit of the lower Milk River Valley.

Mr. KING. True, the benefits to be received were in the lower Milk River Valley for the Government project, but not with reference to those vested rights under the tributaries all in Montana in the lower Milk River Valley. It was with reference to the lands to be watered by the streams flowing across the line into Milk River, to be applied in the appropriation for use upon lands under consideration when the treaty was made, for it was necessary for the United States to take into consideration, in making this appropriation, that there should be sufficient water to flow down and to satisfy the vested rights upon tributaries wholly within Montana (if the supply within the State should prove wholly inadequate) before use would be made of it by the United States and by which our Government expected to reclaim the lands it had in contemplation within the United States. Hence, in entering into the treaty the high contracting parties necessarily took into consideration all these features in order to secure an available water supply for its own use independent of and without interfering with the vested rights.

Mr. MIGNAULT. You will see, Mr. King, that there were vested rights in Canada on the St. Mary River; there were also, I assume, vested rights in Montana on the Milk River; and this provision for a prior appropriation of 500 second-feet from the two rivers, respectively, was to permit each country to have enough water to cover its vested rights, so far as the 500 second-feet would go.

Mr. KING. That is a peculiar feature about it, which makes it difficult on first blush to grasp. It is a very difficult thing to explain. If, for example, the Government of Canada was endeavoring to make an appropriation in its *sovereign capacity* to reclaim several hundred thousand acres, either by itself or through some corporation or individuals, and it should be discovered that such an appropriation would interfere with these vested rights farther down on the streams in the United States, it is very probable that the same question would have arisen; but it so happens that in this particular instance no question had arisen between the two Governments except as to the right of the United States, in its sovereign capacity, to make this particular appropriation, subsequent in time and right to those in Montana, and for use exclusively by the United States in its governmental capacity.

The United States Government had in mind the protection of those rights, the furnishing of a sufficient available water supply to satisfy the vested rights, in lieu of the tributaries wholly within the State, some of which flow into the Government reservoir, and at the same time the furnishing of such a supply as would enable the Government to reclaim the 200,000 acres of land in addition to those for which vested rights were had. There was no intention of interfering with vested rights farther down on the stream. It is presumed that this was all understood; it is presumed that the Government of the United States intended to respect the vested rights granted under the Constitution of the United States. Then, what follows? The only matter in dispute was, after taking into consideration those vested rights and the appropriation which the United States proposed to make, what effect did it have upon what might be termed vested rights of individuals and corporations in Canada? The peculiar situation is that on the Canadian side of the line the object of the treaty was to settle individual and corporate rights without reference to the national sovereignty, while on the side of the United States the object was to settle rights which were to be used by the Government in its sovereign capacity and at the same time to deal fairly and in accordance with the Constitution with the individual water users in its dominion.

Mr. POWELL. What about the lands under irrigation on the lower Milk River Valley? Wouldn't this be for them, or would the Government interfere with them?

Mr. KING. If unsettled and undetermined by this treaty, they would, but if settled in accordance with our view they would not. However, to get down to a practical basis, since water will naturally seep to the land below, they will by the use of the water on the project above receive some benefit.

Mr. POWELL. Water will do more than seep—it will run.

Mr. KING. Yes; all that is not used would run by, and, of course, some would run down anyway; but even that was taken into consideration.

Mr. POWELL. Well, all I want is to get seized of the full facts of the case. Is it a fact or is it not a fact that the lands subject to irrigation in the United States would be served by these waters which are entirely waters of the United States? Were they ample—was the situation such that for all purposes of irrigation these streams were ample?

Mr. KING. Yes; it may be that they were ample for the irrigation of lands then being irrigated—that is to say, if you assume they had an adequate water supply before the Government made any appropriation. But the appropriation made by the Government was to irrigate lands not then farmed and which were not farmed because they did not have an adequate water supply.

Mr. POWELL. Yes; but what I want to get clear is not the purpose of the Government but the actual facts before anything was done. To repeat—were the waters of those streams that you claim should not be considered in interpreting the present treaty at all, were they ample for the purpose of irrigating the lands which were the subject of irrigation in the lower Milk River Valley?

Mr. KING. I assume that they were ample, so far as the lands then farmed were concerned, but there are unappropriated tributaries wholly within the State that do not come within the Government project for which appropriations will eventually be made. The 500 second-feet referred to in Article VI as a prior appropriation represents the water which crosses the international boundary and which is necessary to supply the lands which were not irrigated before the treaty was made. The division of water, as I take it, in excess of that amount was intended to represent the water essential to irrigate the excess lands—that is to say, those that were to come under the Government project.

Mr. POWELL. Your argument assumes that.

Mr. KING. Yes; but the water which the United States was appropriating was to irrigate lands which were not then irrigated by the then water supply.

Mr. POWELL. Well, of course, it may be that they had that in view, but it is the practical bearing that I am after.

Mr. KING. I think an examination of the data available on the subject in the records will disclose that that is all they had in mind. Of course they thought of these vested rights on the theory that the United States *must* provide for a safe available water supply, so that when it irrigated the new lands it could be able to do so without disturbing vested rights. I think it was on that basis that the previously unirrigated land was to get this 500 second-feet which crosses the international boundary. We should not take into consideration the streams situated entirely within Montana and which were not subject to treaty and which they could not have had in mind under any circumstances in deciding how much water is to be divided hundreds of miles up along the Canadian line. Further, to illustrate, while the 500 second-feet may have been intended in part to protect vested rights down below they were using many hundreds of second-feet for the irrigation of their lands from tributaries with which Canada was in no wise concerned. That is the distinction I am endeavoring to make clear. I have some other grounds upon which to base my argument which I desire to lead up to.

Mr. GLENN. Well, while the Government did not have any right to take the water out of this river in Montana, yet couldn't the Government say that we will have the water measured where the Milk River goes into the other river and make that a basis?

Mr. KING. Yes; certainly. I think that could be done, but in determining how that is to be measured we must not take into consideration all these other vested rights in order to arrive at the inten-

tion of the parties at that particular time. But the construction Canada insists upon assumes they must be added to the tributaries crossing the boundary. We can not assume that in making a treaty, absurd conclusions were intended or that one Government intended to perpetrate a fraud on the other. It follows that, if in construing the treaty in that way, such construction would imply an absurd conclusion, it is accordingly evident that such was not the intention of the high contracting parties in entering into the treaty. It would thus follow that if the language is construed to mean that the tributaries entirely within the United States must be added to the streams crossing the boundary line, then the language which unqualifiedly provides for diversion of one-half of the waters of Milk River would prove futile. The disastrous result to follow such an interpretation should clearly demonstrate that such an intention was never contemplated by any of the parties to the treaty. It surely should not be contended that such dire results ever entered into the minds of the representatives of either Government, for neither an absurdity nor a fraud should be presumed to have been intended by either of the contracting parties. To hold as contended by our opponents, when measured with the facts before us, would necessarily imply both.

Mr. MIGNAULT. I quite agree with you that the United States Government in making a treaty could not do a thing that they had no right to do, but for the purpose of estimating the amount of the water, couldn't they say that we would estimate it as if we had a right to do so?

Mr. KING. They certainly might have said so, but I do not think they did say so. They could have said in the treaty that they would not take any water at all, but they did not. In fact, the purpose of the treaty was to secure an available water supply, and it is hardly reasonable to infer that a course would be taken the result of which might secure no water supply.

Mr. POWELL. Yes; but where was the water to be measured; at the boundary or where?

Mr. KING. It is to be measured, as I take it, at the boundary or wherever found most practicable. They could provide, of course, to measure it wherever they saw fit. Provision is made for engineers to be appointed by the respective nations for that very purpose. This provision would imply, as I understand it, that the measurement would be where the engineers would find it most practicable, in order to carry out the spirit and purpose of this treaty. But I will come to that later. The treaty, as I understand it, took all these matters into consideration, that the water was to be divided equally, so far as practicable. The treaty then goes on to define how that shall be done, and says that each shall receive three-fourths of certain streams, one of one stream and the other of the other stream, until it reaches 500 second-feet. And then I assume—I am not sure that everyone will agree with me—that after this 500 second-feet is reached they divide the waters in excess of that equally.

Now, that does not contemplate that in making the estimate as to the amount of water to be divided equally—that is, the amount which exceeds 500 second-feet—that we are to figure, say, a million second-feet down at the mouth of the Mississippi River, or Gulf of Mexico, and add that to the second-feet where the water of Milk River crosses

the northern boundary line of Montana. And it was with a view to ascertaining what was the intention of the parties with regard to that feature that I am going into this question.

And before I get through, I hope, in fact expect, to prove to the satisfaction of everyone on this commission that we have no right even by a treaty to disturb any of the vested rights in Montana or elsewhere. I would not be surprised if even the opposing counsel agreed with me finally before I get through. But if he is not convinced, it will not be for want of *trying* on my part.

Mr. POWELL. Well, Mr. King, as I understand your argument, the construction you are endeavoring to put on this treaty is that the contract which the parties expressed in general terms shall be restricted to certain specific objects or purposes that they had in view. That is your argument, is it?

Mr. KING. Yes, sir; that is my argument.

Mr. POWELL. And on that argument you base your right; that is, you allege we should qualify and restrict the general words of the treaty?

Mr. KING. I am not certain that I understand your question, but my position is this: It is necessary under all rules of construction to take into consideration what was *intended* by this treaty, to consider the language, not merely one word, sentence, or paragraph, but all taken as a whole, and if found sufficiently ambiguous, we must, under all rules of construction of treaties, be permitted to make and to take into consideration all the incidents and transactions leading up to the treaty, including all diplomatic correspondence, and when that is done I believe all concerned will be highly satisfied with the result.

Mr. POWELL. I am prepared to go a little further. It is a well recognized rule of construction, according, I believe, to the jurisprudence in both countries, that general words shall be restricted in their application if reason demands they should be.

Mr. KING. Yes; I think so. I agree with you.

Mr. POWELL. And upon that basis you propose to restrict the general words of the treaty?

Mr. KING. Yes, sir; that is so; that is my position if I fully understand you.

Mr. POWELL. And I understand you to go further and say that the words are not generally applicable to all rivers in Montana nor to all rivers in Alberta or Saskatchewan, but that the word "and" as used means rivers in Montana and in Alberta and Saskatchewan.

Mr. KING. Rivers which flow across the boundary, whether separately or through either channel of the two rivers.

Mr. POWELL. Then, I understand you.

Mr. KING. And I further take the position that whatever may have been the intended effect of the use of the word "and" or the use of the word "or" the result would be the same, but that the use of the word "and" under all rules of construction is, in my judgment, quite sufficient in itself to settle this controversy. But, independent of that feature, there are adequate reasons from a legal standpoint to insure and justify a holding by this honorable commission to the effect that the "tributaries" referred to are only those flowing across the boundary, either northerly or southerly, whether separately or through either of the streams across the boundary line.

Mr. POWELL. Your reason is that you place upon the word "and" a construction to the effect that it associates together the United States and the Provinces of Alberta and Saskatchewan as a territory taken as a unit, through which the rivers must flow.

Mr. KING. It may have the same result; but I will put it this way: These words refer to the tributaries in Alberta and Saskatchewan, also to the tributaries in Montana flowing across the boundary in one direction or the other.

Mr. POWELL. But you are not taking these Provinces distributively, but collectively?

Mr. KING. I am taking the watersheds.

Mr. POWELL. You are taking them collectively.

Mr. KING. Yes; collectively.

Mr. POWELL. Then when it says in Montana and the Provinces of Alberta and Saskatchewan it means that it must be flowing through all three.

Mr. KING. Not necessarily so, but means tributaries flowing across the boundary line in one direction or the other regardless of whether in all three or only in one of them.

Mr. POWELL. I do not see exactly where that comes in.

Mr. MIGNAULT. I think I have your argument, Mr. King—you contend that when they say tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan it means rivers that are in the State of Montana and in either of the two Provinces which are mentioned—I mean tributaries—the only tributaries, according to your argument, which are involved are the tributaries which are in the State of Montana, on the one hand, and one of those two Provinces, on the other hand. That is your argument, is it not?

Mr. KING. I think what you have just stated might be in harmony with my argument, but, further, to clear the atmosphere I will add that my contention is that the language of the treaty has reference to tributaries involved between the two countries, which tributaries flow across the line, and not tributaries not involved between the two countries and which under our Constitution could not be involved, consisting of those entirely within the United States, the waters of which in no way cross the line.

Mr. POWELL. Well, let us get down to the specific language used or let us take an instance. Now, there is a stream that flows from the United States into the St. Mary River. Below that again there is one that takes its rise in Canada and flows into the St. Mary River. As I understand you you would exclude these for the reason that, although they flow through the Province of Alberta, they do not flow through the State of Montana.

Mr. KING. Could you point that out to me on the map, Mr. Powell?

Mr. POWELL. Well, don't bother about what particular river it is, but let us take a hypothetical case. There are a lot of rivers that rise in the south and flow northeast to the Milk River. You say these should not be taken into account for this reason, that, while they flow through the State of Montana, they do not flow through either the Provinces of Alberta or of Saskatchewan, and therefore must be excluded, because the copulative "and" associates the two territories as a subject through which they must flow. Is that your argument, Mr. King?

Mr. KING. That is one reason, but I am willing to eliminate the words "and" or "or" and take entirely what was in mind when the treaty was made. Of course the waters flowing into the St. Mary River on the Montana side form the St. Mary River, and therefore flow through both countries. The same may be said of some flowing into the St. Mary River, or even Milk River, on both sides of the line, and in that manner they flow through the two countries, but that is not the case with the Milk River after it crosses the Canadian line. This, I take it, meets the hypothetical case stated by you.

Mr. MIGNAULT. Well, now, let us take the language in the treaty. I can understand that your argument would be applicable to the language of the treaty to the effect that the tributaries must be, on the one hand, in the State of Montana and, on the other hand, in either of the two Provinces of Canada mentioned—that is, Alberta or Saskatchewan—those are the tributaries comprised in the language of Article VI of the treaty.

Mr. KING. Yes; but I contend that they must flow across the line from one side or the other, through one of the rivers or the other, and that the treaty has reference only to tributaries which may thus flow across the line.

Mr. POWELL. That is, tributaries and rivers.

Mr. KING. Yes; tributaries of the St. Mary and Milk Rivers. Now, if there are any in Canada that do not flow across the line and do not flow into one of the streams crossing the line, I am not considering them; nor am I considering any that are in Montana that do not flow directly across the line or flow into one or the other of the streams before such streams cross the line.

Mr. POWELL. Well, why do you not consider them—because you put a construction on the meaning of the word "and" which would make it appear that while flowing through one portion of the country they do not flow through the other; then is that not enough to include them in the language of the treaty?

Mr. KING. Well, here is what I contend: First, the tributaries in these Provinces flowing across the line, that is one point; and the tributaries in Montana that flow across the line is another, regardless of whether crossing the line through one stream or the other. I think there is an instance up here [pointing to the map] where a tributary does not go across the line but comes into the St. Mary River after it crosses the line flowing north, and some coming into the Milk River below the line. I should think that they are not involved here and that those tributaries south of the line flowing into Milk River are no more involved here than is the stream where it flows into the Gulf of Mexico. That is my position.

Mr. POWELL. Yes; I understand that is your position; but what is your argument?

Mr. KING. Well, I am proceeding with it as fast as I can.

Mr. POWELL. Yes; but getting down to hard facts, on what do you base your contention? As I understand it you base it on the meaning that you attribute to the copulative "and."

Mr. KING. The word "and" as there used is sufficient to settle the controversy. Yet we have stronger reasons in support of our position.

Mr. POWELL. Well, I may say that it made quite an impression on my mind.

Mr. KING. As to the word "and" the trouble is I discussed that point before you came in, Mr. Powell, hence you did not hear my argument on that.

Mr. MIGNAULT. Well, I may say, quite sincerely, Mr. King, that I think there is an argument on the word "and," to the effect that only tributaries are concerned that cross the boundary, since it would mean that they should be both in the State of Montana and in either of these two Provinces of Canada.

Mr. KING. That is my contention, and it seems to me that according to all rules of construction that is what it means. But, for the moment, I am willing to forget all about that. That is only part of my argument.

Mr. POWELL. But what language are you construing, Mr. King?

Mr. KING. The language of the treaty.

Mr. POWELL. Well, but what portion of the treaty—the word "and"?

Mr. KING. Well, if you take that one sentence or paragraph and leave out everything else—I see your position.

Mr. POWELL. Oh, I have no position; I am asking you about your position.

Mr. KING. Well, taking the entire treaty, it should be construed so that every sentence and phrase will be consistent in connection with every other sentence and phrase, and also so as to take into consideration the points and "controversies now pending"—you remember it uses the words "controversies now pending" in the first part of the treaty, which indicates that there was something to settle at the time the treaty was made.

Mr. POWELL. Well, without being so definite, it strikes me at the moment that there is something in Mr. Mignault's suggestion that that is a possible construction of that phrase—that is, that the word "and" couples these together—so that it would appear that the tributaries must flow through both units—that is, the State of Montana and one of the Provinces of Alberta and Saskatchewan—and that consequently crossing the boundary is simply a sequence of that.

Mr. KING. It so happens that as to the controversy then pending, they do cross the boundary. If the boundary line were farther south down here [indicating on the maps] the watershed might govern and take in tributaries now entirely in Montana.

Mr. POWELL. Let me point out to you what it means. If that contention is followed then there is a large number of tributaries flowing from up in Glacier Park into the St. Mary River, and I understand the United States contemplates the possibility or the probability of erecting a dam there, and I think they are going to do it. Now, if your construction is correct, you will eliminate entirely all the waters of that stream from the problem, for the simple reason that they do not flow through the Canadian territory at all.

Mr. KING. No; it does flow through Canadian territory, through St. Mary River, and should be considered.

Mr. POWELL. The waters that enter into the St. Mary River, it is true, and in that way they really do flow through Canadian territory.

Mr. KING. That is correct. I will deal with that when I reach it.

Mr. TAWNEY. Don't you think that perhaps if Judge King proceeds with his argument in the sequence he has prepared it we might make more rapid progress?

Mr. POWELL. Well, perhaps, but I always like to have points cleared up as we go along.

Mr. KING. I must say that the questions asked me have very materially assisted me in my argument and am glad to have them.

Now, I want to take up another question which I think is more important, and even I think more in favor of our position, and that is the distinction between the two Governments, so far as their powers go with regard to making treaties.

This brings us to the question of determining the intention of the contracting parties by considering the limitations invoked upon the respective Governments by the treaty-making powers under which they were acting. In passing upon this feature it is well to observe that the powers which may be exercised in this regard by the respective Governments differ materially. The powers held by the Federal Government of the United States in such matters, as well as in all matters, are enumerated powers, delegated by the States, and include only such authority as through its fundamental law has been surrendered to the General Government by the States. But the powers which may be exercised by the Government of Great Britain respecting the Dominion of Canada or any part thereof, or questions arising therein, are not thus circumscribed. It appears that the Provinces of the Dominion of Canada and other colonies of the British Empire receive their powers from the General Government, which Government reserves rights and privileges to the extent not thus delegated.

In other words, the Government of Great Britain is not restricted in its treaty-making power, while on the other hand the United States, being a Government of delegated and enumerated powers, is circumscribed in its authority accordingly.

Hon. James Bryce, former British ambassador to this country, in his great work, The American Commonwealth, in comparing the two forms of government, says (pp. 241–242, vol. 1):

> In England and many other modern States there is no difference in 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 talking 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 a particular instrument adopted in 1783, 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 par-

ticular. That which the people have enacted, the people only can alter or repeal.

Here therefore we observe two capital differences between England and the United States. The former has left the outlines as well as the details of her system of government to be gathered from a multitude of statutes and cases. The latter has drawn them out in one comprehensive fundamental enactment. The former has placed these so-called constitutional laws at the mercy of her legislature, which can abolish when it pleases any institution of the country, the Crown, the House of Lords, the established church, the House of Commons, Parliament itself. The latter has placed her Constitution altogether out of the reach of Congress, providing a method of amendment whose difficulty is shown by the fact that it has been very sparingly used.

In England Parliament is omnipotent. In America Congress is doubly restricted. It can make laws only for certain purposes specified in the Constitution, and in legislating for these purposes it must not transgress any provision of the Constitution itself. The stream can not rise above its source.

On page 245, in referring to the Government of the United States, Mr. Bryce further observes:

The supreme law-making power is the people—that is, the qualified voters, acting in a prescribed way. The people have by their supreme law, the Constitution, given to Congress a delegated and limited power of legislation. Every statute passed under that power conformably to the Constitution has all the authority of the Constitution behind it. Any statute passed which goes beyond that power is invalid, and incapable of enforcement.

Again, on page 378 of The American Commonwealth (vol. 1), Mr. Bryce states:

Every power alleged to be vested in the National Government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favor of the existence of a power; on the contrary, the burden of proof lies on those who assert its existence to point out something in the Constitution which, either expressly or by necessary implication, confers it.

In discussing this subject, Hon. George F. Hoar, in comparing the Government of Canada with that of the United States, says:

In the United States all powers not granted to Congress are reserved to the States or the people. In Canada all powers granted to the Provinces are subject to the Dominion or to Great Britain. She has moreover no Bill of Rights. The doctrine which lies at the foundation of every American system of Government, State or National, that there are domains on which no human authority can be permitted to enter and acts which no human power shall be permitted to do, is unknown to her. In her foreign relations Canada is wholly under British control. She has no voice in the treaty-making power.

Now the point which I desire to make by quoting from Mr. Bryce and Mr. Hoar with regard to the question as to what could have been under this treaty, is that, as said by Mr. Bryce, the stream can not rise higher than its source—that is to say, that Congress could not delegate any greater powers under the pretence of making a treaty than it already had. It could not go beyond the Constitution, and that of course brings up the question as to what the powers of the Congress are under the Constitution, which I shall take up next.

But to try and make clear the point which I expect to present along these lines—for example, there are vested rights in Montana—vested water rights. Under the Constitution of this country Congress had no power and clearly had no right to delegate the right to make a treaty which would affect any rights wholly within the State of Montana. Now this is questioned by some; in fact, I noticed that in the argument which has been presented here before on this question.

Mr. TAWNEY. What do you mean by saying that Congress would have no power to delegate more powers than itself possessed with regard to treaty making? Congress does not delegate treaty-making power.

Mr. KING. It ratifies the treaty.

Mr. TAWNEY. No; the Senate does it.

Mr. KING. Yes; of course, the Senate must ratify the treaty. I assumed that was understood. A stream can not rise higher than its source, hence the right to make a treaty in violation of the Constitution can not effectively be exercised. Then we come to the question whether it would be a violation of the Constitution to make such treaty as this would be if contended for by learned counsel for the Canadian Government.

The rights of the people of Montana to streams wholly within Montana are the vested rights of the citizens who have appropriated the waters under the laws of that State. Since, therefore, they are the vested rights, and since—if you will agree with me for a moment, if only for the sake of the argument—if the Government has no power to make a treaty which will affect the vested rights of the citizens of the State, it is certainly self-evident that it was not intended when this treaty was made to take into consideration in the measurement of these waters the waters belonging to the citizens of that particular State, any more than it would attempt to take a county of that State and under treaty to give that county to Canada, or even to take a State and give that State to Canada. I know it is claimed by some that that can be done, but nowhere in the history of this country can any authority be found which upholds anything of that kind, or which is to the effect that a treaty can be made along that line, unless in time of war between this and another country as a "war measure."

Mr. TAWNEY. I would like your view on this point, Mr. King; that is, the point made by counsel for the Dominion of Canada in his brief, in which he says:

> A point as to treaty-making power was suggested at the hearing, not on behalf of the United States, but by Mr. Sands, of Chinook. An examination of the facts shows, however, that the point while interesting academically is not and can not be involved in this case. Under no interpretation does the treaty give to Canada water of the Milk River or its tributaries not flowing across the boundary, but all of such water will remain the property and in the possession of the State of Montana and of the persons in such State entitled thereto.

The contention is, as you see, that the treaty does not take any such water away from the State of Montana at all.

Mr. KING. If the eminent counsel who made that statement will pardon me, I will say that he is "begging the question," *petitio principii*, for that is the very point in dispute. Our contention is that in order to place an interpretation, which they are insisting should be placed upon the treaty, it means that they would have the power to do so and that its effect would be to do so. True, of course, the water will continue to run downhill, and will remain in Montana, but it is proposed, by the interpretation here insisted upon, by a system of mathematics and engineering, to add in the calculations the water rising wholly in Montana and which does not and, under the law of gravitation, can not flow into Canada, to the water at the

heads of the streams which, through the two rivers, flows into Canada, and to use that as a basis for dividing the waters in question near the head of the two rivers, or before the Milk River returns to the United States. Possibly I do not understand what he had reference to, but if it is to be taken for granted that the waters rising wholly in Montana and not flowing into either of the rivers before they finally cross the line are not to be considered, then of course there is no room for argument.

Mr. MIGNAULT. But no vested right in Montana would be affected if these appropriations made by the citizens of Montana are not affected.

Mr. KING. Well, that does not touch my point.

Mr. MIGNAULT. But you say the United States were stipulating for those who got some water of the St. Mary River down in the lower Milk River Valley and that the rights of private citizens in Montana were only to be considered as a part of the share which should go to the United States—then your argument does not make any difficulty. No rights are affected, if these waters are merely taken into consideration in order to form the measure which the United States has stipulated for.

Mr. KING. Well, we are not claiming anything of that kind, but if you will take the acre-feet on that map that are wholly in Montana it will disclose the basis used in making the computation.

If you take, as I say, the number of acre-feet required there and the amount that Canada is to require before it crosses the boundary line, or on the boundary line, and add them together, you will find that there will not be any water flowing in the Milk River across the boundary worth bothering with. It is a case of using the tributaries for one purpose, and forgetting them for the other.

Mr. MIGNAULT. Well, the only question I suppose is the division of the water into equal shares, and as a part of the United States share we find that there are water rights in Montana to be considered. They are not affected at all; they will remain in Montana. The citizens down there who use water will get their water, but it is merely considered as a part of the equal share which will be used in the United States.

Mr. KING. Well, kind sirs, let me give a concrete illustration. Assume there are 2,000,000 second-feet produced as a result of the tributaries entirely within Montana and but 1,000 second-feet flowing in the Milk River where it finally crosses the boundary line and you add that 2,000,000 second-feet to the 1,000 second-feet in the two streams flowing across the line then you will have 2,001,000 second-feet. Then take that and divide it, then, gentlemen, permit me to ask: How much will get back to the United States under such circumstances? *None.* If all of the waters and tributaries flowed into the respective rivers above the point of the international boundary, or across it, a different condition would be presented to view, but the plan is, as I take it, under the contention of the very able counsel from Canada, to take the water below the point of division and add that to the water above, and divide on that basis. We do not complain that that is taking the water away from the people of Montana, but it is *an assumption of a right* to do so. As we view

its effects under that method of division the United States will not receive any water at all. Under the argument made by the learned gentlemen from Canada there is clearly an assumption that we on this side of the line would have a right to deprive the citizens of Montana of their water to make the division on the basis contended for, providing the United States should decide to do so. If the United States has not this power it certainly can not take this water as a basis of computation in a treaty.

Mr. TAWNEY. But the tributaries in Montana will not be affected.

Mr. KING. Only in the manner I have stated. I come now to the constitutional questions involved as illustrative of the fact that the two Governments did not have in mind any of the tributaries wholly within Montana that do not pass through the rivers between the two Governments, because such features were not subject to treaty at all. When I say not subject to treaty at all, I have reference to the tributaries south of the boundary line in which Canada could not in any way have been interested.

But if there were a war between our two good countries then, in the end at the settlement of such war, differences might have justified such change, but such a bargain could be made only as a "war measure," as such, and certainly the United States could not authorize anything of that kind under any other circumstances. Now, so far as treaties are concerned, in time of peace between two countries no power could be delegated under the Constitution of the United States which would enable the Government of the United States by treaty to affect any vested rights. I do not wish to be misunderstood that it necessarily follows that the treaty under consideration is taking away vested rights, but I want to be understood as asserting that when you take into consideration the tributaries amounting to hundreds of thousands of acre-feet, entirely within the State of Montana and exclusively within the United States, and in order to determine the distribution of the waters involved add them to the waters flowing across the boundary, which waters flow through tributaries to the St. Mary and Milk Rivers, that it does materially affect the United States. It is accordingly very evident that the United States had no intention of considering any matters which were not subject to treaty. Neither did either of the nations, so far as that is concerned. To assume that the waters wholly in Montana, as to which water rights may be vested, may enter into the computation as a basis of division of the waters of the two nations under the treaty, is to imply that vested rights in Montana were subject to the treaty.

It does not necessarily follow that because a treaty *could* be made by the Canadian Government affecting matters of that character, that it must follow that a treaty to the same effect may be made or was intended to be made with the United States Government. As Mr. Viscount Bryce said, the two Governments are differently situated—because something might be done in one country it does not necessarily follow that it may be done in the other. Whatever may be the construction to be placed on Article VI of the Constitution of the United States delegating to the Federal Government this treaty-

making power when considered as standing alone or in connection with the Constitution as originally adopted, such construction vanishes when we take into consideration the effect of what is known as our Bill of Rights, being the first ten amendments of the Constitution, Article X of which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

As observed by Mr. Bryce, "The stream can not rise higher than its source." In other words, the action of those authorized to make a treaty can not rise higher than the authority granting it. The Constitution places the treaty-making power in the hands of the President, to become effective only on approval by the Senate; but although the President and the Senate, without the concurrence of the House of Representatives, may make a treaty, its effect is not only limited by the Constitution delegating the power, but the joint action of the two branches of Congress, with the approval of the President (or by two-thirds vote of both Houses without the President's approval), may annul a treaty by specific legislation for that purpose or by consciously or unconsciously, as the case may be, enacting legislation which by reason of conflicting or inconsistent provisions may annul the treaty either in whole or in part.

Mr. TAWNEY. Does not this qualification with respect to the treaty-making power affect vested rights? The Governments of the United States and Great Britain, or the Government of the United States and any other country, could make a treaty taking from the citizens vested rights, provided there was compensation and that the taking was under the principle of due process of law.

Mr. KING. I am coming to that next. That is one of the points I make in that connection.

In view, therefore, of the constitutional limitations thus circumscribing the Federal Government of the United States, it must be presumed that in making the treaty here under consideration neither its provisions nor the effect thereof were intended to be inconsistent with the Constitution of the United States.

Much stress has been laid upon the language of that part of Article VI of the Federal Constitution in regard to the treaty-making power, 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.

Now, that stands as very broad language; but let us consider that feature.

The authorities, including all decisions of the Supreme Court of the United States, hold that this provision has reference only to the effect which a treaty might have upon the laws of a State inconsistent or in conflict with powers delegated to the National Government through the conduit known as the Federal Constitution. As before stated, Article X of the amendment to the Constitution, above quoted, was enacted *after* the adoption of section 6 of the original

Constitution, upon which section so much reliance is had by opposing counsel; hence, whatever construction may be placed on Article VI there can be no escape from the fact that Article X of the amendments repeals Article VI so far as its provisions may be in conflict or inconsistent therewith.

No rule is better settled than that where a subsequent law is enacted by a lawmaking body, or a subsequent amendment adopted by the people, which may be in conflict with or inconsistent with a previous provision, the *one last in time must prevail.* As stated in Schick *v.* United States (195 U. S., 65, 68), "If there be any conflict between two provisions, the one found in the amendment must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier one."

Again, it certainly will not be questioned that if a treaty, or a part of a treaty, may be abrogated by subsequent congressional legislation in conflict or inconsistent with it, a subsequent amendment to the Constitution of the United States in conflict or inconsistent with a provision enacted at some earlier date must necessarily have the same effect. In the Cherokee Tobacco case (11 Wall., 616) it was clearly held that a treaty was repealed by a subsequent statute.

It strikes me, gentlemen, that I am discussing a good many fundamental principles, but in view of the fact that counsel went into this and took a view inconsistent with my position, I feel justified in going into these questions pretty fully.

Mr. von Holst, in his Constitutional Law of the United States, page 202, gives it as a "simple and self-evident principle that the treaty-making power of the Nation is not *un*limited and that every treaty-making stipulation inconsistent with a provision of the Federal Constitution is *ipso facto* null and void." This eminent author further observes that it can not be disputed that while a congressional act or law may be repealed by a treaty, and that notwithstanding a treaty requires only the approval of the President and Senate. Congress (under the lawmaking power granted by the Constitution) may enact a statute the effect of which would be to repeal a treaty, and that "if a treaty and a law are in opposition *their respective dates must decide whether one or the other is to be regarded as repealed.*"

Mr. POWELL. Does not the statute in that case require a certain majority in the Senate or Congress?

Mr. KING. A majority is all that is necessary. It is rather a peculiar situation that each can undo the work of the other, but it appears to be conclusively settled that that may be done. For example, a law that is inconsistent with the treaty, as I have just stated, if it is sufficiently inconsistent, repeals the treaty, and a treaty might repeal a law.

Mr. TAWNEY. The act would have to have the approval of the President.

Mr. KING. Yes; or the Senate by a vote of two-thirds, in confirming a treaty made by the President, might repeal a congressional act. Hence, notwithstanding that peculiar legislative arrangement it is a fact nevertheless.

Mr. POWELL. Do you mean that they might repeal a congressional act?

Mr. KING. Yes. The Constitution gives to the President the power to make treaties and if two-thirds of the Senate should approve it, the treaty would, to the extent that it might prove inconsistent, repeal the statute. However, that is questioned by some text writers—I do not recall by whom—but I think it is generally accepted that that could or can be done.

Mr. MIGNAULT. Of course, there is no congressional legislation since this treaty that could affect it.

Mr. KING. That is true, but what we are trying to do now is to find out what this treaty is; that is to say, what it means. I do not claim that there is any subsequent congressional legislation affecting this treaty. The point I am trying to make clear is that in view of the fact that the treaty-making power is limited, and in view of the treaty-making *constitutional* power being thus limited, it can not be presumed that in making this treaty the high contracting powers had in mind the disturbing of any *vested* rights such as where the waters flowed entirely within the boundaries of one State in the United States.

Mr. MIGNAULT. I follow your argument, but I did not see the purport of an argument as to what would happen to a treaty, after it has been sanctioned, through congressional legislation inconsistent with a treaty.

Mr. KING. My position is this, that while that is not necessarily involved here except going into the question as to the power of Congress, it should be kept in mind under the Constitution of our Government that a treaty can be abrogated at any time, and any law that is passed that is clearly inconsistent with the terms of the treaty would abrogate it. But that happens only occasionally through some oversight, because when a treaty is abrogated it is usually done by a specific act. I am speaking of *what the powers are under the Constitution* which we have under our form of government, as indicative of the distinction between this country and others, not that any subsequent congressional action has been taken affecting this treaty.

Judge Cooley, in his Principles of Constitutional Law, page 717, says:

> The Constitution imposes no restrictions upon this power (treaty-making power), but it is subject to the impl'ed restriction that nothing can be done under it which changes the Constitution of the country or robs a department of the Government, *or any of the States*, of its constitutional liberty.

In the case of Whitney *v.* Robertson (124 U. S., 190, 194) Mr. Justice Field, speaking for the court, in referring to conflicts of treaties with congressional acts, says:

> When the two relate to the same subject the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

Judge Story, in his Commentaries on the Constitution, section 1508, uses the following language:

> A treaty to change the organization of the Government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers would be void, because it would destroy what it was designed merely to fulfill—the will of the people.

William Rawle, of Philadelphia, whose work on the Constitution has been in use as a textbook in the United States Military Academy at West Point, states that our Constitution places no restrictions upon Congress respecting treaties, and that to determine whether a treaty can be supported the Constitution must be examined. He states that treaties can not be held to be under the "authority of the United States" unless they are conformable to its Constitution.

The point I wish to make is that, as held by this eminent author, treaties can not be held to be under the authority of the United States unless they conform to its Constitution. Of course, that brings us back to the question of whether a treaty such as mentioned would conform to the Constitution.

Judge Story, in his Commentaries on the Constitution, section 1508, also tells us that: "A power given by the Constitution can not be construed to authorize the destruction of other powers given in the same instrument," but must be construed "in subordination to it."

I call attention to that as indicating that even if we had had no amendment to the Constitution the result would have been the same; that the contention of counsel would not even then be well taken.

Let us for a moment analyze the language contained in the part of Article VI of the Constitution bearing on the question involved. It provides:

> This Constitution and the laws of the United States which shall be made in pursuance thereof * * *.

The words "made in pursuance thereof" clearly limit the laws which may be considered the "law of the land" to such as are in conformity with the Constitution. The sentence then proceeds:

> * * * And all treaties made, or which shall be made, under the authority of the United States * * *.

It will thus be seen that the words "under the authority of the United States" are substituted for the words "in pursuance thereof," and are synonymous in legal effect therewith. It needs no argument therefore, to demonstrate that since the authority of the United States is derived from the enumerated powers delegated to it by the States that such treaty, like the "laws" mentioned, must also be in conformity with the Constitution of the United States.

It will further be noted that this provision ends with the statement, "and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." The effect would have been the same without this clause. It appears to some extent to have been inserted to aid in the construction of the language preceding it.

The section has reference only to the treaty-making power and accordingly only refers to such matters usually considered between nations, or to matters of international concern, so far as they may be in conformity with the powers delegated to the National Government.

Article VI defines the "supreme law of the land" substantially as follows:

(*a*) The Constitution.

(*b*) The laws of the United States made in pursuance of the Constitution, as distinguished from State laws.

(*c*) Treaties made or that shall be made *under the authority of the United States.*

It is then provided in substance that if anything in the constitution or law of any State conflicts with this, such part of the constitution or law of any State shall not have the effect of changing what is the supreme law of the land and should not be construed with that intent.

That clause has reference only to treaties (contracts made between Governments embracing only such matters as are of international concern) made *under the authority of the United States.* To the extent that a treaty made under the authority of the United States exceeds such authority, to that extent it would not be the supreme law of the land. It follows that if the authority of the United States is at any time changed by the "sovereign authority of the country"—the people, by amendment of the Constitution—to that extent existing treaties and subsequent treaties, if made, cease to be the "supreme law of the land."

In order to apply the last sentence above quoted as insisted upon by counsel for the Dominion of Canada, it would be necessary to disregard the universally established canon of construction to the effect that the entire Constitution as first adopted, to say nothing of the amendments, must be construed together, and the construction (as held by the eminent authorities we have cited and quoted), which will give force and effect to all its provisions, must not be adopted.

In the opinion of Mr. Elihu Root, Mr. Henry Cabot Lodge, and Mr. George Turner, United States members of the Alaskan Boundary Tribunal of 1903 (S. Doc. 162, 58th Cong., 2d sess., I 53), it is said:

> The whole document will be taken together and will be considered in connection with the attending circumstances, the situation of the parties, and the object in view, and thus the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended.

That is the point I am contending for here, gentlemen; that is to say, you should not apply a strict definition of the word "tributary," but under any view you must take into consideration the whole instrument; the whole or entire instrument, and take it by its "four corners," and all its contents must be construed together. You should take into consideration the *purpose* for which the treaty was made; every sentence, clause, and paragraph in the treaty throwing any light upon the subject, and construe the treaty as a whole. Just as was said in that decision I referred to:

> The whole document will be taken together and will be considered in connection with the attending circumstances, the situation of the parties, and the object in view, and thus the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended.

Col. MACINNES. Is my learned friend still dealing with the remarks from the Alaskan case?

Mr. KING. Yes; it is quoted, I trust, correctly.

Col. MACINNES. When you have finished with that I would like to make a remark.

Mr. TAWNEY. I want to ask you a question to clear up a matter in my own mind. That treaty related to a single subject matter, did it not—the boundary?

Mr. KING. I do not recall the exact words of the instrument, but I think it was over some islands and as to where the boundary line between our two nations should run, etc.

Mr. TAWNEY. This is important; yes; very important, as it may have some bearing on other cases arising before this commission under this treaty. This treaty differs from almost all other treaties in that it relates to a number of different, separate, and distinct matters. Thus, to say that the provisions of the treaty in regard to obstructions, uses, and diversions of boundary waters have any relation to the subject matter of Article VI under this treaty, I think, is erroneous.

Mr. KING. Was it not one treaty made all at one time?

Mr. TAWNEY. You are talking about construing all of the different provisions of this treaty together. There are so many different subjects in this treaty that have no relation at all to one another that I do not see how you can apply that rule of construction. I did not want it to pass without calling your attention to the fact, because that same statement has been made before the commission in the past, but it is only in so far as the provisions of the treaty are related to one another that they are construed together.

Mr. KING. I agree with you, sir, on that feature. There are some things here not having anything to do with Article VI. I am merely saying you may take the entire treaty into consideration, and that anything you may find in that treaty, all of which treaty was made at one and the same time, that throws any light upon the purpose for which Article VI was inserted in the treaty is entitled to be considered by the commission, and I feel will be so considered.

Mr. TAWNEY. Your argument, based upon the preamble of the treaty, is undoubtedly sound, but when you make the statement repeatedly that the provisions of the entire treaty must be construed together I do not agree with you.

Mr. KING. Well, I fear I have not made myself clear. I, accordingly, thank you for the suggestion. What I mean to say here is subject to the explanation which I made in the beginning with respect to considering any and all parts of the treaty throwing light upon this subject. For instance, the treaty refers to controversies *now pending* and refers to matters that might *hereafter* occur. *But I do not claim that you must take every sentence there as interpreting what is meant by every other sentence.* Why? Merely because it contains matters not here involved.

Mr. TAWNEY. You made no qualifications before.

Mr. KING. Well, I will make them *now* to be certain about it. I assumed I had made myself clear, but now I feel it is certain that I am understood.

Mr. MIGNAULT. You are perfectly right in contending that any provision of this treaty that has any bearing on Article VI should be considered, but at the same time any provision of this treaty that has no bearing on Article VI is out of the question.

Mr. KING. Mr. Commissioner, I thank you for clarifying my statements.

Mr. TAWNEY. Judge King, there is one further question I would like to ask you before you leave the subject of the authority of the treaty-making power under the Constitution to disturb vested rights.

I agree with you entirely in your construction of the Constitution in that respect, but here is a question as applied to this case that is not clear in my mind. Does the inclusion of tributary waters wholly within Montana in the total of the waters to be measured and apportioned between the two countries, on the basis of a more beneficial use to each, constitute an invasion of the vested rights of Montana and the people of Montana in the waters that are wholly within that State?

Mr. KING. Well, it might. It does "in a way."

Mr. TAWNEY. Could there be any question about the Government of the United States not having the power? Does the inclusion of these tributary waters wholly within Montana in the measurement of the total that is to be divided between the two countries, on the basis of a more beneficial use to each, involve an invasion of vested rights?

Mr. KING. It would, in this way: If the Government of the United States took the water which was necessary to irrigate the 200,000 acres of land under the treaty, as the counsel for the Dominion of Canada would have it construed, it would deprive the people in the lower part of the valley, entirely within Montana, of any water rights. If the Government received the quota of the water sufficient to irrigate these lands, and the estimate were made upon the basis contended for under this treaty, they would be deprived of water to the extent necessary for the Government reservoirs essential to the project, because the Government would have to take their water rights in order to have any water with which to irrigate its lands.

Mr. TAWNEY. Would not this be the result: It would not only disturb the vested rights of the people of Montana in the use of the waters of the tributaries that are wholly within the State but it would deprive citizens of Montana who depended upon the use of the waters of Milk River and St. Mary River for the purposes of irrigation in the State of Montana to the extent that their one-half share would be reduced by reason of including tributary waters in the lower part of the State in the whole of the waters that would be divided?

Mr. KING. That unquestionably would be true.

Mr. GARDNER. Would it not deprive the United States of the opportunity of going ahead with the irrigation project?

Mr. KING. Certainly. But my reason for bringing in the question as to the right to make treaties respecting the property entirely within Montana was because of the fact that it was brought in in the former argument by some inquiries which were made. I understood counsel to take the position that the respective Governments by treaty could *do as it pleased* with the property in any part of Montana or in any State in the United States. Now, I am taking the position that, under its treaty-making power, our Government—the Government of the United States—can not do anything of the kind. Since it can not do so, it necessarily follows that nothing of the kind was contemplated when the treaty was entered into, so far as vested rights *entirely within the United States* are concerned. Therefore this feature could not be taken into consideration in determining *what was meant* by the treaty, so far as the division of water is concerned.

Mr. MAGRATH. Do I understand you to mean that unappropriated water lying entirely in the State of Montana could not likewise be taken into consideration by the Government of the United States?

Mr. KING. That is a more difficult question—whether unappropriated waters in a State belong to the State, etc. It is a question now pending in the Supreme Court of the United States and upon which a rehearing was ordered a few days ago for the purpose of permitting further argument to be presented upon the subject.

Mr. TAWNEY. I do not think you understood Mr. Magrath's question. I do not think there is any distinction between appropriated water and unappropriated water wholly within the State that belongs to the State, so far as the treaty-making power is concerned.

Mr. KING. That is a point upon which eminent lawyers differ. That question is now pending before the Supreme Court of the United States, and I do not feel like taking that up at the present time, because I may have to take part therein later. I do not think it is material to this controversy.

Mr. TAWNEY. Would that involve the treaty-making power?

Mr. KING. It might as an illustration only: if the State has absolute control over all the waters in the State as against the Government, it might affect the question. It would go to the question of whether the Government could make a treaty which would affect the unappropriated waters within a State. My idea is that the Government has retained control over the unappropriated waters. But whether this is held to be the law or not, is not so important, as the United States has the undoubted right to appropriate either for its use in its sovereign capacity, or, as in this instance, in trust for a body of its citizens; and in order to effectuate the same, may, as has been done respecting the unappropriated waters of St. Mary River and its tributaries, make treaties in reference thereto with another nation affected. (Hough *v.* Porter, 98 Pac. 1092.)

Mr. TAWNEY. I meant nonnavigable waters.

Mr. KING. I meant nonnavigable and unappropriated waters.

Col. MACINNES. Have you a reference to that case?

Mr. KING. The case I had in mind is the State of Wyoming *v.* the State of Colorado. But it has been requested that the Government intervene by reason of the interests which the Reclamation Service may have in the controversy.

Mr. MIGNAULT. What is the precise question in that case?

Mr. KING. Well, there are a number of questions, but one point of contention made by Colorado is that it has absolute control over every drop of water that falls on its watershed.

Col. MACINNES. What does the Federal Government contend?

Mr. KING. Well, this is a matter between the two States. The streams rise in Colorado and flow into Wyoming. It is really a controversy, when you get down to the practical side of it, between one valley in Wyoming and another valley in Colorado.

That brings up a question which was suggested in one of the briefs filed in this case which I would like to mention now. It gives as an illustration the appropriation of waters between two different States. The brief in the Wyoming case appears to treat the two Governments in respect to the rights regarding this matter as they would treat two States within the one Government. I take the position now that the two cases are not similar at all. So far as I have been able to work out the problem, the *State lines have not anything to do with water rights at all.* Some contend that State lines do have some effect; but, for sake of argument, suppose that is

true, still it has no bearing whatever upon the relation between our two Governments, *because the matters between the two Governments must be, as is attempted to be done here, settled by a treaty.* There are no international water laws between nations. The States have no power to settle those things between themselves. They *could do so in the event that everyone affected is satisfied.* I therefore fail to see any analogy between the illustration given in that brief and the controversy here (or now) pending between our two Governments. It therefore makes no difference whether the Government of the United States has absolute power over *all* waters arising in its watershed or whether Canada—because they have tried to settle this controversy by this treaty—may have such rights.

Mr. MAGRATH. Did I understand you correctly a short time ago, Judge King, that your contention is that these Governments in negotiating a treaty excluded or intended to exclude appropriated waters?

Mr. KING. Well, my theory is this: That when they entered into the treaty all they had in mind was the determination of the *appropriation*, the right to appropriate by the Government of the United States for the Government of the United States reclamation project, and, in considering that as a matter of course there was taken into consideration by the Government, in endeavoring to ascertain the amount of water that would be needed, the water supply that was used entirely within the State of Montana. But so far as the treaty between the two Governments is concerned there was no controversy between them over any of the waters except those on the international boundary; that is, that flow across the boundary and within the watersheds of the two countries, flowing across the boundary.

Mr. MAGRATH. But your contention, as I understand it, is to the effect that the United States Government in negotiating the treaty could not interfere with the appropriated waters in Montana?

Mr. KING. In my mind there is no doubt about that.

Mr. MIGNAULT. And it is contended that they have not done so, that these appropriated waters will remain to the appropriator?

Mr. KING. That will depend on how they are divided. It strikes me that this peculiar position prevails. It is proposed to make an estimate of all the water flowing into Milk River from the tributaries in Montana as a basis of ascertaining how much water shall be divided in Milk River and St. Mary River; and in doing so you are taking into consideration water that does not flow through Milk River nor St. Mary River anywhere in the affected territory between the two countries. While it is not proposed to take the water away from the vested water-right owners, so far as appropriated from tributaries wholly in Montana may be concerned, an interpretation might be made of the treaty which would result in either compelling the Government to take it away from them, by condemnation or otherwise, or the Government lose its entire investment in these various projects, amounting to several million dollars. It can not be assumed that the Government contemplated such an embarrassing result in entering into the treaty, and as you can not affect the vested water rights in any State of the Union by a treaty, it must necessarily follow that that was not in the mind of the treaty-making power.

Mr. MIGNAULT. I see your argument.

Mr. MAGRATH. Would that view be applicable to both countries when making a treaty?

Mr. KING. No; it would not be applicable to both countries, because, as I understand it, the conditions are different in Canada.

Mr. TAWNEY. The difference arises largely from the fact that on the other side there are no such limitations upon the treaty-making power, under the Constitution, as there are on our side of the line.

Mr. KING. Yes; that is the point Mr. Viscount Bryce makes in his work, and a point that I have heretofore attempted to make, to the effect that you might do in one country *that which you can not do in the other*.

Mr. POWELL. It is not a fair assumption to assume that either Government intended what it could not do.

Mr. KING. I think that is clear. That is our position here.

Mr. GLENN. Now, Mr. King, of course the object in making this treaty was to do justice between these two Governments. Now, if you add this water that is situated wholly in Montana would that give a more just division between Canada and the United States than if you left it out of consideration?

Mr. KING. No, sir. I have the figures here to prove it.

Mr. GLENN. Well, we are trying to do justice between these two countries, and whether they had a right to do it or not, I want to know what they intended to do.

Mr. KING. I think they intended to do just what they said they would do without reference to any tributaries in Montana; that is, wholly within Montana, and on a different watershed—that is our contention.

Mr. GLENN. But in estimating the amount of water each was to get, which would be a more equitable division?

Mr. KING. Well, just to make a rough estimate, I would say that if the division were made on that basis, the United States would not get any water during the low-water season.

Mr. POWELL. It would get its proportion of Milk River?

Mr. KING. Not if it was not there. If you figure all the water in Montana and give Canada one-half at the boundary line on that basis, there would not be any to run down to Montana. Of course that is theoretical, as some of the water would naturally run down in that direction anyway.

Mr. POWELL. They can not take it away at all. The water will run there.

Mr. KING. Well, that is what this treaty proposes to do if given the interpretation contended for by the counsel for the Dominion of Canada. I do not think such was the intention of the parties when the treaty was made, but I do think that such will be the result in applying that construction. I have no doubt it was intended that each Government should receive an equitable, and not what will prove to be an inequitable, distribution of the water. But if we place on this treaty the construction for which Canada is contending, to the effect that *all* water is to be considered, regardless of where the tributaries arise, whether wholly in Montana or not, or on one side of the border or not, if flowing through or wholly within one nation or the other, then there will be no water to divide after Canada gets its half.

Admitting, for sake of argument, the soundness of the position insisted upon by our opposing counsel, then, gentlemen, would it not be reasonable to concede that the United States, through the treaty-making power, can completely change our form of government? I am not prepared to admit it, but I am asking you if you are prepared to admit it. If such should be admitted, then such position would convert our *Government, the Government of the United States under the Constitution*, with its distribution of powers, into a *government under the treaty-making power*. This fact, if admitted, would permit by treaty the abrogation of every other provision of the Constitution. Gentlemen, let me illustrate: The Constitution provides (Art. V) that no State shall without its consent be deprived of its equal representation in the Senate. Now, gentlemen, do not take me to be a crank on the question of State rights; "State rights" under the Civil War meant one thing, but here it means another. Permit me to contend that State rights as now under consideration means not the contention that a State has a right to secede or anything of that kind, but it does mean that "States" have a right to insist upon their rights under the Constitution and the Government as organized after the question of State rights was finally settled.

The Constitution guarantees to each State a republican form of government (Art. IV, sec. 4); the Constitution guarantees to the citizens of each State, regardless of whether there were controversies between the North and South, all of the privileges and immunities of the citizens of every other State (Art. IV, sec. 2); the Constitution of the United States, for example, provides that no State shall be formed within a State (Art. IV, sec. 3). (See also Straw *v.* Harris, 103 Pac., 777, 782.) As another illustration, the United States prohibits States from coining money; it prohibits the laying of duties on imports (Art. I, sec. 10); it prohibits Congress and the States from passing bills of attainder and *ex post facto laws* (Art. I, secs. 9, 10); it guarantees its citizens against unlawful search; it guarantees the right of trial by jury, the right of habeas corpus (Arts. I–X of the amendments). It delegates certain powers to the President and to Congress; it vests the judicial power of the United States in a Supreme Court, *including the power to construe treaties* (Art. III).

Any and all of the powers above mentioned, to say nothing of numerous others that might be mentioned, might, under the contention of opposing counsel, by reason of the words "anything in the constitution or laws of any State to the contrary notwithstanding," be annulled or completely changed by a treaty with a foreign Government without the consent of the people.

As stated by Mr. Tucker in his work on Limitations on the Treaty-Making Power (2d ed., p. 339):

> If the establishment of an "unlimited" treaty power is to be the ultimate conclusion on this great question, it must be admitted that the incorporation of the treaty-making power into the Constitution of the United States was the introduction into our governmental citadel of a Trojan horse, whose armored soldiery, for years concealed within it, now steps forth armed cap-a-pie, shameless in their act of deception, eager and ready to capture the citadel upon which they pretended to bestow their gift. If such construction be possible it would be of interest to know for what purpose the tenth amendment was ever demanded and incorporated into the Constitution.

If the contention of the opposing counsel before this honorable tribunal correctly defines the treaty-making powers of this Government, then a treaty might be made—yes, I say, honorable sirs, if the contention for which they have heretofore contended is sound, then a treaty might be made donating one of the States to Russia as a prison for her exiles. A State of the United States, under that interpretation, might without its consent be changed to and be used for an asylum for the paupers and outcasts of foreign powers; yes, under that interpretation it might be converted into a prison for the criminals of Europe, and the citizens of that State removed and their property taken from them in order to meet some assumed treaty-making emergency never dreamed of or contemplated by the Declaration of Independence or the Constitution of the United States, all regardless of the rights reserved to the States and the people of the Union and guaranteed to the citizens thereof by the Constitution, whether property rights or liberties, regardless of the universally known principle, which all decisions ever rendered on the subject by any judicial body of this Nation has announced, to the effect that our National Government is one of enumerated powers only.

That such could not be done became the early history of the settled policy of this country, as evidenced in the administration of President Washington, when his Secretary of State in a letter to the commission appointed to negotiate with Spain, instructed them that with the possible exception of a case of a disastrous war "the right to alienate even an inch of territory belonging to the Union did not exist." (99 American Papers, 252–255. And the doubt expressed by Alexander Hamilton on the subject was only in instances where the territory might be an unpeopled section. (See Ford's edition of the Writings of Jefferson, vol. 5, pp. 443–476.) And permit me to say that this is one instance in which Alexander Hamilton and Thomas Jefferson agreed.

Mr. POWELL. I am glad to know that there is one subject on which they agreed.

Mr. KING. There were times when these two great statesmen agreed, and this is one of them. Our position here is that only as a "war measure" *can it be possible under our fundamental laws for the Government to alienate any part of the territory of any State or take from its citizens their vested property rights.*

Recurring again to Article X of the amendments adopted subsequent to Article VI of the Constitution above quoted, that amendment, if nothing else, removes any doubt upon the question as to the limitations on the power of the United States in making the treaty before us, regardless of the fact that the treaty-making power of the British Government may be practically unlimited. It certainly is to be presumed that it was understood by the contracting parties to the treaty that the United States Government could not go beyond its constitutional restrictions.

Mr. POWELL. Do you think, Judge King, that it is a fair argument to base an opinion on *possibilities?* Federal judges in the United States have no restriction except by impeachment before Congress, and our Superior Court judges in Canada have no restriction on them whatever, except by impeachment before Parliament. A judge, in a way, is the most absolute creature in the universe, next to the

Almighty himself, and I suppose that is why their decisions are regarded as the only way of working out the great principles of *liberty*.

Mr. KING. Through the higher courts of our respective countries; yes. Final decisions must be lodged somewhere.

Mr. POWELL. Now, with regard to the authority of the Legislature of the United States. That authority might go on to say that if any man whistled on a Sunday morning before daylight he could be hanged, because it has that power, and, although it is inconceivable that it should pass such an enormous and ridiculous statute as that, still is that an argument that they have not the power to do it? For instance, take the *blue laws* that were passed in respect of witches. I suppose the proper legislative authority in the United States could reenact those blue laws—that is, that it has the constitutional authority and the power to do so, but is it fair to argue that because such laws were absurd and would be so regarded to-day that they would be unconstitutional?

Mr. KING. Mr. Commissioner, no question is more fully established by all the courts of this country than that the treaty-making power is strictly limited. As to the blue laws regarding witches, they preceded the Constitution in this country, and in fact formed one of the reasons for our constitutional limitations. No such laws can now be made effective in the United States.

Mr. POWELL. But you were speaking about the absurdity of supposing that they would make such a treaty. As a matter of fact, they might destroy trial by jury altogether through an international convention. Is not, then, the assumption, and the only natural and proper assumption, that these departments are going to act in a common sense, in a manner in which their respective countries require them to do so?

Mr. KING. Pardon me, sir; trial by jury could not be abolished in that manner without first amending our Constitution. I am only giving these illustrations as the logical sequence of the contention of opposing counsel. True, this line of reasoning might lead to what at first blush may appear to be an absurd conclusion. The blue laws of Oliver Cromwell's time, for example, aided in the downfall of himself and his intended republic, and the "blue laws" did this in other good nations. But that has nothing to do with this case. What I am trying to give are such illustrations, whether "blue laws" or otherwise, as will demonstrate the fallacy of the argument presented by opposing counsel.

Mr. POWELL. Well, I do not think you should make such extreme illustrations.

Mr. KING. On that feature we do not agree. The logic of the situation as I am trying to apply it is that you can not do certain things under the treaty-making power, and I have given extreme illustrations in order clearly to demonstrate the *illogical* results which would follow if the position heretofore taken by opposing counsel should be adopted. Frequently it requires a far-fetched illustration to make a point clear.

Permit me now to read a quotation from ex-Secretary Root; also to add that there should be considered in this connection a presumption to the effect that ex-Secretary Root's remarks are entitled

to great weight when it is taken into consideration that the treaty now under consideration was consummated by the Secretary of State, the Hon. Elihu Root, as representative of the United States, and Viscount James Bryce, as representative of Great Britain and its dominions, especially when it is found—and I think you will find—that the writings and addresses of both are in support of our position. As to the views of Mr. Bryce, I have heretofore read and I now call attention to the observations made by ex-Secretary Root. Mr. Secretary Root wrote this principle of law by observing:

> Although there are no express limitations upon the treaty-making power granted to the National Government, there are certain implied limitations arising from the nature of our Government and from other provisions of the Constitution. (American Journal of International Law, 1907, p. 279.)

I mention that because I see that Mr. Root has been cited by some one in this case as holding otherwise. I, however, do not understand that to be his position.

Mr. MACINNES. In what connection did Mr. Root use that language?

Mr. KING. Well, I have the citation here as being from the American Journal of International Law, 1907, page 279. As a matter of fact, Mr. MacInnes, I think it is the same article from which you have quoted, but the quotation I have given is but one part of it, being the part which I do not recall you having mentioned in your quotation, when you made your argument at St. Paul.

Now, gentlemen, I want to draw attention to one more provision to which Mr. Commissioner Tawney refers. I direct your attention, in this connection, to the fact that we find another amendment to which Article VI of our Constitution was subjected, and that is the fifth amendment, which among other things provides:

> No person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.

Mr. POWELL. I beg your pardon, Mr. King, I did not catch what you were saying.

Mr. KING (after reading quotation). I was saying that this brings us to one of the most vital and strongly contested points; and that is regarding the effect that the construction urged by the learned counsel for the Dominion Government would have upon the State of Montana in the United States and the vested rights therein under the laws of that State.

In this connection we find an amendment adopted subsequent to Article VI of the Constitution, relied upon by our opponents, and that is the fifth amendment, from which I have just quoted.

It will be observed that under the well-understood rule "that the last expression of the will of the lawmaker prevails over an earlier one," this amendment necessarily repeals any previously adopted provision of the Constitution with which it may be inconsistent or in conflict. (Schick *v.* United States, 195 U. S., 65, 68.)

Mr. POWELL. Might that not apply to this case—assuming that the treaty is a law, might it not follow that the United States has complete power to do everything that is contemplated in this treaty, providing she compensates her people where they are deprived of their vested rights?

Mr. KING. The United States could do so only by condemnation proceedings.

Mr. TAWNEY. Well, they could make the law. As I understand it, you have the law, hence, could condemn.

Mr. KING. Yes, sir; I can conceive of a way by which it could be done. But that brings us back to the original question again, *petitio principii*, but there is nothing in the treaty to indicate that any such plan was contemplated.

Mr. TAWNEY. Well, of course, it could only be done by a just process of law and by providing the necessary machinery, etc.

Mr. KING. I would like to continue now with my line of argument and will soon close.

In United States *v.* Amistad (15 Pet., 595), speaking for the court, Mr. Justice Story said:

> In the solemn treaties between nations it can never be presumed that there is an intent to provide the means of perpetrating or protecting frauds, but all the provisions are to be construed as intended to be applied to *bona fide* transactions.

Under that precedent and reasoning, it could not be presumed that the Government of the United States, or that either Government for that matter, intended, in making this treaty, to do or perform an unauthorized act. It, accordingly, must be presumed that the high contracting parties, in this instance, intended to accept the principle that neither should take advantage of the other, whether you call it the perpetration of a fraud or otherwise, with full knowledge of the "law of the land," circumscribing the power of each nation. In fact, gentlemen, since a treaty is subject to the same rules of construction as an ordinary contract—it being only a contract of an international order—I take it you must agree with me that such treaty must be read and construed in the same light, construed as if the Constitution of the United States, and amendments thereto, were written into it. (Vol. 6, Ruling Case Law, p. 855.) The authority which I have last cited, states the rule thusly:

> The existing statutes and the settled law of the land at the time a contract is made become a part of it, and must be read into it.

In this connection I also call your attention to Deweese *v.* Smith (106 Fed., 438); Armour Packing Co. *v.* United States (153 Fed., 1); Union Ins. Co. *v.* Pollard (26 S. E., 421). Innumerable other authorities might be given to the same effect, but those I have mentioned should serve the purpose so far as the present argument may be concerned.

In view of the effect of the fifth amendment to the Federal Constitution, it is interesting to know what answer may be given to the provision with reference to the protection of property rights. Providing the contention of opposing counsel as disclosed by his argument made at St. Paul is tenable, which, as I take it, was to the effect that the tributaries of the Milk River (which at no time formed any part of the discussion with reference to the treaty) rising and wholly within the State of Montana are to become a subject of the treaty—if his argument is tenable—then it must follow that Article V of the amendments to the Constitution of the United States is to that extent a nullity.

I find it is disclosed by the record (in fact, it is conceded) that many thousands of acres are irrigated by water from these tributaries. I also find that vested rights of the citizens of Montana accrued long before the consummation of the treaty, and in view of the protection afforded by the Constitution of the United States of all vested property rights it is manifest in this regard that these rights were not and are not subject to the treaty. Taking the presumption that there was no intention on the part of those making the treaty to exceed their authority—that is to say, the law of the land—it necessarily follows that the tributaries wholly within the State of Montana, and not at any time the subject of any dispute between the two countries, were not intended to, nor as a matter of law could not have been, and were not intended to be included in or affected by the treaty; nor to be made a basis for water division between nations.

Nowhere in our Federal Constitution can language be found, either expressly or impliedly, giving the General Government the right to take the property of individuals within a State or to take any part of a State, change its boundaries, or in any manner annex to or give to a foreign government the exclusive right to any of its territory *or property of its citizens.* In the boundary right disputes between the Dominion of Canada and the States of Maine and Massachusetts all territory affected within those States was so affected only by and with their consent.

In Monongahela Navigation Co. *v.* United States (148 U. S., 312, 324) the court holds:

> The first 10 amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many that without some such declaration of rights the Government would assume, and might be held to possess, the power to trespass upon rights of persons and property.

Riparian rights are recognized by the courts of Montana, under whose adjudications it will be found that each of the settlers along the tributaries entirely within the State of Montana have vested property rights therein. Some of the settlers along these tributaries claim their rights to water under the doctrine of prior appropriation. Others claim both as riparian owners and as appropriators, while still others claim exclusively under the riparian doctrine. Whether the use be for power purposes or otherwise, Montana, California, Washington, and possibly another State still recognize vested rights under the doctrine of riparian ownership. As to Montana, see Weil, volume 1 (3d ed.), sections 117–118. It needs no argument to establish that the rights acquired, under either theory or under both theories, are vested property rights, of which the owners may not be divested without due process of law. In this right all are protected under the fifth amendment to the Constitution of the United States.

The best statements regarding riparian rights seem to be in Weil on Water Rights, page 735 (3d ed.), and Long on Irrigation, page 66 (2d ed.); Smith *v.* Denniff (60 Pac., 398; 50 L. R. A. (o. s.), 737; 1 Mont., 651); and in the Federal courts, Cruse *v.* McCauley (96 Fed., 369); Howell *v.* Johnson (89 Fed., 556); Winters *v.* United States (143 Fed., 740; 28 U. S., 208); and Bean *v.* Morris (146 Fed., 423; 221 U. S., 485). In South Dakota the Lone Tree Ditch Co. *v.*

Cyclone Ditch Co. (128 N. W., 596); Driskill *v.* Rebbe (117 N. W., 135; 135 N. W., 85); Redwater Land & Canal Co. *v.* Reed (128 N. W., 702).

It is manifest, therefore, that in framing the treaty under consideration, it was not contemplated that any of the vested rights of the citizens of Montana, or the right of the State in its sovereignty over property entirely within its boundaries, should be taken into consideration. They in no wise gave rise to the treaty, except very indirectly. Riparian rights are vested rights which will be materially affected by division of the waters of Milk River.

As to how the waters involved would eventually be divided with reference to the two streams crossing the boundary line, these rights, keep in mind, are hundreds of miles below and, evidently, were not in the minds of the high contracting parties.

As before stated, there was no conflict between the appropriation being made by the United States and the appropriations made by those taking water from the tributaries entirely within the State of Montana. The appropriation under consideration was a new one and the only possible conflict was with the rights of appropriators north of the boundary line. In order properly to adjust the differences, and with due deference to the equities of all concerned in the controversy, the treaty was intended to evolve a plan whereby the appropriation by the United States, under the authority of what is known as the reclamation act of 1902 (32 Stat., 388) might be carried out, which necessitated a consideration and adjustment only of the two main streams and tributaries of each rising in the respective countries and flowing across the boundary between them.

I have here some pages in the form of a sort of tabulated statement which I would like to have included in the record as part of my remarks. I would also like to leave the maps that I have shown, if it is agreeable to all concerned.

Mr. MacInnes. I will be glad to have everything that can be put in.

Mr. Tawney. Well, Mr. King, before you present this statement as a part of your remarks, I think you ought to submit the figures to counsel for the Dominion, so that if he wishes to look them over he can see if he has any objection at all.

Mr. King. I will be glad to let him look over any papers that I have.

Mr. MacInnes. I do not understand that there is anything new in these facts, nothing that is not established in the record.

Mr. King. No; nothing that I know of.

Mr. MacInnes. I would object, of course, to any evidence being put in here that is not sworn evidence and subject to cross-examination.

Mr. King. Everything I have here is in the record in substance, and the map I have left with you is in conformity therewith, and it will aid materially to have it included in the record as a part of my remarks. I would be glad to have you look it over. If there is no objection to it I will just hand these to the reporter and have them inserted as part of my remarks.

The run-off data given in Table I, attached, was obtained, except as noted under Frenchman River and Rock Creek, from the large map showing drainage basins of Milk and St. Mary Rivers, presented by the Canadians and marked "Report on international waterways

treaty, plan No. 1, dated December 24, 1914." The figures given on this map are accepted, though in several instances we have been unable to agree with them from our records. The run-off from the Sweet Grass Hills, taken as half the total increment in river flow between Writing-on-Stone and Pendant d'Oreille, was determined upon the basis that the entire inflow in this section was from the south and that at least half the flow of these streams came from United States territory.

Table II gives run-off data arranged in a similar manner for the seven months April 1 to October 31. These figures are taken entirely from the steam gauging records up to and including the year 1914, which have been agreed upon by both parties, with the exception of the run-off from the small streams crossing the boundary, where no record has been kept. In such cases the figures given are approximate and more or less arbitrarily chosen and may be subject to considerable dispute.

Table III is similar to Table II, except that it includes the run-off for the year 1915.

TABLE I.—*Summary of flow for entire year (Jan. 1 to Dec. 31) of St. Mary and Milk Rivers, averaging all records up to and including 1914. (See explanation above.)*

		Acre-feet
United States to Canada, run-off crossing boundary line from United States watersheds:		
Run-off of St. Mary River at boundary line		735,400
Milk River headwaters—		
2 gauging stations	83,700	
90 square miles, at 8.8 acre-feet	800	
South of Milk River, Alta. (68 square miles, at 5.9 acre-feet)	400	
Sweet Grass Hills (one-half total increment in river flow between Writing on Stone and Pendant d'Oreille)	2,850	
		87,750
Total		823,150
Canada to United States, run-off crossing boundary line from Canadian watersheds:		
Milk River at eastern boundary crossing 104,600—87,750		16,850
Lost River (67 square miles, at 43 acre-feet)		2,900
Lodge Creek, Battle Creek, etc		86,600
Cottonwood Coulee (200 square miles, at 38.4 acre-feet)		7,700
Frenchman River (at Buzzard's ranch)		[1] 48,900
Rock Creek headwaters (3 gauging stations)		[1] 4,760
Total		167,710
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	4,760	
	61,360	
		236,740
Below Hinsdale		72,400
Total		476,240

[1] Average from 1914 and 1915 gauging station records.

TABLE II.—*Summary of flow during irrigation season (Apr. 1 to Oct. 31), excluding 1915 records.*

		Acre-feet.
Run-off crossing boundary line from United States watersheds:		
Run-off of St. Mary River at boundary line		647,000
Milk River headwaters—		
2 stations	64,100	
90 square miles, at 8.8 acre-feet	800	
South of Milk River, Alta (68 square miles, at 5.9 acre-feet	400	
Sweet Grass Hills	2,850	
		68,150
Total		715,150
Run-off crossing boundary line from Canadian watersheds:		
Milk River at eastern crossing, 88,990—68,150		20,750
Lost River (67 square miles, at 24.8 acre-feet)		1,700
Lodge Creek	27,000	
Battle Creek at Nashe's ranch	25,300	
Battle Creek below Nashes' ranch (565 square miles, at 19.4 acre-feet)	11,000	
		63,300
Cottonwood Coulee (200 square miles, at 24.0 acre-feet)		4,800
Frenchman River at Buzzard's ranch		39,800
Rock Creek headwaters (1914 and 1915)		2,200
Total		132,550
Runoff into Milk River wholly in Montana:		
Above Havre	63,900	
Lost River	1,700	
		62,200
Havre to Malta, 114,500—63,300		51,200
Malta to Hinsdale	186,600	
Cottonwood Coulee	4,800	
Frenchman River	39,800	
Rock Creek headwaters	2,200	
	46,800	
		139,800
Below Hinsdale (80 per cent of estimated total for entire year)		58,000
Total		311,200

TABLE III.—*Summary of flow during irrigation season (Apr. 1 to Oct. 31), including 1915 records.*

		Acre-feet.
Runoff crossing boundary line from United States watersheds:		
Runoff of St. Mary River at boundary line		640,500
Milk River headwaters—		
2 stations	67,900	
90 square miles, at 8.8 acre-feet	800	
South of Milk River, Alta (68 square miles, at 5.9 acre-feet)	400	
Sweet Grass Hills	2,850	
		71,950
Total		712,450
Runoff crossing boundary line from Canadian watersheds:		
Milk River at Eastern Crossing, 93,400—71,950		21,450
Lost River (67 square miles, at 24.8 acre-feet)		1,700
Lodge Creek	26,300	
Battle Creek at Nashe's ranch	25,500	

TABLE III.—*Summary of flow during irrigation season (Apr. 1 to Oct. 31), including 1915 records*—Continued.

		Acre-feet.
Runoff crossing boundary line from Canadian watersheds—Continued.		
Battle Creek below Nashe's ranch (565 square miles, at 13.9 acre-feet)	7,300	
		59,100
Cottonwood Coulee (200 square miles, at 25 acre-feet)		5,000
Frenchman River (at Buzzard's ranch)		45,900
Rock Creek headwaters		2,200
Total		135,350
Runoff into Milk River wholly in Montana:		
Above Havre	60,700	
Lost River	1,700	
		59,000
Havre to Malta, 102,500—59,100		43,400
Malta to Hinsdale	194,300	
Cottonwood Coulee	5,000	
Frenchman River	45,900	
Rock Creek headwaters	2,200	
	53,100	
		141,200
Below Hinsdale (80 per cent of estimated total for entire year)		58,000
Total		291,600

Mr. MIGNAULT. I understand, Mr. King, that the small map which you handed to each of us has all the detail shown on the large map.

Mr. KING. I think so, practically all.

Mr. TAWNEY. Well, there is an exhibit, a large map marked "Exhibit A-1," and then there is this small map and some others. There are a number of maps that were filed, and we have them, I think, in the office of the commission at Washington.

Mr. KING. My experience is that it is always better to have too many than not enough, hence will ask that you retain them. I think as a matter of fact these small maps are copies of the others.

I thank you, gentlemen, for the very patient attention given me.

Mr. TAWNEY. Now, Mr. MacInnes, have you anything to say in reply to the argument of Judge King, or has any of the counsel on your side?

Mr. MACINNES. Yes; I have a good deal to say in reply, Mr. Chairman.

Mr. TAWNEY. It is now half past 5, so I do not suppose you could possibly conclude your argument this evening.

Mr. MACINNES. Well, Mr. Chairman, I should estimate that you will probably have to suffer from me for about two hours at the very least. I do not see how I could possibly do justice to the subject in less time than that.

Mr. TAWNEY. You could not go on this afternoon?

Mr. MACINNES. I am perfectly willing to do so, either now or after dinner.

Mr. GLENN. I thought some of the gentlemen wanted to get away as early as possible.

Mr. MACINNES. Yes; Mr. Dennis and myself are anxious to get away at the earliest possible moment, Mr. Dennis to Montreal and myself to Ottawa. However, I do not wish to ask the commission to sit longer hours than is convenient.

Mr. GARDNER. You would like to go on for some time, I understand, Mr. MacInnes?

Mr. MACINNES. I would like to have the pleasure of hearing Senator Walsh speak before me. I merely say that I would prefer to hear him, but I do not think it is necessary for me to postpone my remarks until after hearing from Senator Walsh, so I will proceed at once if the commission desires.

Mr. GARDNER. Then, perhaps you had better go on in the morning, whether Senator Walsh is here or not.

Mr. MACINNES. Yes; that would be entirely satisfactory to me.

Mr. GARDNER. Is there any one present who has any desire to address the commission on this subject now pending, besides Mr. MacInnes and Mr. Robinson?

Mr. DENNIS. In view of the remarks I have to make I would like to make them after Mr. MacInnes has finished.

Mr. GARDNER. Very well, gentlemen; the commission will stand adjourned until 10 to-morrow forenoon.

WEDNESDAY, MAY 16, 1917.

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

Present: All the members, Mr. Gardner presiding.

Mr. GARDNER. Judge King, Mr. Tawney desires to ask you a few questions this morning.

Mr. TAWNEY. Judge King, in the course of your former argument you referred to a suggestion made by Mr. Newell at the hearing at St. Paul with respect to the administrative features of Article VI of this treaty. I have understood that under our reclamation law if the work incident to the measurement of these streams is performed by an officer of the Reclamation Service the expense attached thereto is charged to the water users in Montana, and therefore the water users of Montana would be to that extent contributing to the expense incident to the settlement of an international dispute. For purposes of the record I would like to have you state just what the reclamation law of the United States is in that regard.

Mr. KING. Speaking for the Reclamation Service, I will say that I have carefully read what Mr. F. H. Newell, former Director of the Reclamation Service, had to say on that occasion. I fully concur in his opinion, as I understand it. I concur at least to the effect that the engineer to be designated by the Reclamation Service under the treaty must necessarily assist and work in cooperation with the engineers of the Dominion of Canada in making the stream measurements between our two Governments. A rather unusual feature in this connection is that when considered in connection with the usual way of transacting matters of this type between two governments, if the Reclamation Service should name the party and pay his salary out of the reclamation funds, the compensation would as a matter of fact be paid, under the laws of the United States, by the water users or farmers under the reclamation project of the Government of the United States. We are presented therefore with this peculiar feature which I think this honorable commission should

take into consideration. That feature is this: If the water users of Montana, in the United States, under the reclamation project are to pay all these expenses, it must necessarily place the engineer representing the United States in a somewhat embarrassing position. Why? Merely because human nature, as all of us know, will assert itself. In this situation human nature will inquire, "Why are we paying the bill? And, if so, why do you not look especially after our interests regardless of others?"

You see, gentlemen, it is very much like employing a lawyer in a case; the one who employs him will say—whether right or wrong, he will think he is right—"We are paying you; hence, expect you to look after our interests exclusively."

But if a plan can be devised, as suggested by Mr. Newell—who was director at the time this suggestion was made—to the effect that this expense shall be paid out of the funds provided by the Congress of the United States and the Dominion of Canada; in that way the result, as I take it, will be that the two engineers, representing the commission and thereby becoming the representatives of the two Governments, will be placed in the position that neither thereof will feel that he is under any special obligations to the other Government. They will naturally feel that in the distribution of the water between the two Governments they are acting for both, or, to be more pointed in my suggestion, acting for this commission representing the two Governments as a whole.

In other words, as I take it, this commission represents our two great Governments. If the two engineers are employed by this commission, and they shall receive their salaries through this commission, it will necessarily place them in a position of representing the *commission* and where, whatever they may do will not be criticized by way of saying something to the effect that "We are representing the water users' association under the Reclamation Service of the United States, etc."

As I endeavored to make clear yesterday, under the powers of the Dominion of Canada, they have one right, one privilege, one power, and powers in themselves, some of which might there be recognized but which might not be recognized under the Constitution of the United States.

But, again, if the two engineers to be selected between our two great Governments may be paid out of the funds allowed for this commission by Congress, it should readily be seen that such plan would relieve such engineers, as I take it, under the treaty. They would thus be selected as an impartial engineering jury between the two Governments. Then should we not select them in a way that will make them feel that they are impartial arbitrators? Permit me to suggest to this honorable commission that whoever may be selected their salaries should be paid out of the general funds of the two Governments over which this commission may have jurisdiction.

Mr. John T. Whistler, of Portland, Oreg., has been nominated by the Reclamation Service under the terms of the treaty. Mr. Drake has been suggested by the Dominion of Canada. The moment that

these two gentlemen begin to serve in their respective capacities I am constrained to believe that from that moment their expenses and their salaries should be paid out of the common fund provided by the two Governments for the payment of expenses by this commission and that by so doing they and each of them will thereby be relieved from an embarrassment otherwise to ensue.

Mr. TAWNEY. In that case there would be no charge made against the water users in connection with any project in Montana?

Mr. KING. No; under such arrangement there would be no charge made against the water users in Montana. But as the technical use of the words may be construed to indicate that the Reclamation Service should select the engineer and that his expenses be charged against the Reclamation Service and thereby make such charges a lien upon the water users in the State of Montana to that extent at least the water users of that State might feel that the engineer thus selected was under special obligation to them. In the Dominion of Canada, however, as I understand it, the expenses would be paid by the general Government. It needs but little thought, therefore, to observe the difference between the two Governments. The Canadian Government pays its representatives; its representatives will represent that Government as a government in its sovereign capacity. Not so, however, with the United States. The one representing the United States will be treated as representing a certain class of citizens in the United States who will pay the bills and have the expenses charged up to their individual farms. This, gentlemen, again illustrates the difference between our two forms of government: In one Government the general Government represents the sovereign; in the other the individual becomes specially interested. Yes; strange as it may seem, notwithstanding, the two greatest Governments on earth assuming to be alike are very unlike. This, gentlemen of the commission, demonstrates and, I trust, brings to light many of the points which I have endeavored to make which thus far has not been clear. This feature in this special connection I think should demonstrate that the moneys to be paid to each of the engineers in this particular case should come from the general fund. However, I recognize, gentlemen of this commission, that the Secretary of State of my country has ruled otherwise; but in doing so I feel that he has not been made conscious on this point of a distinction between the situation in your country and the situation in ours—that is, regarding different sources of payment.

Mr. MAGRATH. Your suggestion is due to the fact, as I take it, that the expenditures of the Reclamation Service must eventually be met by the settlers whose lands are being reclaimed?

Mr. KING. That is right. If you charge those expenditures up to this side of the line it will be met by the water users under the project which our Government south of the line is building for the benefit of those settlers.

Mr. TAWNEY. That constitutes a lien upon their land, does it not?

Mr. KING. It becomes a lien upon the lands and it will readily be observed how embarrassing it might be to one, who even though termed a "juror," might, under the designation of an engineer, measure the flow of the stream and determine, so far as the United States is concerned, the rights of this Government, along with the engineers

Map Not Included

who might be designated under different conditions to measure the flow of the streams for the Canadian Government.

Chairman GARDNER. Have you anything further, Judge King, that you desire to state?

Mr. KING. I have nothing further to offer at this time, except to say that it has just occurred to me—and not until after I was through with my remarks—that the views which I have here expressed as to the tactics to be pursued with reference to the payment of the engineers may not fully coincide with those of the Secretary of State. However, I have reason to believe the Secretary will be called upon to review his position upon this point.

Again thanking you for the very patient manner in which you have listened to me in this argument—which has extended over about three times the period which I had in mind—I await and will endeavor to listen to opposing counsel in the same patient and respectful manner given me by them in this very important controversy.

NOTE.—Map referred to by Mr. King, copy of which was left with commissioners, faces page 66.

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

Senator WALSH. May it please the commission, I desire to express my appreciation of the courtesy of the commission in continuing over until to-day the hearing that began on yesterday so that I might be heard on the very important controversy pending before you of such vital consequence to the people of my State. I entertain no doubt that it will be ultimately disposed of in keeping with the spirit of good will that has happily prevailed between the two countries directly interested for so long a period and which recent events have done so much to intensify.

It is not to be expected that after the very able and elaborate arguments that have been made before the commission in support of the view of the treaty taken by the United States that I shall be able to develop any new ideas concerning the construction which ought to be given to it. I shall hope, however, to contribute something toward directing the minds of the members of the commission into the comparatively narrow field to which, as I conceive it, the exigencies of the present restrict its inquiry.

The treaty provides that the waters of the St. Mary and the Milk Rivers shall be measured and apportioned by the irrigation authorities of both countries under the direction of the commission, and it is now engaged, as I understand the matter, in an effort to formulate rules or directions so that the measurement and division may go on in conformity with the requirements of the treaty.

It is quite obvious that a serious difference of opinion has arisen as to where this measurement should be made, whether at the international crossing, as is contended for by the United States, or at the mouths of the two rivers, respectively. That, as I understand it, is the contention on behalf of the Dominion. Stated differently, this tribunal inquires whether the apportionment should be made upon the basis of the waters that cross the boundary or whether it should be made upon the basis of the entire flow of the stream after it receives the contributions of all tributaries, even those that have no international character.

In my view, if it please the commission, a vast mass of matter has been introduced and a great wealth of argument presented, much of which is only remotely related to the direct question which, it seems to me, is before you—the construction that is to be given to the treaty. It was urged, for instance, by some of the counsel representing our side of the controversy that the commission is entirely without power in the premises and that a case is presented here which falls under the provisions of Article X of the treaty, calling practically for a new treaty. I am not able to subscribe to that view. To my mind Article X of the treaty contemplates a controversy which has not yet been the subject of treaty between the two countries involved. It contem-

plates a case which may in the future arise with respect to which no negotiations have been had or at least no final agreement entered into.

This controversy was carried on for a period of perhaps more than 10 years until the two countries involved finally got together, and, as they believed at least, settled the thing by a convention. Now, it may be that that treaty is so insensible in its terms as that it can not be executed, in which case, as a matter of course, it becomes incumbent upon the two countries again to open negotiation for the purpose of entering into a new treaty. I shall advert to that after a little because, as it seems to me, much the same contention in effect is made by the other side, not that the two countries ought to engage in the making of a new treaty, but this Commission is practically invited to enter the field of new negotiations rather than to execute and construe the treaty which has already been made.

Then, I want to advert to a feature that has been the subject of a very protracted discussion before the commission as I gather from the record that has thus far been made. It is a very ingenious idea and I am not prepared to say that it is an idea that is not altogether sound. It was advanced by Mr. Sands of my State, a very keen lawyer and a man whose long service to the settlers in the Milk River Valley, whose interests are so deeply involved in this controversy, entitles him to a very high measure of praise. He takes the view, apparently, that this treaty undertakes to dispose of the water rights upon streams entirely within the State of Montana, tributaries of the Milk River that are not international in character at all, and he advances the view that that is entirely beyond the power of the National Government.

I have not stated Mr. Sands's position with accuracy. Rather he contends that if the construction to be given to the treaty is that contended for by the representatives of the Dominion Government it would be the disposition by the nation of waters that are not international in character, a subject that is without the treaty-making power of the Government, and that, therefore, in construing the treaty that construction is to be rejected. I have not looked at the treaty in exactly that light. I do not find in it any effort to dispose of those rights, even though the construction were given to it which is contended for by our friends on the other side. Of course, if that is the correct construction I do not think that there is any answer to be made to the argument thus advanced by Mr. Sands; and not so much because it falls without the treaty-making power of the Government as because the Federal Government has no power to dispose of the property rights of its citizens, or for the matter of that the property rights of the States that constitute entities of the Union.

Most of the waters of the tributaries of the Milk River in Montana have already been appropriated. Those waters, or the right to take those waters from the stream, have thus become private property. Those rights belong to the men who appropriated them and their successors in interest, just as much as the very land upon which their houses are built and to which they have secured patent from the Government of the United States. They own these water rights just as much as they own their horses and their cows and the furniture in their homes, and it need not be said that the Government of the United States can not enter into a treaty with the Dominion of Canada by

which it takes that property away from them and turns it over to the Dominion of Canada.

Likewise, may it please the commission, there is entire unanimity of opinion, in our country at least, and all through the West—and it is a theory that is recognized by the Congress of the United States—that even if these waters are not appropriated they belong to the States, respectively, and not to the National Government. So that if the waters have not been appropriated they are the private property of the State of Montana. The State of Montana disposes of it by its laws as it sees fit. It says the water of the streams of the State of Montana belong to the State of Montana, and we will dispose of these waters thus and so; and the State laws distribute the waters in accordance with their provisions, with the acquiesence and consent of the Government of the United States. Indeed, if your honors please, the Government of the United States in undertaking to carry out the reclamation project involved in this controversy has recognized that it must get the right to take waters from the streams for the purpose of effectuating that project by complying with the laws of the State of Montana. Accordingly an act was passed a few years ago authorizing the United States of America to appropriate waters of streams in the Western States just exactly the same as a private individual would appropriate these waters. So that in any case the waters belong either to the individual settlers who have appropriated them and are their private property, and are thus not disposable by treaty at all, or they belong in exactly the same way to all the people of the State of Montana, and are equally not disposable by the Federal Government.

But, as I say, I am not able to take that view of the contention made by the eminent counsel representing our Government, who advanced the argument I am considering. The situation as it addresses itself to me is this: The Government of the United States might, if it were so disposed, take all the water out of the St. Mary River, throw it into one of the more southern channels, and utilize it for the irrigation of lands in the lower Milk River Valley. I say it might do so. It is an engineering possibility. It may be an expensive thing to do, but the Government of the United States can do that.

Mr. POWELL. Do you mean it can physically?

Senator WALSH. It can physically. As an engineering proposition it is not a difficult thing at all. It can physically do it. On the other hand, the Dominion Government may, or can, at least physically, take out all the water of the Milk River and divert it onto land within its territory. Likewise, there may be engineering difficulties, but they are not insuperable. By spending money enough that can be done. If the Canadian Government should do that, the settlers upon the lower Milk River would have no water at all. So the two Governments get together and the Government of the United States says, in effect, to the Government of Canada, "We respectfully request that you do not take out all of the water of Milk River. It would be fair and right to allow some of it to come down to our settlers." The Dominion Government says to the Government of the United States, "We ask you not to take out all of the water of the St. Mary River and thus injure settlers within our territory." They thus ne-

gotiate, and, finally, the Dominion Government says, "We will not take all of the water out of Milk River; we will allow a certain quantity to go down." The Government of the United States says, "We will not take all of the water out of the St. Mary River; we will allow a certain quantity to go down."

Mr. MIGNAULT. Do you suggest, Senator, that the Government of the United States could not make that bargain?

Senator WALSH. I do not. I see no reason why it could not. If you will pardon me, let me make myself a little more clear in respect to that. We will assume that such an aggression has been perpetrated, that the Government of Canada has actually constructed expensive diversion works, and it has actually taken all of the water out. The Government of the United States then being importuned by settlers makes representations to the Canadian Government and they say, "Well, in view of mutual concessions with respect to the St. Mary, and in view of the pleasant relations between the Governments and the desire to live in amity with our neighbors, we will gladly allow half of the water to go down." Then the Government of the United States turns around to its citizens and says, "We have done the best we can for you. They could take it all if they were so disposed, but we have induced them to allow one-half or two-thirds or three-fourths to come down:" or as they did say, "They have agreed that you shall have a priority to the extent of 500 cubic feet per second, and they have agreed that that amount shall be allowed to come down to you, and we will make no further representations upon your behalf to the Canadian Government to induce their consent to allow any more to come down." That is my view of the treaty and my view of the contention made by the counsel upon the other side.

Mr. MIGNAULT. You do not question the right of the United States to make such an agreement with the Dominion of Canada?

Senator WALSH. I do not.

Mr. POWELL. It is a question of the legality or illegality of abstraction of the water. Assuming that the Dominion of Canada did not abstract the water of Milk River, would that enter into your opinion? Would your opinion be the same with respect to the power of the United States to make an agreement whether the water was legally or illegally abstracted by Canada?

Senator WALSH. Well, I find it difficult to get a clear idea, sir, of an abstraction which would be legal as distinguished from an abstraction which would be illegal.

Mr. POWELL. It has been contended on behalf of the United States that inasmuch as the water had fallen and gathered on American territory all the water was theirs; they would have no right to prevent its flowing into Canada where it first crosses the international boundary line. If that were the case and Canada had the right to abstract it, then there would be no vested rights of the United States citizens.

Mr. TAWNEY. One moment, Senator. Applying the suggestion of Mr. Powell, the United States would have a legal right to divert the Milk River, as well as the St. Mary River, before it crosses into Canada at all, would it not, the source of both rivers being in the United States?

Senator WALSH. When you say "right" I am still troubled because the question of right to do so must be determined upon the princi-

ples of international law. Now, unfortunately, I do not think there is any international law on the subject. So the United States has the power to divert all of the water of the St. Mary River, and Canada has the power to divert all of the water of the Milk River. I have been unable to find any direct adjudication upon the matter of right. Controversies of this character have usually been disposed of by adjusting the differences, and treaties are thereupon entered into, the same as was done in this case, to compose differences of this character. So I find it difficult to answer the question addressed to me by Commissioner Powell because he asks about Canada legally abstracting or illegally abstracting. I am not able to tell when the abstraction would be legal by Canada and when the abstraction would be illegal by Canada. I know of no principle of international law to the effect that the country upon which the rain falls which goes to make up a river may divert all of the water of that river without giving occasion for just complaint to the country through which the lower courses of the river run. Neither am I able to assert that there is any determination such as would establish it as a principle of law that a country has not such a right as that.

That leads me, if the commission please, to the consideration of another matter that has been referred to quite repeatedly here. I have with me a very able brief prepared by my neighbor and very much-esteemed friend, Hon. Milton S. Gunn, on behalf of the Canadian Pacific. We live in adjacent blocks. Our law offices are in the same block. He is a very able and a very keen-minded lawyer and a very successful practitioner. I do not know any man in the State of Montana whom the Canadian Pacific might more advantageously have procured to present their cause to this commission. I find the greater portion of the brief of Mr. Gunn taken up with the discussion of the Kansas-Colorado case, and I find it rather difficult to determine just what application the case has to anything that is properly before the commission at this time.

The Kansas-Colorado case presented much the same question that is involved in the query addressed to me by Commissioner Powell. The doctrine of appropriation has long been established in the State of Colorado. It recognizes to no degree whatever so-called riparian rights. It denies absolutely that any such thing exists in the State of Colorado. The same doctrine obtains in Montana, in Wyoming, in Utah, and in all of the Rocky Mountain States. When you get farther east you encounter the doctrine of riparian rights, and when you get farther west to the State of California both doctrines are to some extent recognized, but the State of Colorado recognizes only the doctrine of appropriation.

Mr. POWELL. Is that the result of judicial legislation?

Senator WALSH. It is both, sir.

Mr. MIGNAULT. It may have started by accepting, Senator, that which was afterwards ratified by legislation.

Senator WALSH. On the organization of territorial government in all of those territories the first legislature ordinarily adopted a general sweeping statute to the effect that the rules of common law should govern in the determination of controversies in all courts. Then the question arose as to whether that general statute carried with it riparian rights, and all of the courts of all the States named

held that it did not. That is to say, they said that the conditions were such that industry could not exist in that region under such a doctrine and, therefore, it was held that, notwithstanding the sweeping statute referred to, it did not take over that portion of the common law, but that in place of it there existed the rights which were recognized under the Spanish occupation of a portion of that territory and the rights which sprung from the practices of the miners who first went into the country and who took out the water for placer-mining purposes. And thus the doctrine of appropriation grew up. But thereafter statutes were passed, as I have indicated to you before, regulating the right of appropriation, under which the State undertook to say that the man who did thus and so might have the waters of a stream or some specific part thereof. Out of that practice arose the principle that the waters of the streams belong to the States, respectively, and may be disposed of upon such terms and under such conditions as the State may prescribe.

Now, the State of Colorado, recognizing that doctrine, justified its citizens in taking every drop of water out of the Arkansas River which flowed down through the State of Kansas.

Mr. MIGNAULT. Do you say that the State owns the water, or is the water considered like the air, res nullius, but to belong to the first appropriater?

Senator WALSH. The State owns the water, sir, in this sense, that it is regarded as public; and the State assumes to tell how it shall be disposed of. It says, if I do a certain thing or things, go through a certain formula, I shall have the water as against another who does not do so.

Mr. MIGNAULT. That is to say, the water itself being res nullius, so long as it is not appropriated, belongs to the first occupant—that is, the first person who appropriates it?

Senator WALSH. Well, whether there is any distinction between ownership and the right to dispose of by legislation may be a question. It handles the thing practically the same as it does its lands. The State of Montana has received a very large grant of free land from the National Government. It disposes of those lands. It lays down through its laws the terms upon which anyone may acquire any of those lands, and in exactly the same way it lays down the terms and conditions under which anyone may acquire a right to the waters of its streams.

Now, I find it a little difficult to distinguish between the character of the right it enjoys to the land thus granted and the character of the right which it enjoys to the waters of the streams.

But, to proceed, the State of Kansas objected to the complete diversion in the State of Colorado of the waters of the Arkansas River, alleging that the people of the former State suffered by reason of the exercise of the right claimed by the State of Colorado. You will recall that under the Constitution of the United States the States are prohibited from entering into treaties or alliances. And so the Supreme Court of the United States becomes a tribunal not only for the purpose of litigating questions that arise between private litigants and that rest upon established principles of law, but it becomes in a certain sense a tribunal which hears upon principles of equity contentions that arise between the different States. So it was not neces-

sary for the State of Kansas and the State of Colorado to enter into a treaty with reference to the use of the waters of the Arkansas River; and if it were necessary the probabilities are they would not have agreed upon it as the United States was obliged to with the Dominion of Canada with reference to the waters that are involved here. But the State of Kansas went into the Supreme Court of the United States and there addressed itself to that tribunal, insisting upon the principles of the common law and upon the principles of equity and justice that a portion of the waters of the Arkansas River should be allowed by the State of Colorado to flow down to it. The abstract justice of the contention was recognized by the Supreme Court of the United States. Just as the United States recognizes here the equity of Canada to have a portion at least of the waters of the St. Mary River, just as Canada recognizes that the United States ought to have at least a portion of the waters of the Milk River, the Supreme Court of the United States recognized that Kansas ought to have a part of the waters of the Arkansas River; but it held that the State of Kansas had not yet established that any substantial injury had resulted to her by reason of the diversions already made in the State of Colorado. Relief was denied, but the court declared that if in the course of time it should develop that substantial injury had resulted to the citizens of Kansas by the completeness of the diversion made in the State of Colorado, it would hear a further application for an injunction restraining that State.

Mr. TAWNEY. Let me understand you, Senator Walsh. Is it your contention that the Supreme Court of the United States was exercising the jurisdiction of a law court or of a quasi arbitration tribunal?

Senator WALSH. A quasi arbitration tribunal.

Mr. TAWNEY. And it was not governed by hard and fast principles of law?

Senator WALSH. Exactly. Let me illustrate by referring to the case of the State of Virginia against the State of West Virginia. You will recall that that part of the State of Virginia which is now a part of the State of West Virginia was during the Civil War intensely Union in its attachments. By acquiescence on the part of Congress those counties organized themselves into a separate State and called that State West Virginia and sent Representatives to the Congress in both branches, and the State of West Virginia was admitted into the Union. The original State of Virginia was deeply indebted and within the last 10 or 15 years demanded of the State of West Virginia that it assume a proportionate share of the indebtedness which lay upon the government of the State of Virginia. Not getting a satisfactory response from the State of West Virginia, it brought suit in the Supreme Court of the United States to secure a judgment imposing upon the State of West Virginia a portion of the indebtedness of the State of Virginia and prevailed in the action, not upon any real applicable principles of law, not because the State of West Virginia had bound itself by any contract or otherwise to pay any portion of the indebtedness, but upon——

Mr. TAWNEY. Did they not, though, in that particular case contend that there was an unenforceable right?

Senator WALSH. Exactly. The equity of the case appealed to the court, and without any foundation of contract it imposed the lia-

bility upon the new State. So I am utterly unable to make any application of the case of Kansas against Colorado to anything that is before us here except as an evidence of the recognition by the Supreme Court of the United States of the justice, of the elemental justice, that is the foundation of this particular treaty, namely, that the United States ought not to take all of the water of the St. Mary River regardless of the rights of Canada and the interest of Canada, and, likewise, Canada ought not to take all of the waters of the Milk River to the detriment of people within the United States.

Then, a vast amount of matter has come in here concerning the rules under which the State of Montana undertakes to dispose of the waters of its streams and more as to the laws under which the Dominion of Canada grants rights to take water from streams within its territory, and about the extent of the works that are being carried on by the Reclamation Service in the State of Montana and the area which it is expected to cover and the demands upon the streams necessary to meet the requirements there. I think it quite enlightening that all this should be here, but I am endeavoring, if I can, to use the pruning knife to get rid of the things that to my mind are the nonessentials for the purpose of the very matter that is before us and to direct your attention to the question of the proper construction of this treaty so that this commission may formulate the proper rules and directions to the officers of the irrigation services of both countries, so that they may go on and make the division.

Now, it is the law, as a matter of course, that the intention of the parties to the treaty is to be the guiding star of the commission in interpreting that treaty. You are to labor to find out what the parties who negotiated this convention intended, what was in their minds. Of course, the language which they used is of the very first consequence in determining the idea they intended to express, and to arrive at a just conclusion as to how they intended the division to be made, and what part of the water the different countries should have. But it is often the case that by too careful attention to the language used in a treaty or a contract, we utterly ignore and forget the real idea that was in the minds of those who framed it. I fear that we may do so here.

I brought with me a work on Treaties, Their Making and Enforcement, by Crandall, a work which was issued only last year. I read from section 164:

> 164. *Intention of the parties.*—The intention, sufficiently known, furnishes the true matter of the convention. The sole purpose of a resort to construction is to determine and give effect to the intention of the parties otherwise obscure.

Mr. MIGNAULT. The whole question, it seems to me, is this: The first guide as to the intention of the parties is the language; if that language is clear, then the only thing to do is to give application to it; if the language is doubtful, then the intention of the parties may be determined from the circumstances under which they were at the time they made the contract, or, if you wish, at the time they made the treaty. So the first point is as to what is the meaning of the language in its ordinary application and signification of the terms used, and if the language is clear, then there is no question.

Senator WALSH. I believe that the commissioner has stated the rule quite accurately, but the trouble about it is that often the language

of a contract will appear to be perfectly plain, but when the circumstances under which it was made, the prior negotiations of the parties, and other similar matters quite proper for the construing tribunal to take into consideration, are had in mind, it becomes quite obscure. So that it always becomes necessary in the matter of the construction of a contract or treaty to determine the circumstances, for the purpose of deciding whether indeed the language is clear or obscure.

I shall invite your attention presently to a contract which was construed in one of the English courts—I think it is in one of the common-law decisions—in which the word "privilege" was used. Now, for the meaning of the word "privilege," you simply go to the dictionary and find out what it is. But in this particular case the court admitted evidence concerning the previous negotiations to show that the common meaning was not the signification in which the word was used in that contract.

Mr. MIGNAULT. You have used the words "prior negotiations," but it seems to me that in order to determine what is the meaning of the plain language in article 6, it is quite possible to do that without referring in any way to any prior negotiations, though I believe if it should be found necessary to go to the prior negotiations, it would be proper to consult and study the custom and law of the country.

Senator WALSH. Yes; but the troublesome thing is to find out what is meant by the words "The St. Mary and Milk Rivers and their tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan)."

I wish to read further from Crandall—the volume from which I read a moment ago. I read now from section 165:

165. *General purpose of the treaty.*—The intention of the parties as there expressed is, however, to be determined by a consideration of the whole instrument, not by viewing the stipulations separately. From this it follows that a literal and narrow meaning of a clause may not be made to defeat the manifest purpose of the parties as gathered from the entire instrument.

I read further from the same work, on page 372, where some classical instances are given:

Grotius quotes several instances of evidently false interpretations put upon treaties: The Plateans, having promised the Thebans to restore their prisoners, restored them after they had put them to death. Pericles, having promised to spare the lives of such of the enemy as laid down their arms (literally laid down their iron or steel), ordered all those to be killed who had iron clasps to their cloaks.

A Roman general, having agreed with Antiochus to restore him half of his fleet, caused each of the ships to be sawed in two. All such interpretations are as fraudulent as that of Rhadamistus, who, according to Tacitus's account, having sworn to Mithridates that he would not employ either poison or the steel against him, caused him to be smothered under a heap of clothes.

Mahomet, Emperor of the Turks, at the taking of Negropont, having promised a man to spare his head, caused him to be cut in two through the middle of the body. Tamerlane, after having engaged the city of Sebastia to capitulate under his promise of shedding no blood, caused all the soldiers of the garrison to be buried alive—gross subterfuges which, as Cicero remarks, only serve to aggravate the guilt of the perfidious wretch who has recourse to them.

Mr. POWELL. Of course, these classical instances appear to us very absurd and terrible, but they did the very same thing to the witches in the Eastern States. They put them to death without the shedding of blood by burning them to death.

Senator WALSH. Yes; so we can not really arrive at a just conclusion in interpreting a document, particularly with reference to the treaty, by a too close attention to the particular language used, omitting altogether considerations that often become no less important. Now, in determining the true intention of the parties under this instrument, Mr. Commissioner Mignault has stated the correct rule. We must first attend to the language that was used; and, attending to the language used, we find that it is the St. Mary and Milk Rivers and their tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan that are to be treated as one stream for the purposes of irrigation and power, and the waters thereof to be apportioned equally between the two countries. It has been advanced here that the word "tributaries" in this treaty is modified by the succeeding clause, namely, "in the State of Montana and the Provinces of Alberta and Saskatchewan," and that the treaty provides for the distribution of the waters, not of all the tributaries of these two rivers but only of those tributaries that are referred to in the qualifying clause—that is to say, those tributaries that are in the State of Montana or in one or other of the two Provinces that are named in the qualifying clause.

Now, that is a most important consideration, and to my mind that is the correct signification that is to be given to it. It refers only to those tributaries, to my mind, that are both in the State of Montana and in one of the Provinces mentioned; and that view as I shall argue later is confirmed by the whole course of the negotiations which obtained between the parties. It was, however, suggested from the bench by one of the Canadian commissioners, if my recollection serves me accurately, that if that is correct then we must find a tributary that is not only in Montana but also in the two Provinces of Alberta and Saskatchewan, because of the conjunctive between Alberta and Saskatchewan. I think perhaps a little attention to the history of the treaty will disclose that that consideration offers no obstacle to the view which I take. You will recall, no doubt—as I shall show in detail later—that after many attempts to bring this treaty into such form as would make it acceptable to both parties, a draft was eventually made by Mr. Gibbons, a Canadian official, who transmitted it apparently to Mr. Chandler Anderson, representing the Government of the United States. In that draft we find language which eventually went into the treaty, with just a few modifications that were made upon telegraphic suggestions from the Dominion authorities. This was one of them—you will find reference to it at page 97 of the transcript, the draft of Mr. Gibbons being at page 96. I read from 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.

Now, gentlemen, you will bear in mind that Saskatchewan was not included in that draft at all. That draft was practically accepted by the Government of the United States. Now, it has been suggested that these prior drafts are not proper to be referred to at all. I shall address myself next to that contention. But if you will bear

with me for the present, and indulge me so far for the present instance, I invite your attention to the fact that the draft as prepared by Mr. Gibbons touched only those streams and tributaries that were in both Montana and the Province of Alberta.

Mr. POWELL. It seems to me, Mr. Walsh, that there is a territorial qualification as respects the tributaries, but not as respects the rivers.

Senator WALSH. That is true.

Mr. POWELL. That might work in your favor, because afterwards there is a qualification put in which makes a territorial limitation as well.

Senator WALSH. I appreciate your suggestion, sir. If you turn to page 97 of the transcript you will find that Mr. Gibbons wired to Mr. Anderson, as I take it, as follows:

OTTAWA, ONTARIO, *January 9, 1909.*

CHANDLER P. ANDERSON,
Mills Building, New York City:

Home authorities suggest the following changes, all of which I think you can concur in, to bring treaty within Constitution.

Then he goes on and suggests changes in articles 1, 2, and 3, and then, coming to 6, he says:

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

So you see the words "and Saskatchewan" were simply added to it upon this suggestion, which came from the Canadian authorities. I can not for a moment believe that the construction that is to be given to the treaty is to any extent to be modified by the addition of those words. I think undoubtedly the same construction must be given to the treaty as would be given to it if the original draft made by Mr. Anderson had become the treaty. That is to say, we are now trying to get at what the authorities were thinking about, what they had in their minds, and I think that qualifying clause must be deemed to read "those rivers and their tributaries in the State of Montana and the Province of Alberta and in the State of Montana and the Province of Saskatchewan," inasmuch as, as I understand the matter, there is no tributary—nor river, for that matter—which at one and the same time is in the State of Montana and in both of these Provinces. So that if that construction should be given to it, it would have no application whatever, and that is consequently to be rejected.

Mr. MIGNAULT. Senator Walsh, you will see that Mr. Anderson's draft, at page 97 of the transcript, is very general and refers to the St. Mary and Milk Rivers and their tributaries. Mr. Anderson drafted it in this way:

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.

You will see that he puts it in very general terms, without any qualification geographically whatever, so that apparently Mr. Anderson agreed that the two rivers and their tributaries should be equally divided between the two countries. You refer to Mr. Gib-

bons' draft, in which he says, "In the State of Montana and the Province of Alberta." Mr. Anderson, who was the negotiator for the United States, states 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," without any qualification whatever.

Senator WALSH. Exactly; I was going to show you that throughout, as I shall develop, the course of negotiations the word "tributaries" has been continuously used by the representatives of the United States from the very start as including only those tributaries which cross the boundary line. I wish to recur presently to the original draft proposed by Secretary Root, and I think it is easily to be appreciated from his draft that he used the word "tributaries" without any qualifying phrase and referred only to the tributaries which crossed the boundary line, and Mr. Anderson did exactly the same thing.

Now, the qualifying clause, "In the State of Montana and the Provinces of Alberta and Saskatchewan," was, in the final draft, it is quite obvious, moved forward so as to occupy a place after the word "tributaries" instead of before it, which, I have no doubt, was done more clearly to express the idea of the parties, whatever that idea was, either one way or the other.

Now, may it please the commission, I want to submit this consideration, which, as it seems to me, is susceptible of practically no answer at all, viz, that if this is not the signification to be given to the qualifying phrase "in the State of Montana and the Provinces of Alberta and Saskatchewan," it has no meaning whatever. The whole purpose would be accomplished by just saying "the high contracting parties agree that the St. Mary and Milk Rivers and their tributaries are to be treated as one stream for the purpose of irrigation and power."

You can assign no significance whatever to that language if the contention urged by my esteemed friend, the counsel for the Canadian Government, is sound. At least, I have not found any other explanation given for that language. It is utterly useless where it is. It certainly was not necessary to identify the Milk River or the St. Mary River, because it could hardly be contended that the treaty referred possibly to some rivers up in the State of Minnesota or in the State of Maine. This language must be given a meaning, and unless it is intended to refer to those rivers and tributaries of those rivers which at one and the same time are in the State of Montana and in one of those Provinces, I find it difficult to assign any meaning whatever to that language.

But, may it please the commission, there is another feature that leads with equal force, to my mind, to the same conclusion, and I attach more importance to it than I do even to this contention which I have just now made, upon the very language of the treaty itself, and that is that the whole course of the negotiations discloses that never at any time or any place was it suggested that these tributaries that were not international in character, those which had their sources as well as their mouths in the State of Montana on the one hand or in the Dominion of Canada on the other, were to be considered in the problem at all. It was entirely outside of the whole course of the negotiations between the parties entering into the treaty.

Mr. POWELL. Before you pass on, Senator Walsh, there is a river south of the boundary line, which takes its rise in Glacier Park, joins the St. Mary River a mile or two—possibly more—south of the international boundary line. Now that river is not at any one time in the State of Montana and in the Province of Alberta or the Province of Saskatchewan. Now, what effect would your construction have upon that tributary? Would it be ruled out of consideration entirely? It is quite a large river, and the United States are to-day erecting for the purposes of irrigation a large dam to turn the stream. Now, your interpretation of this treaty would strike that out altogether?

Senator WALSH. Not at all, because under my interpretation the volume of the stream at the international crossing is the thing to be apportioned. I think we should bear in mind that it is the natural flow at the international crossing, and the Government of the United States would not be permitted under this treaty to divert the tributary and thus reduce the natural flow at the crossing. And in exactly the same way, any tributary of the Milk River in Canada will go to swell the volume of that river where it crosses the international boundary line. Therefore that will be taken into consideration in the measurement of the volume of water that passes the boundary line.

Mr. POWELL. That seems to me to be quite a reasonable construction. Your suggestion, then, is that the word "tributary" is only introduced to save abstraction of the water that is in that tributary.

Senator WALSH. No, your honor; that is not my construction of it at all. My construction of it is that the thing that is being dealt with is the natural amount of water that crosses the boundary in the main streams and the water of the tributaries which likewise crosses the boundary. That is the total volume of water which crosses the boundary. Of course, there is included the water which is added to the main rivers by the tributaries above the point of crossing.

Mr. MIGNAULT. When you say that the United States can take the water of that tributary which flows entirely in the State of Montana, its mouth being a few miles south of the international boundary, do you concede, then, that that tributary should be considered for the purpose of an equal apportionment between the two countries? I can follow your argument when you say that unless a tributary is in both countries, both in the United States and in Canada, it should not be considered: but when you say that the United States has not the right to divert the waters of a tributary which goes into one of those rivers before the river crosses the international boundary, it does not seem to me that you have so much logic on your side as when you say the tributary is entirely out of consideration unless its waters flow in both countries.

Senator WALSH. To my mind it is not necessary to take those tributaries into consideration at all. All you have to take into consideration is the water that crosses the international boundary. For illustration, we will assume that measurements will show that during the month of July the natural flow of the St. Mary River at the crossing, including whatever may come from the boundary stream or from any other stream or rivulet that may enter into that river before it crosses the boundary, is 1,000 inches. Now, the Government of the United States is obliged to deliver to Canada the 500 second-feet—

I said a minute ago 1,000 inches; I meant 1,000 second-feet; I used the word inches because we are more accustomed to speak of it that way in Montana. As I was saying, the Government of the United States is obliged to deliver to Canada the 500 second-feet of water to which Canada is entitled by preference, and it makes absolutely no difference to Canada whether it comes out of the boundary creek or out of the stored water in the reservoir at Swift Current.

Mr. POWELL. I understand you are saying this in order to assist us in putting an interpretation on the words "tributary" and "river"?

Senator WALSH. Yes; and I say it is the tributaries that are actually in the State of Montana and in one of the Provinces. You need not pay any attention at all to the tributaries that are above the crossing, because that flow is included in the natural flow that comes across the international boundary line. I do not feel that the United States would be to any degree reprehensible or subject to correction by this commission if it took out of the boundary creek every drop of water there is in it, provided it delivered at the crossing the amount of water which is prescribed by this treaty, namely, 500 second-feet.

Mr. MIGNAULT. That is, you say that no tributary is to be considered under Article VI unless it is in both countries; therefore, it is logical to say that the United States can treat the entire water of the boundary creek which does not cross the boundary and prevent any drop of that water reaching the international boundary. That is the logical position.

Senator WALSH. No, sir; I do not think that is the logic of the position that I take, at all. The Government must allow that amount to go through; if it diverts any one of the tributaries that otherwise would go to swell the volume of the stream so that Canada may have the amount to which she is entitled, that deficiency must be supplied from some other source. And so Canada, if she wishes, may impound any of the flood waters of the Milk River in Canada and take out those waters and use them in Canada but must supply the deficiency by impounded water which she has. All she is required to do is to deliver 500 second-feet, if there is that much, at the crossing of that river.

Mr. MIGNAULT. Then you say that each country is bound not to interfere with the natural flow of each of those streams so as to prevent the other country from getting this quantity, or at least three-quarters of the natural flow of the stream.

Senator WALSH. That is my idea.

Mr. MIGNAULT. I follow you there.

Mr. POWELL. What puzzles me is in the document itself. What is the use of introducing the word "tributaries" at all? If your construction is right, and it only applies to the waters crossing the boundary line, it would not be necessary to put in the word "tributaries," according to your contention. Take the St. Mary River. It all crosses the line into Canada.

Senator WALSH. Yes, sir.

Mr. POWELL. Well, then, what is the necessity of using the word "tributaries" at all, provided the St. Mary River crosses as a whole?

Senator WALSH. The answer, it seems to me, is perfectly plain, and it arises out of the controversy which existed not only with reference to the waters of the main stream but with reference to those waters

which cross the line. The correspondence here shows a protest on the part of the settlers in the State of Montana, because of the diversion of the tributaries arising in Alberta and crossing the boundary line and emptying into Milk River in the State of Montana, and this treaty was to compose all differences which had arisen. To that end the provision in relation to the tributaries was necessary.

Mr. POWELL. Then you rest the whole thing on the correspondence and the negotiations?

Senator WALSH. Yes.

Mr. MIGNAULT. Well, Mr. Walsh, can you find something in the language of the treaty showing that it is essential that they shall cross the line? I understand your argument is that the tributary must be in Canada and the United States, and therefore necessarily must cross the line. But to follow that out, I can not see where you get any reference to the boundary line outside of these words "in the State of Montana and the Provinces of Alberta and Saskatchewan."

Senator WALSH. That is all there is in the treaty—and I am now coming to my next point—and even if there were no qualifying phrase here—even if there were no limiting phrase—the whole course of the negotiations discloses that these were all the waters that were included in the treaty.

Mr. POWELL. That is your second proposition?

Senator WALSH. Yes.

Mr. POWELL. I am sorry to interrupt you, Mr. Walsh, but I want to raise every point that suggests itself to my mind.

Senator WALSH. I sincerely hope you will continue to do so.

Mr. POWELL. Well, certainly I will. Supposing the contention were made that the word "tributaries" is used generally to avoid mentioning specifically all the branches—the Swift Current stream and all those others—and they use the general term to scoop in the whole of them; take the whole thing together as a river system. Supposing the argument was put forward, you would meet it by saying that the course of the negotiations would show that that was never intended.

Senator WALSH. Yes; of course, if there were no limiting clause at all, I would say that the whole course of the negotiations shows it was only the tributaries crossing the line that were referred to. There was no occasion to refer to the others.

Mr. TAWNEY. And no authority to include the others.

Senator WALSH. Exactly; and because some doubt was expressed in the course of the hearings here, about the right of the commission to go into an examination of these prior negotiations and particularly to enlighten itself from the previous drafts of the treaty that had been made, I shall digress for a little while to address myself to that question.

It was urged from the bench, as I think—though possibly by counsel—that if the language which was used theretofore had been restricted, if there was a qualifying phrase which limited the word "tributaries" to those which crossed the line, and the language was changed, that that would indicate a change of intention. Possibly if we did not follow the course of the negotiations that might be a just conclusion, because, generally speaking, if parties change the language of any contract they change it to express some other meaning. If a statute in course of framing is changed, we may assume it

is changed in order to change the meaning. However, that does not follow. It may be that the change was made not for the purpose of changing the meaning, but in order that the meaning might be made more clear, or it might be changed in order to meet a condition that had not been considered before. So in connection with the change we are equally, it seems to me, obliged to inform ourselves concerning the course of the negotiations to ascertain, if we can, if anything transpired to indicate that a change in the language was desired on the part of both parties to express a change of purpose, or at least if they eventually agreed that the language used did not carry the meaning they intended it to convey or did not express the real agreement, and that they employed different language in order to express something different from what they had theretofore intended to say.

I think we will probably agree that a treaty is a contract. The word "contract" is ordinarily used to denote an agreement entered into between two private parties. A treaty is a contract entered into between two nations; but the rules which govern the construction of a contract are equally applicable to the construction of a treaty. I desire now to refer to the Encyclopædia of Law and Procedure, a work which is an authority in Canada, as well as in this country, I dare say.

Mr. MIGNAULT. Oh, yes; we all respect it.

Senator WALSH. Well, on page 969 of 38 Cyc. with regard to the construction and operation of treaties, I find the following:

> If the terms of the treaty are clear and unambiguous, the courts must recognize and enforce it as written, notwithstanding the language of the treaty is inconsistent with the correspondence which preceded it; but if the treaty is open to construction they should endeavor to ascertain and give effect to the intention of the parties and in so doing will adopt the same general rules which are applicable to the construction of statutes, contracts, and written instruments generally, and particularly those applicable in the construction of contracts between individuals.

Now, what is the rule concerning the admissibility of prior negotiations and prior drafts of a contract between the parties before a court called upon to determine what is the meaning of the parties in the contract to which they eventually attached their signatures? That matter was before the Supreme Court of the United States in the case of United States *v.* The Bethlehem Steel Co. (205 U. S. Sup. Ct. Repts., p. 105). The opinion is by Mr. Justice Peckham. I will read it:

> It is objected on the part of the company that as the contract in question is, as asserted, plain and unambiguous in its terms, no reference can be made to other evidence or documents which do not form part of the contract. The general rule that prior negotiations are merged in the terms of a written contract between the parties is referred to, and it is insisted that under that rule the various letters passing between the parties prior to the execution of the contract are not admissible.
>
> The rule that prior negotiations are merged in the contract is general in its nature and, we think, does not preclude reference to letters between the parties prior to the execution of the contract in this case. The language employed in this contract for a deduction, in the discretion of the Chief of Ordnance, of $35 per day from the price to be paid for each day of delay in the delivery of each gun carriage, respectively, taken in connection with the subject matter of the contract leaves room for the construction of that language in order to determine which was intended, a penalty or liquidated damages. While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet we think that

much light is given as to the true meaning of language that is not wholly free from doubt by a consideration of the correspondence between the parties before the final execution of the contract itself. Under such circumstances we think it never has been held that recourse could not be had to the facts surrounding the case and to the prior negotiations for the purpose of determining the correct construction of the language of the contract.

Then the author makes a reference to the case of Simpson *v.* The United States (199 U. S., pp. 397–399).

In Brawley *v.* The United States (96 U. S., pp. 168–173), the court says:

> Previous and contemporaneous transactions may be all very properly taken into consideration to ascertain the subject matter of a contract and the sense in which the parties may have used particular terms.

These last two excerpts are referred to in the opinion of the court in the case of United States *v.* Bethlehem Steel Co. In rendering judgment in that case, Mr. Justice Peckham continued:

> It is not for the purpose of making a contract for the parties, but to understand what contract was actually made, that in cases of doubt as to the meaning of language actually used prior negotiations may sometimes be referred to.

So, I think, if your honors please, if this were a controversy between private parties, there could be no doubt, that for the purpose of resolving the doubt in question before us—and no one I take it would have the hardihood to assert that there is no doubt about it—we might refer to all negotiations between the individuals for determining what they meant by the language that they used.

But we need not depend upon the general statement made in the American Encyclopædia of Law and Procedure; that is, 38 Cyc., the authority to which I referred a while ago, for the rule there announced was, as I think, expressly adjudicated in the case to which I called your attention a while ago, namely, the case of Birch and another *v.* Depeyster, reported in 1 Starkie, 210. The opinion in that case is brief. I shall read it:

> This was an action of assumpsit brought by the owners of an India ship, against the captain for the amount of freight carried by him. By the contract between the parties, the defendant was to receive a stipulated sum in lieu of privilege and primage. The freight claimed had been earned in respect of goods carried in the cabin, and the principal question was, whether the terms of the contract excluded all right on the part of the captain to use the cabin for the carriage of goods on his own account.
>
> On the part of the defendant, it was proposed to give in evidence a conversation between the parties before the agreement was entered into, in the course of which it had been expressly stated by the plaintiffs that the defendant was to have the use of the cabin entirely to himself.
>
> For the plaintiff it was contended that no evidence was admissible by way of explanation, except as to the general meaning of the term "privilege" in mercantile understanding.
>
> Gibbs, C. J.: The distinction which you take is, that evidence may be received to show what the mercantile part of the nation mean by the term "privilege": just as you would look into a dictionary in order to ascertain the meaning of a word, and that it must then be taken to have been used by the parties in its mercantile and established sense. But I think that the word privilege is of so indeterminate a significance that I must receive this evidence. It is certainly evidence, and in the way in which it is offered falls within the general current of mercantile understanding, since they had previous to the agreement a conversation on the subject of privilege; to this extent it is evidence if not further, and if the term has been used in different trades in different ways, the conversation is evidence to show in which sense it was used in the present occasion.
>
> The conversation was then admitted, and being to the effect stated was held to be decisive of the case.

So as I shall show you that whatever may be the significance of the word "tributary," as used here in this treaty, it was used throughout by the representatives of the United States as comprising only those tributaries which crossed the line, and that that is the sense in which it was used by both parties to the treaty. As I see it, the principle is equally applicable to treaties as to contracts between private individuals. I will now read again from the volume to which I referred a while ago, namely, Crandall on Treaties, Their Making and Enforcement. I am reading now from section 166 of Crandall, where he says:

Contemporaneous declarations and prior negotiations.—It is the general rule of interpretation of written contracts applicable to treaties that prior negotiations are merged in the written instrument, and can not be resorted to for the purpose of contradicting or explaining its plain provisions. The reason of the rule is obvious. The object of the written instrument is to record the final and common intention of the parties, which may have undergone a change during the progress of the negotiations. Moreover, in the case of treaties, the contracting parties are the States, not the individuals through whom the negotiations are conducted, whose acts are binding on the State only so far as they are duly authorized. However, in case of ambiguity or doubt in the application of the terms of a treaty, reference is frequently made to the contemporaneous declarations of the negotiators who framed the treaty and to prior negotiations, not to make a treaty where the parties have failed to do so, nor to change the terms of the treaty actually made, but to determine the general object of the negotiations, the broad sense in which the terms otherwise uncertain of application were used at the time, or the conditions as they existed at the time of the conclusion of the treaty.

Records of international tribunals of arbitration contain many instances of contemporaneous declarations and prior correspondence for this purpose; thus, under the North Atlantic coast fisheries arbitration of 1910, between the United States and Great Britain, the tribunal in determining whether the inhabitants of the United States, while exercising the privileges referred to in Article I of the convention of 1818, had a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States, took into consideration the correspondence between Mr. Adams and Lord Bathurst of 1815.

I believe, therefore, that no valid objection can be urged to this tribunal taking up and considering for all purposes of enlightenment which they may afford, the negotiations between these high contracting parties.

Mr. POWELL. Do you concede that we are bound entirely by the principles of evidence in this matter, or do you think there should be more laxity in the interpretation of a treaty than in a case in litigation before the court? I make this suggestion because anyone who reflects for a moment will realize that though the rules of evidence in their most refined form are solely for the purpose of arriving at the truth, still their object is to arrive at the truth consistently with certain provisions as to putting an end to litigation and doing away with unnecessary litigation as much as possible. In other words, the object of rules of evidence is not entirely to arrive at the truth but also to lessen and do away with litigation. And it struck me that perhaps in an exceptional tribunal such as this it may be that we are not absolutely bound by rules of evidence.

Senator WALSH. I think there is a great deal in what the commissioner has said. I think no one could successfully contend that the rules that ought to govern this tribunal could be any less liberal than those which govern a court. And if a court, in arriving at a just conclusion concerning even a matter of fact, or a proper construction of a

contract, which is before the court for consideration, may consider matters of this character, I feel there can be no doubt that this tribunal would be quite within its rights if it observed at least an equally liberal rule.

Mr. POWELL. Of course, if the historian governed himself by evidence that would satisfy a law court the history of the world would be wiped out; in fact, the history of the world could never have been written. And then we must remember that these rules of evidence are imposed on courts largely as a matter of convenience. Take the case of hearsay evidence. It is undoubtedly for the sake of convenience largely that hearsay evidence is not allowed. Then take the question of evidence on collateral issues. That also is largely on the ground of convenience.

Senator WALSH. Yes; oftentimes hearsay evidence governs all of us in matters of the greatest moment.

Mr. POWELL. And it seems to me that in international matters it may well be that the interpretation of rules of evidence and of construction should be still more liberal.

Senator WALSH. Yes; and I feel that another question might properly address itself to the commission. Of course, a court sits as an impartial arbiter between the parties, and the parties are expected to come before the court and to make their case. The court is not expected to go outside of the record to enlighten itself about anything. I have no doubt, however, that this commission might very possibly resort to the archives of either country for the purpose of arriving at a just conclusion on any question submitted to it, even though such archives were not introduced formally before it. That reminds me that a draft of this treaty is found here in the record purporting to have been made by Mr. Campbell, who, as I understand, was in some way or other connected with the Forestry Service of the Dominion of Canada, perhaps occupying an office corresponding to our chief forester.[1] It does not affirmatively appear here just what his connection with the matter was, but he seemed to be in Washington at the time. It does not appear here by what authority he sent in the draft. Now, it occurs to me that the commission might very properly call Mr. Campbell here in order to enable it to inquire of him of its own motion as to what place he occupied in the Dominion Government and how he came to submit a draft treaty, and on the suggestion of whom he was authorized to do so. In other words, in a case of that kind it seems to me that the commission might of its own motion prosecute the inquiry which would clear up any obscure matter in connection with this case.

Mr. TAWNEY. I was going to ask you, Senator Walsh, as to whether you considered the duty of the commission under Article VI judicial or administrative, and if administrative, whether the commission would be at liberty to obtain from any source information as to what the real intent and purpose of the parties to this treaty were. That is, if we are not acting judicially, we are not bound by the same rules governing the construction of contracts that restrict the courts in their determination of what the parties to a contract meant.

Senator WALSH. I should say that the duty was administrative rather than judicial, but, of course, we all recognize that almost every officer called upon to perform important duties of an administrative

[1] Mr. Campbell, as Director of Forestry, had charge of the irrigation work of Canada.

or executive character is often called upon to exercise what are practically quasi judicial powers.

Mr. POWELL. I should think the interpretation of a statute is judicial.

Senator WALSH. Of course it would seem so, but almost every officer called upon to execute a law is required to construe the law, to ascertain its meaning as a court would.

Mr. TAWNEY. But the commission is required to direct the measurement and the apportionment of these waters. Now, in ascertaining how that duty should be performed I take it that the commission is not necessarily circumscribed by the same rules of construction in order to ascertain what the parties meant that a court would be restricted to in considering a controversy between two litigants.

Senator WALSH. Of course there are administrative duties imposed by the terms of the treaty upon this body, but it is called upon to perform judicial duties just exactly the same as an ordinary tribunal of arbitration is called upon to do so.

Mr. MIGNAULT. At the very threshold of the whole question, as you have stated, the commission has to determine what waters are to be divided. In order to determine what waters are to be divided they must necessarily construe Article VI of the treaty, and in construing Article VI of the treaty they exercise a judicial power.

Senator WALSH. There is no doubt about that.

Mr. MIGNAULT. Now, as to rules of evidence, I think you will agree with me, Senator, that they have been devised and imposed for the protection of parties. For instance, I can only make a certain contract or a certain promise in writing. The statute of frauds refuses to give effect to a parole contract. This protects me against any person coming in and swearing falsely that I made a promise verbally. The rules of evidence are to prevent arbitrary decisions and especially to protect parties.

The two countries here have entered into an agreement. Unless certain rules of construction are followed it may be that a meaning might be attached to this contract between the two countries which they had no intention to give to it, and therefore, for the protection of the two countries, as well as for the protection of the litigants in private litigation, unless the transaction be entirely arbitrary, it is necessary to follow certain rules which have been laid down for the construction of contracts.

Senator WALSH. Yes; I quite agree with that general statement. Of course, the number of controversies submitted to international tribunals is infinitesimally small as compared with the number of controversies between private individuals that are submitted to the courts, and the courts are obliged to lay down general rules that sometimes operate to defeat justice, concerning the admission of evidence, because to proceed without such rules would operate disastrously in a multitude of cases which come before them. So they must do an injustice in some instances to reach general justice in the mass of cases. But the likelihood of anything of the kind in an international tribunal is, of course, less by reason of the fewer cases submitted.

Mr. MIGNAULT. There is always the danger of arriving at an arbitrary result if rules are obscured. I think, at the same time, we should decide it by rule and by precedent.

Senator WALSH. Now, I am going to ask that you, as you have before you a transcript of the hearings thus far, to follow with me the course of these negotiations. I want to invite your attention to page 56, where appears the first communication upon this subject from the authorities of the Dominion to those on this side of the line. I read as follows:

On a report dated December 13, 1895, from the Minister of the Interior, saying 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 adjusting the conflicting rights which have arisen, or may hereafter arise, on 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, situation adjacent to the forty-ninth 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.

That is to say, those streams which arise in the United States and flow into Canada and those streams which arise in Canada and flow into the United States.

The minister therefore recommends that Her Majesty's ambassador at Washington be requested to inform the Government of the United States that this 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 be requested to ascertain at an 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.

That was the original proposition, to debate and consider those streams, and those streams only, which arise in the one country and flow into the other.

Now, I will ask you to turn to page 58.

Mr. POWELL. You are tracing it chronologically, are you?

Senator WALSH. I am; yes, sir. I trace it as it is found in the transcript. There is one break in the chronological order. I shall advert to it. This is a communication from Mr. McGee, clerk of the Privy Council, to the Minister of the Interior.

I shall read from the first and second paragraphs and shall be very glad if counsel would call my attention to any other portion of the letter which might seem to be enlightening.

On a report, dated October 15, 1902, from the Minister of the Interior, stating that the International Irrigation Congress, at its meeting at Albuquerque, N. Mex., in September, 1895, passed a resolution 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."

The minister further states that in an order in council dated January 8, 1896, and communicated to the United States Secretary of State through Her Majesty's ambassador at Washington, it was represented that it would be in

the highest and best interests of both countries that in respect of such streams the suggestion of the irrigation congress should be acted upon and the Government of Canada offered to cooperate by the appointment of an international commission or otherwise, as might be agreed upon, 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 consequently flow through the territory of another. The answer of the Secretary of State was that he did not lack interest in this important subject, yet from the information in his department's possession he could only regret his inability, agreeably to Her Majesty's ambassador's courteous request, to give expression to the views of his Government upon the subject at the present time.

Then, I ask you to pass to pages 63 and 64, where will be found a letter from Mr. McGee.

Col. MACINNES. Would my learned friend mind reading as in chronological order that memorandum of the 9th of May, 1904, at the foot of page 61 and the top of page 62?

Senator WALSH. I have marked only those portions of the correspondence which as it seems to me shed light upon the questions that I am endeavoring to present now to the commission, namely, that from the beginning there were no tributaries of any character that were under consideration except those of an international character. Now, these letters often go into details and I shall be very glad to read the entire letter to which counsel refers, but you can very readily appreciate that to read the whole of these letters will do what I am endeavoring to prevent. I want to direct the mind of the commission to the single feature of the tributaries as that term is used in the negotiations.

Col. MACINNES. I am quite satisfied. I do not want to ask my learned friend to do anything that would obscure his immediate point.

Senator WALSH. The entire correspondence is important, of course, but oftentimes it goes into details quite apart from this matter. If counsel does not insist upon his request, I shall read from page 64 of Mr. McGee's letter as follows:

> The Minister of the Interior, to whom the said dispatches were referred, observed with respect to the conditions existing in the State of Montana and the district 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.
>
> 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.

I suppose the word "questions" is used as having much the same significance as controversy would have—all controversies. Now, controversies had arisen concerning the use of the waters of these two streams and their tributaries that cross the boundary. I shall invite your attention to the fact that the controversy about the tributaries seemed to generate as much heat between the parties possibly as the controversy concerning the waters of the main river.

On page 65 there appears a letter from Mr. Root. The efforts up to the present time not having eventuated into anything, the Government of the United States, going on with its great work of reclamation upon which, according to the testimony that is in the record already, some eight millions of dollars have been spent, and upon the ultimate success of which the prosperity, not to speak of the very existence, of multitudes of people in my State depend, had arrived at no adjustment in the matter and the Canadian Government—pursuing a policy that I do not criticize at all—started in to take out their canal from the Milk River by which they might, if they saw fit to do so, appropriate even the stored and conserved waters. The necessity of some composition and adjustment becoming perfectly apparent, this letter was written by Mr. Root, then Secretary of State:

With a view to bringing to a determination the questions—

Controversies again, I suppose—

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.

Bear in mind what Mr. Root is talking about. He is talking about those waters which flow across the boundary line and about controversies, questions, which had arisen between the two Governments concerning those waters.

Mr. MIGNAULT. If you read on, Senator, you will see that Mr. Root refers to the two rivers and their tributaries in general language.

Senator WALSH. Exactly. That is just the point I am making. I said some time ago that it is perfectly obvious that though Mr. Root used the word "tributaries" without any qualifying clause, the very context shows that he was referring only to those tributaries which cross the boundary.

Mr. TAWNEY. That is, while he used general terms, he had a restricted idea in his mind?

Senator WALSH. Exactly. After having told about the questions concerning the waters which crossed the boundary line, he then continues:

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.

Now, no one can doubt that when he talked about tributaries he meant the tributaries having waters as indicated in the final paragraph which crossed the boundary line.

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, as you will observe, is the source and the origin of the language which eventually came into the treaty, and a little later on the correspondence indicates what was in the mind of Mr. Root when he said that they were to be considered as one river or really as one single drainage system.

I want to ask the commission to attend particularly to the distribution which Mr. Root sought to make of the waters of these

rivers and their tributaries. To show you that he did not undertake to divide up the waters of the tributaries that were entirely in Montana or the tributaries that were entirely in Canada, he did not deal with those at all; he made no provision for the distribution of any such waters. He says:

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.

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 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:

(*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 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.

The share to which Canada is entitled shall be the total of the following items:

(*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*).

Now I refer you to the letter in answer thereto by Mr. Boudreau, clerk of the Privy Council, which appears on pages 67 and 68. Mr. Boudreau does not at any time or in any place suggest that Mr. Root has failed to take into consideration as an element in his calculation in any sense whatever those waters, those tributaries, which are below the crossing and in the other country and which constitute no part of any waters that cross the boundary line.

Mr. MIGNAULT. This is not a letter from Mr. Boudreau, but a certified copy by him as clerk of the Privy Council of an order in council of the Canadian Government.

Senator WALSH. It is transmitted by him, I take it, in his official capacity as clerk. I shall read from page 67 of the record. Bear in mind that this is a criticism of the proposal for division and distribution made by Mr. Root. Bear in mind also that I find no fault with it. I read it for the purpose of inviting your attention to the fact that he does not even suggest that Mr. Root ought to take into consideration the fact that there are tributaries of the Milk River that do not cross the international boundary line at all and that on the basis of right or reason those should enter into the computation. While he criticizes—and I do not mean to say unjustly criticizes—the proposal in many of its aspects, no suggestion of that character seems to be in his mind at all.

Mr. POWELL. Did Mr. Root propose to add the two rivers together and divide equally the resultant?

Senator WALSH. He states as a general proposition that the St. Mary and the Milk Rivers 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. That is, after being connected by the diversion canal they were to be as though they were one river system.

Mr. TAWNEY. He makes that distribution with reference particularly to the waters referred to in the first paragraph of his letter.

Senator WALSH. Exactly.

Mr. POWELL. He is evidently speaking there in a restricted sense.

Senator WALSH. Undoubtedly. That is the point I am making, that he uses the word "tributaries" here even without a qualifying clause. He uses it in the restricted sense.

Mr. MIGNAULT. Mr. Root determines the sum total comprising the rivers and their tributaries and then he indicates how the sum total is to be divided between the two countries.

Mr. TAWNEY. But in the first paragraph of his letter of June 15, 1907, appearing on page 65 of the record, he 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.

All of his apportionment of the waters referred later to the waters which he describes in the first paragraph of his letter.

Mr. MIGNAULT. He takes the two rivers and their tributaries as the sum total, and he states how this sum total is to be divided, not necessarily in equal division—I think in Canada it was found that it was not an equal division—but the sum of the total to be divided is the two rivers and their tributaries.

Senator WALSH. The letter which came in response to this agreed to the general principle that they should be divided equally, but complaint is made that the distribution he suggests does not make an equal division.

Mr. POWELL. This is the first intimation that it was desirable to add the two rivers together and divide the sum total, is it not?

Senator WALSH. Well, that is referred to, but it does not convey much of an idea to me. A little later on a letter from Mr. Newell refers to this.

Mr. POWELL. Yes; but this is the first time that idea appeared in the correspondence.

Senator WALSH. Yes, sir; so far as I have been able to discover. Now, I refer to the letter from Mr. Boudreau and read from page 67 as follows:

> The Minister of the Interior, to whom the said dispatch was referred, states that in the opinion of your excellency's advisers it would have been far preferable that the question of the equitable apportionment of the waters of the St. Mary River and the Milk River, as well as all similar questions arising in all rivers and streams flowing from one country into the other, should be dealt with on the lines suggested by the report of the international waterways commission, but as there is no prospect of immediate adoption or even considera-

tion of the views set forth in that report, and as the season is fast approaching for irrigation works, he has caused the draft treaty, inclosed in the above dispatch, to be carefully considered by the expert officers of his department.

So it would appear from this that the Privy Council of Canada understood Mr. Root's communication in just exactly the sense that he understood it, as referring only to those waters which actually crossed the boundary line.

It having been found impracticable to arrive at any agreement at long range, it was suggested that representatives of the two Governments get together. I wish now to call your attention to a communication from Ambassador Bryce appearing on page 77 of the record.

Mr. POWELL. Is there any modification, before you come to that? We have the thing down absolutely to a certain stage. Is there any modification or any suggestion of any controversy between that and the time they get together?

Senator WALSH. No, sir; I think not.

Col. MACINNES. I would call my learned friend's attention to other parts of that order in council, at the foot of page 67 and the top of page 68, in which the most emphatic objection is raised against the division being too small.

Senator WALSH. Yes; I have endeavored to make that clear, that the Privy Council, speaking through Mr. Boudreau, makes emphatic complaint against the distribution proposed by Mr. Root. They express the idea that they do not get as much water crossing the boundary line as they feel they are entitled to, but the point I am making is that in all of the criticisms they make of it, in everything that they set forth concerning the basis upon which the distribution ought to be made, it is nowhere suggested that the streams entirely within the State of Montana east of the Eastern Crossing of the Milk River or in the Dominion of Canada below the crossing of the St. Mary should enter into the computation at all

Replying to the inquiry of Mr. Commissioner Powell, there is a letter at pages 74 and 75 of the transcript written by Mr. Hay. I do not think it is exactly in chronological order, but that I think is the only exception. However, with regard to this letter, I do not find anything in it which I think of sufficient consequence on the point on which I am addressing myself at present to call the attention of the commission to it.

So, we come to the proposal to consider the matter by direct negotiations rather than by letter. I will now read the letter of Ambassador Bryce, on page 77 of the transcript. This letter was written in reply to one of April 9, 1908, addressed to his excellency the Right Hon. James Bryce, ambassador of Great Britain, as follows:

His Excellency the Right Hon. JAMES BRYCE, O. M.,
Ambassador of Great Britain.

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.

To this letter Mr. Bryce replied as follows:

WASHINGTON, *April 10, 1908.*

SIR: I have the honor to acknowledge the receipt of your note, No. 290, of yesterday's date, in which you inform me that Mr. F. H. Newell has been designated to meet the Canadian representative to consider the basis of an agreement with respect to the question of the diversion of the waters of the Milk and St. Mary Rivers.

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, and I shall not fail to notify his arrival to you in order that he may meet Mr. Newell as soon as possible.

I have the honor to be, with the highest consideration, sir, your most obedient humble servant.

JAMES BRYCE.

The Hon. ELIHU ROOT,
Secretary of State.

So we come down to the negotiations between Mr. Newell, on one side, and Mr. King, on the other. Mr. King accordingly submits when they come together quite an elaborate proposal, which you will find at pages 81 to 83 of the transcript. Again I invite your attention to the fact that Mr. King nowhere suggests in the remotest way that the tributaries which are not international in character should be taken into consideration or that they enter into the negotiations or the division in any way whatever.

Mr. POWELL. What language does he use, Mr. Walsh?

Senator WALSH. I read at page 81 of the transcript:

MEMORANDUM UPON THE PROPOSED DIVERSION OF ST. MARY AND MILK RIVERS.

APRIL 27, 1908.

The proposals of the United States, set forth in the letter of the Secretary of State to His Majesty's ambassador, dated June 15, 1907, have been discussed in the minute of council of March 2, 1908. The following is offered in further explanation and amplification of the views expressed therein.

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.

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. Marys River and Canada may store those of Milk River.

3. That vested interests in both countries shall be protected.

While the provisions here epitomized provide in their terms for equal division, it is, nevertheless, felt that there are certain considerations respecting them which ought to be taken into account.

He continues further on, at the top of page 83, and concludes his letter as follows:

The two cases are, however, not exactly parallel. In the case of Milk River settlers the date is that upon which proceedings were taken which had for their purpose the prevention of the acquirement of further rights to the waters of the river.

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 contemplated 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.

These observations are respectfully submitted for consideration with a hope that some modifications may be made to the proposals of the United States in the directions indicated. It is the earnest wish of the Government of Canada that a mutually satisfactory settlement of this difficult question may be reached.

Very respectfully,

W. F. KING.

Mr. F. H. NEWELL.

He subsequently apparently had a conference with Mr. Newell, who explained to him the significance of prior proposals made by the United States, and he writes him another letter from the Shoreham, dated Washington, May 1, 1908, which reads as follows:

THE SHOREHAM.
Washington, May 1, 1908.

Mr. F. H. NEWELL,
Director United States Reclamation Service, Washington, D. C.

DEAR SIR: Referring to the memorandum which I addressed to you on the 27th ultimo, I would say that its purpose was to discuss, from the viewpoint of Canada, your proposals relative to the diversion of the waters of the St. Mary and Milk Rivers. I now realize from the reading with you of your proposals that I entirely misunderstood some features of them. This makes it necessary for me to submit a new memorandum, and as you suggested the desirability of receiving my views as to a method of division more satisfactory to Canada, such will be found below:

The Alberta Railway & Irrigation Co. has made an appropriation of the waters of 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.

This seems to be in accord with the principle enunciated by the late Mr. Secretary Hay in a communication addressed to the British ambassador on February 19, 1903, in which he stated that "it is proposed to deal with this matter [the diversion of St. Mary River in Montana] 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 boundary and on the other."

Leaving aside what appears to be a very serious question of undertaking to deplete the water supply of one international stream for the benefit of another, your proposal is that Canada relinquish its rights to the difference between what it is committed to supply and one-half of 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 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 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 amount required as above by the appropriations in the lower valley, shall be divided equally between the two countries.

That the United States may use the channel of Milk River through Canada for the transportation from St. Mary River of the waters thereof to which they are entitled under the foregoing provisions, but shall be responsible for the proper control of the waters so transported.

Well, Mr. Newell seems to have been absorbingly engaged at that time—this was in the month of May—and he did not get around to make an elaborate presentation of the United States side of the case, until the month of October, when he went into the thing with some fullness. The communication address by him to Mr. King will be found at pages 85 to 90 of the transcript. I shall read from it only comparatively brief extracts. Among other things it recites the history of the trouble, and the contentions respecting this water of the respective parties, etc. At page 87 he says:

The primary question which has stimulated action has been the demand of the citizens of Montana that the waters of Milk River, including its tributaries, shall not be diverted in Canada to their injury.

Of course, when he speaks of these tributaries it is obvious that tributaries which never got into Canada could not be diverted in Canada. Then he goes on:

And more than this, that the available water supply shall be increased, if possible, by local storage or by diversion of some of the stored waters of St. Mary River. The action of the Canadian Government in granting the waters aroused great indignation, but the destruction of the headworks of the Canadian Milk River Canal by flood in May, 1908, has allayed popular feeling. If these works should be restored there may be another general protest.

The United States Government has planned local storage works on Milk River, and has begun construction of a flood or high-water canal heading at Dodson, Mont. This will be gradually enlarged and extended as opportunity arises.

This flood-water canal is, for the present at least, in lieu of the original plan of diverting water from St. Mary River to Milk River. In other words, the negotiation to protect the diversion of water from St. Mary River to and down Milk River have been so prolonged that for the time being at least this scheme of supplying the lands along Milk River in Montana has been laid aside and the people are and probably will remain tranquil, unless Canada rebuilds the Canadian Milk River Canal heading.

Then he goes on, on page 88, as follows:

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 rise 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.

Then, in the middle of the same page is this—speaking of the feeling that the controversy had engendered, he says:

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 Fort 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.

So that explains the necessity of the word "tributaries" being used in the treaty, because controversies had arisen, not only with respect to the waters of the main stream, which crossed the boundary, but also controversies engendering no little feeling had arisen concerning tributaries which rise in Canada and flow across the boundary line into the Milk River in Montana. Then I pass on to page 89 of the transcript. He gives there a review of some of the criticisms made by Mr. King of the proposal of Mr. Root, and says, quoting now from Mr. King's communication:

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.

Then Mr. Newell adds:

It seems from the above that the privy council did not fully comprehend the proposed terms. On account of lack of equality of these rivers it is proposed in Article I to treat them as parts of a single drainage system. This results from connecting them, storing the excess water, and dividing the summer flow equally, giving each country half. The council does not indicate as to how much water it considers that Canada is "equitably entitled," but it has been tacitly assumed that if Canada had half, this is more than strict equity demands.

I read that particularly for the purpose of explaining the language used by Mr. Root suggesting making of the two one stream in order to make a division of all water in the two rivers that cross the boundary. Then Mr. Newell submits a counter proposal, which you will find at the conclusion of his communication, at the bottom of page 90 of the transcript, as follows:

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 takes, 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.

This again, as the commission will see, deals exclusively with the waters crossing the boundary.

To that Mr. King makes a reply at considerable length. I read from page 92 of the transcript:

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, 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.

It is believed that the foregoing will show that the attitude of Canada has not been arbitrary or disregardful of the rights of the United States and its citizens, and it is hoped that the explanations which have been made will operate to free the discussion from considerations extraneous to the proper purpose of the present negotiations, which is the adjustment of the matter under the conditions which now exist.

The central idea of the proposal of May 1, 1908, was a balancing of benefits and concessions while making provision for existing appropriations. In working out the idea, it was thought to offset the reservation on St. Mary River in favor of the Canadian company by allotting to the United States the flow of St. Mary River during five winter months and that of Milk River during eight months, with a greater share of water of the latter river during the four remaining months. 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.

This was thought to be an equitable arrangement. It is, however, not satisfactory to Mr. Newell, who while signifying his acquiescence to certain clauses of the proposal, rejects others. As his rejection touches a vital point of the

principle of the proposal, namely, the balancing of concessions by payment in quantity of water, reconsideration of the whole proposal is necessary.

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.

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).

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.

And so Mr. King proposes that the "boundary waters"—the term perhaps is not used accurately here, but undoubtedly he means the waters crossing the line—proposes a division of the boundary waters upon the basis of an equal share after the priorities of each State have been satisfied. And that was the principle which eventually found expression in the treaty. Again I suggest, if your honors please, that he does not even mention the matter of taking consideration of those streams which do not cross the boundary.

Col. MACINNES. May I call the attention of my learned friend to the fact that that proposal contains these words: "Each country providing for its existing interests out of its share of the water"?

Senator WALSH. I read that—each country providing for its existing interests out of its share of the water—that is to say, the water was to be divided evenly between the two countries and the preferences or appropriations would take care of themselves; that is to say, Canada has so much water and she will distribute that as she sees fit, and if the North West Canal under her law has a prior right—and undoubtedly it has—it would come in for a first allotment out of her share, and so on each side; and on our side, say Jones, away down in Chinook, being the first appropriator of water, he would satisfy his appropriation first out of our half. And the man that has the last appropriation simply would not get any. That was the proposition as I understand it. And I must say that there was nothing unfair about it either.

I come now to the draft made by Mr. Campbell, which reads as follows—I shall read the greater portion of that. This is found on page 93 and reads as follows:

DECEMBER 29, 1908.

(1) 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 measurements at the point or points where such streass 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.

(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.

(3) Subject to such regulations as may be established by the commission, each country may divert, store, or use its share of the water of any stream so divided in such manner as to it may seem best.

(4) Rights to the use of water for irrigation now or hereafter established within the territory of either country, on any stream which crosses the international boundary, shall not be a charge on the share of the other country.

(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.

(6) If as a result of the construction or operation of works for the carriage or storage of water for irrigation from any stream which crosses the international boundary or as a result of the total or partial destruction or breaking away of such works, loss or damages caused to the property of either country or to the property or persons of the citizens of either country the government of the country in which the works from which the loss and damage has resulted are situated shall be responsible for the payment of the amount of such loss or damage as determined by the commission, and the commission shall have authority to take such steps as may be necessary to ascertain the amount of such loss or damage.

(7) When water is diverted from one stream or watershed into any other stream which crosses the international boundary the country within which such diversion is made shall be responsible for the payment of the amount of such loss or damage as may be determined by the commission to have resulted from the increased flow of water in such stream and of the amount of such expenditure as may be determined by the commission to have been made necessary to provide for the safe and convenient crossing of the stream in consequence of such increased flow, and the commission shall have authority to take such steps as may be necessary to ascertain the amount of such loss, damage, or expenditure.

Now, I do not understand Mr. Campbell desired to express any idea here different or varying from the ideas that the negotiators had in mind all the time. He simply uses other language to express the same idea. And you will observe by the reading of it that it does not simply throw every idea that had been advanced into the waste-paper basket and introduce a new and entirely novel method of distribution, but it picks the thing up where he found it. He embodies in his draft many of the ideas that had been the subject of discussion, and some of which in principle had been adopted, and puts it in such shape as he thinks ought to be acceptable to the parties. As I understand it, he is expressing the same idea that was in the minds of all, but using different language to express it. I will trace the origin of some of his language directly to the proposal of Mr. Root in one case, and, I think, to the proposal of Mr. King in another case. You will notice that he goes on, "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 where such streams cross the international boundary." I have read all this already. I will not repeat it.

Mr. GARDNER. Permit me to call your attention, Senator Walsh, to the fact that you have been running under high gear now for about three hours, and, as it is 1 o'clock, I would suggest that it might be acceptable to you to have some refreshment before proceeding.

Senator WALSH. I shall be very glad to, Mr. Chairman.

Mr. GARDNER. We will take recess, then, until half past 2.

(The commission adjourned until half past 2, and at the hour of half past 2 the sitting was resumed as follows:)

Senator WALSH. If your honors please, I had reached consideration of the draft of the treaty proposed by Mr. Campbell and had read it to the commission. Now, I invite your attention to the fact that not only the language of the draft thus proposed by Mr. Campbell is taken from the original proposal of Secretary Root, showing that he had the correspondence before him and was endeavoring to make a draft which would embody the ideas which had theretofore been agreed upon or apparently accepted. For instance, in the first paragraph of his draft he defines what is meant by the words "natural flow." He says:

"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 obstructions 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.

Now, if you turn back to page 67 of the transcript, you will find that language in Mr. Root's draft. It is subdivision 11, on page 66, and reads as follows:

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.

So likewise take paragraph 5 of Mr. Campbell's draft, on page 93, where he says:

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 practically the same as paragraph 3 of Mr. Root's draft, on page 65, where he says:

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.

Now, on the same page, 93, is a further draft, suggested by Mr. Newell, which contains the following language as the initial paragraph:

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 the 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.

Then Mr. Newell proceeds with his draft, as follows:

Inasmuch as the water of the rivers have widely different values at different times of the year, and have a special 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 St. Mary River at the international boundary being less than double this amount—viz, 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, 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.

Now, we come to the draft proposed by Mr. Gibbons, which has been heretofore referred to and which comes most nearly to the form that it eventually took in the treaty. This is at the bottom of page 94 of the transcript:

ARTICLE 6. 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.

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 the waters of St. Mary River stored in the United States. The provisions of article 2 of this treaty shall apply to any injury resulting to property in Canada from the conveyance through the Milk River of the waters from the St. Mary River.

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

Then follows the draft of Mr. Chandler Anderson, appearing at page 97 of the transcript, and which reads as follows:

ARTICE 6. 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.

The provisions of article 2 of this treaty shall apply to any injury resulting to property in Canada from the conveyance through the Milk River of the waters belonging to the United States.

It is further agreed that there exists on the part of the United States the right to a prior appropriation of 400 feet of the natural flow of the waters of the Milk River during the irrigation season between April 1 and September 30, annually, and that there exists during the same season a right on the part of Canada to a prior appropriation of an equal amount of the natural flow of the waters of the St. Mary River, and during the period above mentioned such prior appropriations shall not be subject to reduction by the other country.

You will observe that though the word "tributaries" is not restricted by any qualifying clause there, the language following clearly shows that he used it in the sense of tributaries crossing the line. And that draft became the treaty after the changes had been made in accordance with the telegraphic communication found at pages 97 and 98 and to which I have heretofore referred; showing, may it please the commissioners, that there never was a time in the course of all these negotiations when anything else was thought of, and that whatever form the language took, it was those waters, and those waters alone, that were the subject of debate and consideration and contention; and that at no time was it suggested from any source whatever that the waters of those other streams should be taken into consideration or form any part of the computation. And therefore I submit, if your honors please, that if there were no qualifying clause at all, and if the treaty referred only to tributaries, the negotiations between the parties would force the commission to the conclusion that that word is to be used in a restricted sense as embracing only those tributaries which actually cross the boundary line.

Now, with that idea in mind, we can very well understand that when the two countries went about to execute the treaty neither of them ever thought of establishing measuring stations at any place except at the international crossings. Then the four joint stations were established at the crossing of the St. Mary, at the crossing of the two forks of the Milk River, and at the eastern crossing of the Milk River. No suggestion was made of the establishment of measuring stations at the mouths of the rivers or upon the tributaries wholly within one or the other country at all.

Mr. POWELL. Were any measuring stations established at the crossing of the boundary line where the rivers flowed into the Saskatchewan?

Senator WALSH. Not on the tributaries; no.

Mr. WYVELL. They have very recently been established since the hearing.

Mr. POWELL. That appears to arise from the statute. If in working out the treaty, both powers had put stations wherever the waters cross—it seems to me——

Senator WALSH. Well, I just figured it out that these stations were not established immediately, as my recollection of the testimony is, but from time to time. There were stations adjacent, which were moved to the international boundary line, and I had in my mind—possibly justified by the record, and possibly not—that the controversy was acute, so far as the main stream was concerned, while the controversy, so far as it involved the tributaries to the east, was not so acute, and that there was no immediate anxiety with regard to these other measuring stations, which were permitted to bide their time. That they had been established, I was not, however, aware. I am now told by Mr. Wyvell that they are.

So the rule is that where the parties to a contract or treaty have themselves gone about and acted with reference to the subject matter in such a manner as to indicate their understanding of the treaty it is entitled to the very highest degree of consideration in an effort to arrive at what was the original intention in respect to the subject matter.

Now, I want to refer rather hurriedly to the want of a suggestion—so far as the printed record will enable me to speak—coming from the able counsel on the other side, as to just exactly how you would go about to discharge the duty which the treaty devolves upon you, on a basis of measurement made at the mouths of these streams.

Of course the United States can not go over into Canada and get any water out of either the St. Mary River or any of the tributaries of that river after the water is over in Canada. And in the same way Canada can not come over into the United States and get any water from Milk River after it has passed the boundary line; nor can it get any water out of any tributary of the Milk River that is wholly within the State of Montana. Each country must make the diversion in that country—in its own territory. In other words, whatever water Canada is entitled to out of the Milk River she must take out in Canada; and the United States will be entitled to her share of the water when it is thus divided in Canada. And it goes without saying that there will not be the amount of water to divide there which you find down at the mouth of the river—that is to say, the natural flow. Now, how will it be possible to divide the waters of the Milk River in Canada upon the basis of measurements made at the mouth of the Milk River so that each country shall get an equal share?

Mr. POWELL. It is not necessary to divide the water of any one river to measure it; and then, of course, there might be no beneficial use in taking waters in Canada over into the United States. And we must remember that the treaty calls for beneficial use of the water.

Senator WALSH. True, you are going to measure them, but in just the same way, if your honors please, the United States will have to divert whatever water it can divert from the St. Mary River in the State of Montana, and there will not be the amount of water in the St. Mary River to divide above the crossing that you will find down at the mouth of the St. Mary River.

Now, referring to the words "beneficial use." As I suggested in the opening, I am impressed with the fact that there is a large amount of testimony here concerning the subject of beneficial use, as to how much water they need down in the Milk River Valley, and as to whether they exercise a proper care in conserving the water, and whether they could not get along with considerably less than they use if they exercise judgment in the utilization of the water. All of these matters are certainly exceedingly important in a case regarding water rights when a court is endeavoring to arrive at a judgment concerning the amount of water that any contestant ought to have. But finally the court reaches a conclusion and makes a judgment and awards to this man 100 inches and to that man 50 inches of water.

Now, the question of beneficial use is passed—it is disposed of. So here, if your honors please, when we came to negotiate this treaty,

the question of how much water was needed in order to supply the necessities of those using the canal of the Canadian Northwest Co., was a very proper matter for consideration, and so likewise a question of how much water was needed for the beneficial use of the people in Montana was likewise a proper matter for consideration. But the judgment is passed on that question. Now, it does not make any difference to us whether they need it all or whether they do not need it all. If the Canadian authorities demand the 500 second-feet of water in the St. Mary River, it is for them to do with that water as they see fit. We can not deny it to them on the claim that they do not need to use 500 second-feet—that is, that they can not make beneficial use of it. They may properly say: "We are entitled to that amount under the treaty, and we want it."

Now, I have no doubt that by mutual adjustment, if they do not need that much water in Canada, the Canadian representatives will say: "We do not need that much—we have had fine rains in our country, and it will be quite satisfactory for you to turn us in 300 second-feet for the time being," or our representatives in Montana will probably say: "We have been blessed with abundant rains in the Milk River Valley, and we understand you are badly in need of water up there in Canada, so you may go on and take what water you need out of the river." Of course they would naturally be courteous to one another in that way. But that is not what I am talking about at all; I am talking now about what are the rights of the parties. And in discussing the rights of the parties there is no occasion for any more talk about the question of beneficial use. You are entitled to 500 second-feet of water and we must give it to you whenever you ask for it.

Now, the words "beneficial use," as you will see by reference to the treaty, are used only with regard to the question of how much shall be taken from one river and how much from another. The treaty says: "But in making such equal apportionments 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."

Mr. POWELL. In other words, to divide the water as required.

Senator WALSH. Yes; exactly; but the point is that each nation is entitled to so much anyway. It is not at all a question of how much each wishes for beneficial use; it is only a question of where the water shall be derived from in order to give more beneficial use to that quantity of water. I have just read the language of the treaty in that respect. But there is no doubt that each country is entitled to half of the total flow, and we can not stop to inquire whether you are putting it to beneficial use or not. Nor can this commission be called upon to say anything about that.

The specific amount to which each should be entitled was declared in the treaty for the purpose of getting rid of that question. In the negotiations between the parties, as you follow them down, reference is made to the doctrine of beneficial use, and it was originally suggested that the division ought to be made upon that basis. But when the final draft was made, the words "beneficial use" were simply applied to the question as to where the amount should be taken from, whether from one river or from the other.

Now, that leads me to this observation: You will have noticed that in these negotiations as they were carried on from time to time

an effort was made to fix the particular period in which the United States might take all the water of the St. Mary River and store it, but as was suggested by Mr. King in one of his letters, they were unable to arrive at any satisfactory conclusion with respect to that. It has been suggested, if your honors please, that the distribution must be made upon the basis of the total annual flow, and that you should say how the total annual flow should be divided and distributed. I do not think so. If I had a controversy with my neighbor concerning the priority of right to the water of a stream, I would make this proposition to him: I would say to him, I think my right is just as good as yours is, and you probably believe that your right is just as good as mine is. Let us settle this matter in this way—I will give you three-fourths of the annual flow of this river, and I will content myself with one-fourth. I would give him the flow during every month in the year except the months of May, June, and July; he could have all the rest. And distribution on the basis of the annual flow puts you back, if your honors please, among the mazes that confronted the gentlemen who were burdened with the duty of making the treaty, and who abandoned it as an utterly impossible proposition. Why, let us assume that the total annual flow of a stream is 1,000 second-feet, and it is distributed regularly throughout the year. I do not care who gets that water in October, November, December, January, February, March, and probably in April—unless of course I have a storage reservoir—if I may have it in the months of May, June, and July. That is all I care for.

Now, if your honors please, I think the language of the treaty is quite plain in that regard, where it says "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 apportionments 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." The State of Montana or the Government of the United States has no right to take all the water of the St. Mary River in the month of December and put it into their storage basin. The Government of Canada at the present time, as I understand, has no storage basin on their side of the line, but it does not follow that they may not build one there, and when they do build one, they are as much entitled to one-half the flow of the St. Mary River in the month of December, as the Government of the United States. And this commission has, in my judgment, no power to deny them that right. At the present time they haven't it, and they may be moved to say to us "Now this water is running away here, and if you care to take the entire flow of the St. Mary River during the winter season we shall not interpose any objection." I fully expect that they will do that. I expect that if the Canadian Government or local parties by their authority should establish a storage basin in the valley of the Milk River in Canada, and we have no storage basin down below, and they should say to us, "Now, this water will simply run away, and we would like to take the entire flow of the Milk River," we would probably say "take everything you care for, provided you leave enough water to supply our stock." But that of course is a

matter of courtesy and a matter of arrangement and not in any way a matter of right under the treaty. As a matter of right the Canadian Government can impound one-half of the flow of the Milk River in the month of December or any other month they see fit to do so.

On the other hand, if your honors please, I would like to say that I have not found any justification whatever in the treaty for the distribution of the waters of the Milk River which is proposed by the learned counsel for the Canadian Government, appearing at page 48 of their brief. They propose as follows: That the St. Mary River up to a maximum flow of 2,000 second-feet, from May to October inclusive, will go to Canada, and then that the St. Mary River below the A. R. & I. intake, from November to April inclusive, peaks of over 2,000 second-feet flood flow in summer shall go to the United States.

Now, I can not find any justification for that. That means that Canada will take the entire flow of the St. Mary River during the irrigating season of the year.

Mr. POWELL. And as much more if they could get it.

Senator WALSH. Yes; they are entitled to 500 second-feet, or three-fourths of the flow of the river if there are not as much as 500 cubic feet per second. The one-fourth of the flow obviously the Government of the United States is entitled to take. Well, it is proposed to make a distribution under the terms of the treaty by which Canada shall take 2,000 second-feet of the flow of the St. Mary River, and the United States the peak flow over that. I suppose there would be a period in the month of June when there may be more than 2,000 second-feet flow. Then Canada is to have the St. Mary River below the A. R. & I. intake, 72,000 feet. Of course, no question can arise about that. If she does not get it by the treaty, she gets it because it is not covered by the treaty. And that makes the distribution of the St. Mary River that is proposed by counsel.

Then the distribution of the water of the Milk River is taken up. Let me make a comparison, if your honors please, between the distribution there proposed and the distribution that was proposed by Mr. King in one of the early proposals made by him—I should have said that the proposal gives to the United States the St. Mary River from November to April, that it proposes that the United States take the entire flow of the St. Mary River from November to April inclusive, of course to be stored in the Swift Current storage basin. However, as I suggest, although Canada has not at present any storage facilities for water on her side of the line, she may at any time install such storage facilities, and such a distribution under such circumstances would obviously be quite contrary to the terms of the treaty. In other words, it is proposed that Canada take the entire flow during the irrigating season and the United States take the entire flow during the nonirrigating season for purposes of storage.

Now, let me show you what Mr. King proposed. He made a proposal early in the proceedings very much more to the advantage of the United States than that: He proposed that the St. Mary water for storage purposes be assigned to the United States for the months of November, December, January, February, and March, which, you will observe, is exactly the same period that is proposed here. Then

he proposes that for the remaining months, that would be for April, May, June, July, August, September, and October—it stretches it there a little—that Canada be entitled, not to 2,000 second-feet, but to 1,400 second-feet. I am referring to Mr. King's proposal on page 84 of the transcript. Then he proposes that of the St. Mary River the excess above the 1,400 second-feet should be divided equally between the two countries, instead of as in this other proposition the excess above 2,000 feet going to the United States. In other words, Mr. King, at an early stage of the proceedings, proposed a division and distribution of the waters of the St. Mary River infinitely better than the counsel for the Dominion of Canada now asserts they are entitled to get under the treaty that was eventually made. This, it seems to me, is a further and a very powerful argument in favor of the conclusion that the construction which leads to that result must of necessity be rejected by the commission.

But now let me call your attention to the distribution of the waters of the Milk River. No comparison can be made of the distribution here proposed and that proposed by Mr. King. They are entirely on different lines. But the distribution proposed here, that is on page 48 of the brief of the learned counsel for the Dominion of Canada, proposes a distribution that is entirely on different lines from that of the St. Mary River.

Mr. POWELL. Are they not precisely on the same lines? The results are different, but are the methods not exactly the same?

Senator WALSH. Well, in the first place, Canada is to take 20,000 acre-feet of the Milk River at the A. R. & I. Co.'s intake during floods. Now, I suppose that means that the amount which is awarded in the distribution to the United States is satisfied.

After that Canada is to get 76,400 acre-feet at the A. R. & I. Co.'s intake—St. Mary or Milk River waters. Now, Canada is to be entitled to take out 76,400 acre-feet from the Milk River during the irrigation season upon this basis. And it must be borne in mind that this may be either Milk River water or St. Mary River water stored; that is to say that if there is not enough water there naturally in the Milk River—that is, the natural flow of the Milk River—the United States is to let enough stored water down to them so that they may satisfy their allotment of 76,400 acre-feet. Now, what does that mean? The irrigating season in our country is generally regarded as being four months—April, May, June, and July. Really, irrigation does not ordinarily commence until the middle or the latter part of April and goes on to the middle of July. That is, we will say, the 15th of May would be one month, the 15th of June would be two months, the 15th of July would be three months, and the 15th of August would be four. If, then, during the irrigating season Canada was supplied with 76,400 acre-feet, do you know how many second-feet that would be? It is a very easy computation—it would be 313 second-feet for four months.

But, if your honor please, as a rule in that country, and along the Milk River, they do not commence to irrigate as early as that, and they do not conclude as late as that. Really, the season there—the irrigating season—is no more than 90 days. Indeed, we plant what we call 90-day oats in that country. It is so called because it is ready for harvest 90 days after it is sown. That would indicate to you that

for that quality of grain from the time it goes into the ground until it is in the shock only 90 days have elapsed, and accordingly you can see that the period for irrigation for ordinary grain is only 90 days. They plant this 90-day oats so that it will not be planted so early that the germination will be retarded, nor so late as to be attacked by the frost. So I would say that three months is the ordinary irrigation period in the northern part of the State of Montana.

More than that, the month of June is our rainy month. I think the records of the weather bureau will show that there is more precipitation in Montana in the month of June than any other month of the year, and perhaps than in any other two months of the year. In fact, some rather adventurous gentlemen in Butte, Mont., will lay anyone a small wager that it will rain 25 days in the month; that is, there will be precipitation of some kind, either rain or snow.

So you will see that in our State we are not ordinarily troubled about irrigation in the month of June. We get the spring thaws, and the ground is moist during the latter part of April and the first part of May. And then the dry period comes, say, from about the 10th to the 20th of May, and continuing during the latter part of the month of May, and that is the first critical period in the irrigation season. Then, when that is over, the farmer feels reasonably safe for the month of June. But when it gets along about the 4th of July things begin to dry up, and he needs irrigation water, and he needs it very badly.

So that out of the 90 days that I have set as the time when water is needed, you can practically eliminate 30 days when you do not need any water at all. If you do not eliminate the 30 days and take the 76,400 acre-feet during these three months, you would take 420 second-feet out of the Milk River. And if you do cut out those 30 days, and reckon the irrigation period as 60 days, you would take out 636 second-feet from the Milk River and still supply only your 76,400 acre-feet. Perhaps Mr. Newell would be kind enough to verify my figures. They are not exact, but they will do for all practical purposes.

Now, what does that mean? Mr. Newell says in his testimony, and it is not disputed at all, that there are rarely 500 cubic feet of water per second in the Milk River at the eastern crossing at any time during the irrigating season, and possibly Commissioner Magrath will be able to recall something about the facts himself.

When an appropriation was made for the Canadian Canal it was an appropriation of 500 cubic feet per second, or the flow of low water, as my recollection is, and 1,500 feet in high water, evidently recognizing that except in periods of flood, 500 cubic feet per second was the limit of the water that could be taken out of the Milk River.

Now, their proposal is then, that instead of the natural flow of the Milk River being divided after the priority is satisfied, that the Canadian Government will take it all. Indeed, if your honors please, the distribution does not even take into consideration the priority created by the treaty, and granted to the users of water in the United States nor to the users of the waters of the St. Mary River in Canada; and then the northern tributaries of the Milk River which cross the boundary line are divided as follows:

Northern tributaries of Milk River stored or diverted by Canada, to Canada 136,000 acre-feet, and 54,000 acre-feet to the United States.

That makes 190,000 acre-feet, of which the United States get 54,000 and Canada gets 136,000. If your honors please, this plan proposed in the brief of counsel is plainly not in pursuance of the treaty. To enforce it would be to make a new treaty. It serves to enforce the point heretofore made that it is impossible to divide the waters of the streams in question consistently with the terms of the treaty on the basis of measurements made at their mouths. I must say that I feel like apologizing to the court for consuming so much of your time. I thank you cordially for the attention you have given to my discussion of the subject.

Mr. GARDNER. Is there any other representative who cares to be heard at this time?

Mr. WYVELL. I do not think so, unless Mr. Mitchell, the assistant attorney general of the State of Montana, would like to say something.

Mr. MITCHELL. May it please the commission, in view of the very exhaustive and masterful arguments that have been made here in behalf of the United States, I do not feel that I should consume any of your time. During the past few years the State of Montana has been going through a very remarkable development. The homestead lands are being taken up, the open range is being exhausted, and the farmers have to pasture or herd their cattle. In the past there has been plenty of homestead land upon which the cattle could graze, but now they have to take up more intensive farming. High prices of wheat have been driving the farmer westward into what they call the cheap Montana wheat lands. This means that Montana has got to farm more intensively, and that means more irrigated farming. They have to begin to raise more alfalfa to feed their stock. For that reason this proposition is of very vital interest to the State of Montana, and I sincerely hope that the commission will give due consideration to the interest of the farmers of Montana in this particular matter.

I think it has been conservatively estimated that there are about a million acres of irrigable land in the Milk River Valley. An average farm of irrigated land is not over 80 acres, but considered for purposes of this statement 100 acres. That would mean 10,000 irrigable farms in the Milk River Valley, and I think you can understand how very important this matter is to the farmers of the State of Montana, in view of their desire to get their equitable share of this water for the purpose of irrigating those farms upon which the future development of that section of Montana so very greatly depends.

Mr. GARDNER. Do you mean that there are that many farms in Montana, or in the entire valley?

Mr. MITCHELL. In the Milk River Valley I understand the total area is some 9,000,000 acres, and the record in one place, I think, states that there are about a million irrigable acres of land. You can see the great number of farms that depend upon water in the Milk River basin. I speak of this to call the attention of the commission to the very vital interest that the State has in this matter. It has been physically impossible for the Attorney General's office to give the attention to this matter that it demands. It has been taken care of very ably by our distinguished Senator from Montana and by

Judge King of the Reclamation Service, and we have not devoted the attention to it that it demands, but I want to simply state to the commission in behalf of the State that they are very vitally interested in this matter. It is for you to determine, and I sincerely believe they will be satisfied with the determination in the hands of this commission.

Mr. WYVELL. Mr. Chairman, there is another matter which I desire to bring to the attention of the commission in this connection and which I have already discussed with Col. MacInnes, but in order not to interrupt the procedure I think it would be more agreeable to wait until after he is heard before I bring it to the attention of the commission.

Mr. GARDNER. Is that acceptable to you, Col. MacInnes?

Col. MACINNES. It is quite acceptable. I would like to ask the commission's permission, Mr. Chairman, for Mr. Dennis to be allowed to address the commission, as by doing so now he will be able to catch an early train.

STATEMENT OF MR. J. S. DENNIS, ON BEHALF OF THE CANADIAN PACIFIC RAILWAY.

Mr. DENNIS. Mr. Chairman and gentlemen, on behalf of the Canadian Pacific Railway, who are, I suppose, the most interested parties on our side of the line, relative to the use of the water of the St. Mary River, I would like to say that our general counsel feels that we should be given an opportunity of considering and answering the very extended and very exhaustive presentations of this case which have been put before the commission by Judge King and Senator Walsh. He feels that as far as we are concerned our position relative to this matter was very clearly dealt with at the hearing in St. Paul in May, 1915, and that we considered the case closed at that time, and now that it has been seen fit by the commission to reopen it in the sense of admitting arguments on the part of those representing the United States, that while it is quite possible that the counsel for the Dominion Government may feel disposed to follow these gentleman by presenting his argument, the Canadian Pacific Railway, as one of those who took part in the original hearing and as the party that is most interested in the waters of the St. Mary River due to the fact that they own the Alberta Railway & Irrigation Project, should be given an opportunity of considering the case as presented to-day and submit a written brief in reply.

Mr. TAWNEY. Do you desire the opportunity of submitting a brief or presenting an oral argument?

Mr. DENNIS. I think probably the desire is that we should submit a written brief. I do not think it is desired unless that request is made on behalf of the Dominion Government that the commission should sit again to hear this case, but our general counsel certainly feels that he should be given the opportunity of considering in detail these very interesting arguments that have been advanced, very elaborate arguments in a great many ways, many of which were not before the commission at the time of the original hearing, and putting before the commission our views relative thereto. If that meets with the approval of the commission, I would not ask that we should be heard any further at this meeting. I do not propose, of course, Mr. Chairman and gentlemen of the commission, attempting to deal with any of the questions that have been discussed, because, after all, they are very largely legal matters or matters of construction and, naturally, the larger array of legal talent we have considering them the greater number of constructions that will be put upon them.

There are one or two physical facts as we see them with reference to this matter that, as an engineer and from an engineering standpoint, possibly I might be allowed to refer to very briefly.

The fact that this treaty was the outcome of a certain discussion which took place at the meeting of the International Irrigation Congress in Albuquerque, as referred to by Senator Walsh, resulted from the additional fact that at that time the question of the possibility

of the diversion of the water of St. Mary River south of the international boundary was going to leave without any water the first irrigation system which had been undertaken on our side of the line, and at that congress the whole question of these international waters came up for discussion as a result of the dispute between the United States and Mexico regarding the division of the waters of the Rio Grande. The gentleman representing Mexico and myself representing Canada at that time decided to endeavor to get that congress to pass a resolution inviting the cooperation of the Governments of the different countries in a consideration of these questions. That is the resolution referred to by Senator Walsh.

Mr. TAWNEY. That resolution is incorporated into the record?

Mr. DENNIS. Yes; it is in the record. That was the initial step to attempt to protect on our side of the line the proposed then-called Canadian Northwest irrigation scheme. It was followed, as has been so very concisely and at the same time eloquently set forth by Senator Walsh, by negotiations which finally resulted in this treaty.

The physical fact that I would like to bring to your attention is this, that the so-called A. R. & I. Canal—the then Canadian Northwest Irrigation Co.'s canal—was commenced and carried on for the diversion of water from St. Mary River before any work was undertaken at all to construct the canal on the south of the boundary to divert the water of the St. Mary River to lands in the lower Milk River Valley. I think that some of the preliminary surveys or original investigations relative to the possibility of diverting the St. Mary River directly or through the Milk River for the purpose of irrigating land in the lower valley of the Milk had been carried on at that time, but the actual construction work of an irrigation system to utilize the waters of the St. Mary River was that of the A. R. & I. Canal north of the boundary.

That company invested a very considerable amount of money.

Mr. TAWNEY. Mr. Dennis, was the work of constructing the diversion canal on St. Mary Lake into the bed of the Milk River commenced before the conclusion of this treaty between Great Britain and the United States or afterwards?

Mr. DENNIS. Well, Mr. Commissioner, that I could not answer. I am of the opinion that the preliminary surveys were completed, but whether actual construction work was undertaken before the treaty was signed or not, I could not say.

Mr. TAWNEY. Well, was the project adopted by Congress prior or subsequent to the conclusion of this treaty?

Mr. DENNIS. That I could not answer either. I am of the opinion that the project was one of those included in the program of the Reclamation Service prior to the time the treaty was entered into.

Mr. TAWNEY. What I wanted to ascertain for my own information in this connection was whether or not the project was authorized by the Congress of the United States before or subsequent to the conclusion of this treaty.

Mr. DENNIS. That I could not answer, sir. The point I was trying to make was that the actual construction of an irrigation system for the diversion of water from the St. Mary River had been commenced prior to the carrying out of the treaty.

Mr. TAWNEY. On your side?

Mr. DENNIS. Yes; on our side, and before any construction work was done on the south side. That system has been extended and elaborated since it was purchased by the Canadian Pacific Railway Co., and we now have applications from people living in the district which could be served by an extension of it, to have the canal system extended to irrigate their lands. We have had contracts offered us under which the people owning the land have undertaken to pay the sum of $10 an acre for the purpose of constructing the canal system to carry the water to their land.

That would mean that if those schemes are adopted and carried out the irrigable area will be very materially extended. The limitation of its extension is entirely dependent upon the water supply. There has been invested in that system up to date some millions of dollars, and with the extensions there will be some $200,000 or $300,000 additional invested. So that our particular interest in this question is based upon the fact that this money is invested there, the scheme is there, the people are there, and they are dependent upon this water supply; and while we have very little fear that whatever division of the water may be decided upon by the commission the rights there will be protected, we at the same time think that the people living under that system and in the country which could be served by an extension of that system are just as much entitled to consideration and to the same consideration as the people living under the systems which were in existence in the lower Milk River Valley when this treaty was entered into, or in any district that could be reached by extensions of those systems.

If the priorities or vested rights, as I call them, which existed when this treaty was entered into are met and covered by the 500 feet granted Canada and the 500 feet granted to the lower Milk River, then I do not see why we are concerned at all about all this discussion of what happens with the rest. I can not personally see it at all. It seems to me that the vital question is whether the vested rights that existed at that time in the lower Milk River Valley and in Canada are protected by the priorities which everybody admit came to either country under provisions of Article VI of the treaty.

That point being settled, naturally the question of how the balance of the water shall be divided is one that will have to be finally dealt with by the commission. When that time comes I have very little doubt in my mind that some equitable basis can be arrived at that will get rid of these troubles, and it will be found that by a proper method of conserving the water supply in that country and then a proper method for its measurement and distribution, the requirements of all the people out there will be met.

Mr. MAGRATH. You spoke about extending your system.

Mr. DENNIS. I refer to the extension of the system east of Lethbridge.

Mr. MAGRATH. The statement was made at the last hearing that there was no authorization for that territory. I think you are wrong. I think you will find the Taber district was included in the original authorization. You said you had no authority.

Mr. DENNIS. No; we are proceeding with the possibility of that extension under the assumption that the authority granted originally to the Canadian Northwest Irrigation Co. covers the water for that distance.

Mr. MIGNAULT. Mr. Dennis, how much time do you require to put in your brief?

Mr. POWELL. That is, how much time after getting a copy of the stenographic report of this hearing?

Mr. DENNIS. It is very hard for me to answer that. I do not know how long our legal department will take, but I can only promise that it will be done with the very least possible delay.

Mr. MIGNAULT. Personally I would be anxious to see this matter concluded. It was argued nearly two years ago, and the sooner your brief is put in the sooner the commission will be able to deal with the question. It would necessarily have to wait until your brief is received.

Mr. DENNIS. I can only say in reply to that, Mr. Mignault, that I will point out to Mr. Beatty, our general counsel, that the reply should be put in at the earliest possible date, so as not to cause any further delay. We naturally are desirous of having the commission rule on this important matter at as early a date as possible. We feel it has been outstanding for some time, and while we are not suffering at all and have very little fear that any of our friends in Montana are going to take any immediate action that will cause us to suffer, we hope that the commission will in the near future be able to deal with it.

Mr. GARDNER. Can you give me an idea of how much water it takes to irrigate an acre for a season?

Mr. DENNIS. That differs very materially in different countries. Do you mean in our country?

Mr. GARDNER. Yes.

Mr. DENNIS. Well, under our law, under the Province of Alberta in our existing duty of water which is fixed by law, we are required to provide about 2 acre-feet during the irrigation season. I think in Montana it is a little less than that.

Mr. KING. Is it not a good deal like asking how long is a string?

Mr. DENNIS. Yes. In Canada we differ some from the States on the United States side of the line in that under our law the duty of water is fixed. In many of the States of the Union I think the matter of the duty of water is somewhat doubtful. That is, anybody supplying water for irrigation is required by law to provide a certain definite amount, a continuous flow of water during the irrigation season, which under present conditions amounts to about 2 feet.

Mr. KING. Does it not really depend upon the land you have to irrigate?

Mr. DENNIS. No; it is not a variable quantity with us at all; it is a fixed quantity.

Mr. KING. Fixed by law?

Mr. DENNIS. It is fixed by law; yes. The duty of water under our act is fixed from time to time by an order of the Minister of the Interior, and at present it amounts to about 2 acre-feet. Of course, the next year it might be varied somewhat and we might be required to furnish only 1 acre-foot.

Mr. KING. You say "by our law." Do you mean in Canada?

Mr. DENNIS. In Canada; yes.

Senator WALSH. Reference was made to Montana. We have no act fixing the duty, but in the trial of water-right cases proof is made as to how much water is really needed to irrigate a particular tract of

land. In the absence of that the old rule has been an inch to the acre, and an inch would be about to 2½ acre-feet. In recent years a very decided opinion has taken root. I think the Reclamation Service have taught the farmers that that is altogether too much water, and the general belief now is that, as a rule in our State, an acre-foot is all that is necessary when it is judiciously handled.

Mr. WYVELL. If the commission please, in view of the fact that Mr. Dennis has brought to the attention of the commission the desire of his company, the Canadian Pacific Railway, to submit a further brief and in order that the discussion might be made now, I want to tell the commission that the Secretary of State very much desires that the Attorney General of the United States have an opportunity to examine the facts as brought out by the hearings that have been had and an opportunity to appear and make an argument, if he so desires. I am not certain that after he has seen the very complete and very clear arguments of Senator Walsh and Mr. King that he may want to argue the case, but I must ask and most earnestly request that he be offered an opportunity to do so.

The Secretary of State has personally interested himself in the matter. Before I left he personally requested me to make this request of the commission.

Now, as to time. The Attorney General would like at least three months' time. I had the possible suggestion in my mind that since three months would bring the hearing in August, it might perhaps be better to fix it for the month of September.

Mr. KING. Mr. Chairman, if I may be pardoned for making the suggestion, since the attorney representing the Dominion of Canada is present, I will suggest that he be heard from, and that all present at this time be permitted to say something in response to his argument, so that it will not be necessary for us to inflict upon this commission any further argument at a later date. That is to say—and I say this without meaning to be facetious or anything of that kind—that so far as the present argument is concerned the matter be closed at this time. If the Attorney General is to be heard from that is another matter; if the representative of the Secretary of State is to be heard later he could be heard; but I suggest that we be afforded an opportunity at this time to close up the argument that is now before this honorable commission.

Mr. TAWNEY. Mr. Chairman, I suggest in view of the time that has been occupied by the United States in the presentation of its case at this hearing that the matter of continuance for the purpose of filing briefs be deferred until counsel for the Dominion Government has been heard in response to Judge King and Senator Walsh.

Mr. GARDNER. I was about to suggest that.

Mr. MIGNAULT. I was wondering whether Judge King would tell us in a few words what is the present status of the diversion project of the Reclamation Service in Montana. It was in progress at the time of the last hearing, and I am not exactly certain as to whether or not the reservoirs have been built.

Mr. KING. I do not quite catch the purport of your inquiry.

Mr. MIGNAULT. It is simply to get the present status of the diversion project.

Mr. KING. I can only give the present status in general figures, and that is that it means that a great deal of money has been invested in the way of reclamation work.

Now, if the representative of the Canadian Government has anything to say at this time I think we should hear him, and so far as the Reclamation Service is concerned we will endeavor to close our remarks and not ask for a further hearing before this commission.

Senator WALSH. I do not think Judge King caught the import of the question asked by the commissioner. I think I may say that the diversions works are practically complete, and that the irrigation service will be prepared to make the diversion during the present season.

Mr. GARDNER. Does that include the storage dam at the mouth of the St. Mary Lake?

Senator WALSH. Oh, yes.

Mr. WYVELL. I took means to inform myself on that point by consulting with many men in the service, Judge King being away. The siphon and the canal for the diversion of substantially 400 second-feet have been completed, it being understood as a part of the proposition that during this irrigation season not to exceed 200 feet per second would be allowed to go through the canal, due to its new construction. The so-called Sherburne Lake storage on Swift Current Creek will be completed probably during the year. It is almost completed now. That will store substantially 75,000 acre-feet.

Mr. POWELL. Senator Walsh, I inferred from what you said that you adopted a construction of Article VI of this treaty to the effect that the equal division of the waters begins after the allotment of the prior abstraction.

Senator WALSH. Yes, sir.

Mr. POWELL. If the prior appropriation is only 100 and 400, if that is all they would get out of the water, then after that the division is equal.

Senator WALSH. Exactly. There are 500 inches going across the boundary and that is all.

Mr. POWELL. What if there were not 500?

Senator WALSH. If there were not 500 it would be divided three-fourths and one-fourth.

Mr. POWELL. And then after that it would be equal?

Senator WALSH. It would then be equal.

ARGUMENT BY COL. C. S. MacINNES, K. C., ON BEHALF OF THE GOVERNMENT OF THE DOMINION OF CANADA.

Col. MacINNES. May it please the commission, since the commission met here yesterday for the purpose, mainly, of hearing an argument by Judge King on behalf of the Reclamation Service of the United States we have had the benefit and the opportunity of hearing not only his remarks, with the subtle and ingenious argument that we may have to go so far afield as a question of knowledge to the parties negotiating of the treaty-making power of the United States, but we have also had advantage of hearing other argument. I should like, if I may, Senator Walsh, to refer to that argument as a most able and forcible presentation of the contentions of the United States, not on the point alone to which we had expected to address ourselves, but on the whole purview and all the aspects of this case.

While I am unable to agree or to concur with his arguments, even though so presented, I would like to be allowed to associate myself with his graceful remarks as to the functions of this honorable commission and their performance. It is unnecessary, I think, for me to refer to all that has taken place in the past by this commission, in view of the fact that the situation is even more marked to-day owing to the relationship of the two countries which you represent and on behalf of which we have the honor to appear before you.

Now then, as to the argument. I have traveled this road with the commission before, so I do not wish to take up longer time than is necessary, and my learned friends will understand, and the commission will understand, I hope, if some points are not dealt with in detail, that there are already written arguments before the commission.

During the discussion yesterday and to-day we have, perhaps, gone somewhat afar from the article itself, and I would therefore invite your attention again to the article. What is the article and where is it? The article, as it seems, and it is not disputed, is a treaty within a treaty. The treaty relates, as Mr. Commissioner Tawney remarked during the argument, to a number of different matters. It refers to a number of waters, to a certain class, and the whole of a class of waters. This particular article, however, refers to rivers only, to two particular rivers. I invite your attention to that for this reason, that there we find the natural and the obvious reason for the statement or descriptive words as to the location of these rivers. That would be so in any event; but here we know, and it is a matter of common knowledge, that at the time when this treaty was being negotiated a separate agreement was being negotiated with regard to these two rivers. That treaty would probably have contained certain preambles as to the localities of the rivers and as to the property in question. Then this article was dealt with along with other matters and was put into this treaty. It was put into a treaty relating to a number of other rivers. It so happens that there

are other rivers of the name of St. Mary. As a matter of fact, there is one which is also a boundary river. That is a river with which this commission has dealt, the St. Mary River at the Sault. It seems to me, therefore, that it is going very far afield to seek to hang some limiting construction as to the operation of this article on words which were put there for a reason which was both necessary and obvious.

If that be so, and I think it must be so, it cuts the ground away entirely from any suggestion that there is to be found in this article itself any doubt or ambiguity as to its terms taken by themselves. That being so, we are at once face to face with this proposition, which is acceded to by all counsel, although there have been some minor points to which I shall refer later, and that is if in a contract or in a treaty you find language which is free from ambiguity, then you must construe that contract or that article according to the language in its natural terms.

That proposition of law is not one which is technical or established with the idea of shutting out something that might properly be let in, but it is a rule which has been established for the safety of the parties themselves. If it were otherwise, if when language were clear you were to look at previous drafts or previous conversations between the parties and to interpret the contract between them, not according to the language which they finally adopted, but according to the language which they had used and they had then rejected, you would be very likely to come to the wrong conclusion. For instance, apply that here. The suggestion is made that you can go beyond this article to written drafts which have passed between the parties. It so happens in this case that there have been not only written drafts, but conversations and interviews of which there is no record. And at those interviews and conversations of which there is no record it may well be that there was elaborated the reasons for the change in language which is found adopted in the final draft. But even if all the drafts here were in writing and this change had been found, as it is alleged, I submit that nothing could be more likely to carry out the opposite intention than to assume that the parties intended to continue to adopt more restricted language which they had definitely rejected when they came to the agreement itself. For instance, take the suggestion here, the drafts which have been made and which have been referred to. It is said that the now general language must be cut down by reason of those drafts.

I invite your attention to pages 67 and 68 of the record, containing the order in council of the 2d of March, 1908, and call your attention particularly to the third paragraph on page 68. This was the reply by Canada to the Root proposition:

> 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.

Canada there expressly stated that the Root proposition was not satisfactory because it did not give her enough water.

Mr. POWELL. What is that proposition again?

Col. MACINNES. That proposition, as you will remember, started, Mr. Powell, with the express limitation at the beginning that it was referring to certain waters which flowed across the boundary. That

is not found in the final article at all. It then went on for a division between them as therein described, but it did not cover a complete division, as Dr. King, of Canada, subsequently pointed out. It did not cover the waters over and above 2,000 second-feet, and one of his objections to the Root treaty is that the proposition ought to cover all the water that was available. That is one of the points I am making here, that the objection on the part of Canada to the Root proposal was that it did not cover all the water that was available and that it did not give them sufficient water, according to their view of what they ought to get.

Then, on page 88 of the record, we come to a paragraph of a memorandum from Mr. Newell to Dr. King of the 15th of October, 1908. I read from that paragraph as follows:

> 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 suggest 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.

He follows that with these significant remarks:

> 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.

So that while it seemed to Mr. Newell, as a negotiator, impossible that it should be put in terms as more than half, the matter could be dealt with and satisfactorily adjusted by adopting a basis which would make that half larger or smaller, as the case may be.

Mr. TAWNEY. Do I understand you to say that more than one-half of the waters of the St. Mary and Milk Rivers and their tributaries that cross the international boundary were to be distributed to Canada, and the difficulty was as to how she could get more than her one-half, and that, therefore, the tributaries wholly within the State of Montana were included in order to make that equal division or to give her the share that she felt she was entitled to?

Col. MACINNES. Not quite that so much as this, that the division should be one-half; that would be the basis.

Mr. TAWNEY. The division of one-half of what?

Col MACINNES. Exactly; that is the point. The division of one-half of what? The resultant one-half would be larger or smaller according to what was measured for the purpose of arriving at the total.

Mr. KING. May I interrupt you with a question?

Col. MACINNES. Yes.

Mr. KING. On what basis do you want to figure the total in order to arrive at that one-half?

Col. MACINNES. Well, that is exactly in accordance with the contention which we have made and which we have always made, namely, that all the waters which are available here for beneficial use for irrigation are to be included.

Mr. KING. When you say "all of the waters" to what do you refer?

Col. MACINNES. All of the waters of the St. Mary River and Milk River and their tributaries.

Mr. KING. Do you include the river to the ocean, or do you limit it to the territory within Canada or the tributaries that cross Canada?

Col. MACINNES. No; in accordance with the contention which has always been put forward. We say it includes all the tributaries of both of these rivers. I can not put it in any clearer language. Your contention on your side is that you eliminate certain tributaries, and the tributaries which you eliminate are the tributaries which are wholly in one country, but not even all of those; you limit it to those wholly in one country which join either of the rivers after it has crossed the international boundary.

Mr. KING. What I want to ask is this: Do you include in your estimate the tributaries that are wholly within Canada or only the tributaries that flow across the line in one direction or the other in Canada—that is, that flow across the boundary line—or do you include in making your estimate the tributaries in Montana plus those that flow across the line in Canada and the United States?

Col. MACINNES. I am afraid that I can not make it any clearer than the treaty does. That includes all the tributaries of both rivers.

Mr. KING. Then, you take in the tributaries that are wholly in Canada, do you?

Col. MACINNES. Yes. On page 92, where appears a memorandum from Dr. King to Mr. Newell, we find in order to overcome the difficulty which I have mentioned a suggestion of a reconsideration of the whole matter. It was put in this way:

> 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.

Now, here is the counter proposal, which was made:

> 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).

So there the proposition is made that it would be only waters that cross the boundary, but there would be no question of prior appropriations, that each country would take care of them itself.

Mr. KING. What do you understand to be meant by "boundary streams"?

Col. MACINNES. Well, that, I think, has been already discussed, Judge King, in an earlier part. There is a definition given in the treaty of boundary waters. I would be very glad to answer any questions, but I think it would divert me from the present contention if we embark on a discussion of that kind.

My learned friend, Mr. Robinson, has called my attention to this fact, that at the time Dr. King was writing this letter there was no treaty; there was no definition then of boundary waters or boundary streams. What I was calling attention to was this, as the language in the memorandum written at that time states, it was waters which crossed the boundary. That is the interpretation of Dr. King's language.

On page 93 of the record we find a proposal which was put forward on behalf of Canada on the 29th of December, 1908, which is re-

ferred to as a draft by R. H. Campbell. My learned friend, the Senator, referred to Mr. Campbell's draft. Now, I do not want to put anything on the record that should not be there, but I can state a fact which is beyond controversy, and that is that Mr. Campbell was an officer of the Department of the Interior of Canada who was performing the same function as Dr. King, only in a judicial capacity. He came to Washington to take this matter up with Mr. Gibbons, afterwards Sir George Gibbons, to assist him, and he returned as soon as Dr. King came down a day or so afterwards. In other words, when he put in this draft he was acting on behalf of the Department of the Interior and assisting Mr. George Gibbons in the negotiation.

Senator WALSH. I assumed that.

Col. MACINNES. So that it is in the same position exactly as any document put forward by Dr. King or Mr. George Gibbons. Mr. Campbell's proposal corresponded to that of Dr. King.

Mr. POWELL. In what capacity was Mr. Campbell acting?

Col. MACINNES. As a Government representative. He was from the Department of the Interior, which deals with these matters. His proposition is limited in definite language, as follows:

> 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.

The fourth paragraph of Mr. Campbell's draft reads as follows:

> Rights to the use of water for irrigation now or hereafter established within the territory of either country on any stream which crosses the international boundary shall not be a charge on the share of the other country.

In other words, there was to be equal division of such streams as crossed the boundary, but each party was to take care of anything in the nature of prior appropriations.

That was, however, rejected, as you see by Mr. Newell's draft on the same page, page 93. Mr. Newell used the language, "The waters of St. Mary River and its tributaries crossing the international boundary." He did not make it applicable to all rivers, but he made it applicable to the St. Mary River and its tributaries, and subsequently to the main Milk River and its tributaries which crossed the international boundary. But he came back again to the point which the United States seemed to regard as essential, that priorities of appropriation must be taken care of. It is of the greatest importance for the commission to bear that in mind, this question of prior appropriation, and the insistence of the United States on it, because the reason for it will be found at pages 61, 62, and 63 of the record; that is to say, in a memorandum from Mr. Hay, Secretary of State, to the British ambassador on the 9th of May, 1904, and in a letter from Mr. Hay to the British ambassador on the 30th of December, 1908, pointing out that it was essential for the United States to obtain an international assurance so as to protect the rights of those in the Milk River Valley in Montana. In other words, that was the object of the prior appropriation. That was why the United States insisted upon it, and so far as private rights in the Milk River Valley are concerned they were taken care of and they are protected in the treaty.

Now, then, to continue the examination of the diplomatic correspondence and the drafts, we come to page 97 of the transcript,

where we find what is described as the original draft of Mr. Chandler Anderson, which was apparently put in in the month of January, some days later, and between these dates it is admitted that personal interviews and discussions had taken place. What do we find in this draft? It is of particular importance. We find that it is stated in express language as follows:

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.

Now, it is perfectly clear that it was not only considered, but was put forward by the United States themselves that there should be these measurements, not merely at the boundary, not merely where the storage was, but also at the points of diversion.

Mr. TAWNEY. Measurements of what?

Col. MACINNES. Measurements of the water.

Mr. TAWNEY. Of the rivers and their tributaries?

Col. MACINNES. Well, it says:

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.

So you have it there absolutely and positively that the United States then evidently acceded to this contention that the amount to be divided should be measured there, because there were to be measurements not merely at the boundary but at the points of storage, and at the places where the water was to be diverted, these places being manifestly not at the boundary, but in the territory of either of the countries, and the volume obviously being increased by the waters which arose there.

Mr. TAWNEY. Well, under that, where would you measure the tributaries which are situated wholly in Montana?

Col. MACINNES. You would get those—they would have come in, for instance take the case of diversion—the most southern point of diversion is at Hinsdale—you would get measurements there from Hinsdale northward.

Mr. TAWNEY. But take the tributaries flowing northeast into the Milk River, after it comes back across the eastern crossing—where would you measure those waters?

Col. MACINNES. You would get those at the place where they are diverted.

Mr. TAWNEY. I don't see where you would measure them at all.

Col. MACINNES. You would measure them at their point of diversion.

Mr. TAWNEY. But they are not diverted; they flow in their natural channel into the Milk River.

Col. MACINNES. Quite true, but if you look at the map, you will see that there are points of diversion all the way down to Hinsdale.

Mr. TAWNEY. You mean artificial diversion?

Col. MACINNES. Yes, certainly, artificial diversion.

Mr. TAWNEY. Are these tributaries wholly in Montana?

Col. MACINNES. Well, some of them may be. Of course I was referring to artificial diversion. There are diversions where the water is taken away from the Milk River in Montana and elsewhere.

Mr. TAWNEY. For irrigation purposes you mean?

Col. MACINNES. Yes.

Mr. TAWNEY. I do not think that is the diversion contemplated at all.

Col. MACINNES. Surely, Mr. Tawney, it must mean that. Look at the wording of the draft treaty.

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.

Mr. TAWNEY. Well, is not the reference more especially to the diversion from the St. Mary River in the diversion canal?

Col. MACINNES. Oh, not necessarily at all. However, I am not concerned to go farther than just to show that after this argument—that offer made and suggested—the suggestion was put forward by the United States that there would be points of measurement other than those situated merely at the boundary. I am not concerned to go one bit farther than that; I am only pointing out the course of the negotiations. Because, then, we find that is followed by the next draft on the next page, which is called Mr. Gibbons' draft, although I think the evidence is to the effect that it was a joint draft. That is on page 96, at the foot of the page, and reads as follows:

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.

And then from that you come to the treaty itself, which is in practically the same language, but says, instead of "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"—I say, instead of that language, the language of the treaty is that the waters "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 one-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."

Mr. MIGNAULT. It was stated at the hearing, Mr. MacInnes, that these drafts have no dates, that is, there is nothing to show which antedated the other one—I am referring to the two drafts on pages 96 and 97. Mr. Wyvell says that there are also two undated drafts submitted between January 1 and January 9, but there is nothing to show which draft antedated the other.

Col. MACINNES. No; there are no dates attached to those two drafts, but the internal evidence is such that we may conclude that the one which has just been read was the one more immediately antecedent to the treaty.

Mr. MIGNAULT. It might be very material which one was prior to the other.

Col. MACINNES. It did not seem so to me. It only showed that there was disagreement between the parties, and then the solution of it was arrived at by having more points of measurement, and that was put in the latest draft. And then in the treaty we have inserted language of the broadest possible nature, instead of any limiting language whatever.

Mr. MIGNAULT. Have you compared the two drafts with article 6? It would seem as if Mr. Gibbons, afterwards Sir George Gibbons, as if his draft followed Mr. Anderson's draft, because the language of Sir George Gibbons' draft is very similar to the language of article 6 as it appears in the treaty. He has the parenthetical clause, and then supplementing that, there is Sir George Gibbons' telegram of January 9 suggesting the addition of the words "and Saskatchewan."

Col. MACINNES. Quite so.

Mr. MIGNAULT. So it is quite possible that although Sir George Gibbons' draft was printed first it may be that it was prepared after the other one.

Col. MACINNES. I think the internal evidence shows that it was. However, I do not think that is material. All I am putting—and I think it is quite sufficient—is this: That this diplomatic correspondence and these drafts, if they can be looked at at all, show or illustrate the danger of attempting to solve the meaning of a document by looking at previous drafts. Because in this particular case, as I say, you have language—and this is my learned friend's proposition, I understand—you have a draft with limiting language, and then you subsequently find the agreement itself is drafted in the widest possible language, and the contention is made that that wide language must be cut down because narrower language was used in the previous drafts. Now, it seems to me that the very reason that these previous drafts were not accepted was because they were in language which was not satisfactory to the two parties. Therefore the parties, before they could come to an agreement, had to change the language—and let me put this to you, that if they had been wanting to change it to cover exactly what they said they did—that is, all the waters and tributaries of both of these rivers in both of these countries which could be used for irrigation and for beneficial use; that is to say, that one country should use the water which is available in one place rather than take the water from another place and deprive the other country—if they had been wanting to do that, what language would or could they have used better than the language which we actually find in the treaty.

Mr. TAWNEY. But, Col. MacInnes, the use of these prior drafts which you say were rejected because they were not satisfactory——

Col. MACINNES. I not merely say so. They really were rejected because they were not satisfactory.

Mr. TAWNEY. 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."

Mr. TAWNEY. Then do you mean to say that in order to meet the demand of the Dominion Government for more water that the United States invaded the rights of the State of Montana and the rights of its inhabitants for the purpose of securing an additional amount necessary to meet the demands of Canada?

Col. MACINNES. No, sir; there is no invasion of any rights of anyone in the State of Montana. And the reason is that although the tributaries, as said by my learned friend, were included, they were only included for the purpose of measuring, and no water whatever would be taken away from the people of Montana. These tributaries remain where they have always been, and the people of Montana will get the benefit of them and of the whole of them. In addition to that they will get all the water by way of prior appropriation that their own Government has stipulated for, namely, 500 second-feet, or three-quarters of the flow when there is less than that.

And as a matter of fact, the only point which is touched upon is a matter which is obviously international and always has been so considered by your country as well as ours, and that is the division of the waters of the St. Mary River flowing from Montana into our country, which it is true you could take and waste if you so will, and of which, if you did that, we should never get a drop. But on the other hand, if you ever tried to use it for yourselves by putting it in the Milk River we could take it out and you would never get a drop of it. So the question before these parties was as to the St. Mary River on which Canada had certain vested rights by way of prior appropriation and on which the United States Government was about to establish a reservoir for its own purposes, which might have the effect of destroying the rights of Canadians below that.

Now, in order to get over that difficulty, the two countries got together, and to arrive at the amount which each of the two countries was to get out of that water they finally agreed to take into consideration all the water which was available on the watersheds of the two rivers in connection with the same rivers. In other words, Canada said take what you want out of your St. Mary River, but for what you take it is fair and right that there should be a consideration out of the water that you get in the lower Milk River, for these people down there for whose benefit you will use the same

water, which, if left alone, would come to us and on which water we have vested rights in accordance with a law which corresponds to your own law on that subject.

Mr. TAWNEY. But what was the necessity of including tributaries that were wholly in Montana? Why didn't the United States say, "We will give Canada two-thirds of the amount of the St. Mary River and its share of the Milk River and its tributaries crossing the boundary?" Why should they include waters which are wholly without the jurisdiction of the Government of Canada and wholly beyond the control of the treaty-making powers of the United States?

Col. MACINNES. They tried that. There was considerable bargaining back and forth, and all kinds of percentages were proposed. But they finally came to the conclusion as follows—and I think it appears to be a very proper and fair way of settling the matter—there are two rivers, and there are lands irrigated by the same water—we will take all that into consideration. Why leave any out. Why should water be taken from the St. Mary River all the way down to the lower Milk River Valley, in addition to water which can be used there, when the same water in the St. Mary River can be used more advantageously where it is? It seems to me that that is a very natural, sensible, reasonable way of reaching a solution. Everything was thrown into a common pot and divided, but divided in such a way that nothing whatever was taken away from any people in the lower Milk River Valley.

Mr. TAWNEY. No: they were not taken away from them, but the people in northern Montana who otherwise would be entitled to the use of the St. Mary River were deprived of that use, to the extent to which the people in lower Montana would use it.

Col. MACINNES. Well, Mr. Tawney, to arrive at any bargain where there is a dispute, each party must give up something. You say that some one on the St. Mary River in upper Montana was deprived of the use of some of the water in the St. Mary River. Now, that is exactly where the importance of the fact comes in. There was no one there who was being deprived of the use of the water. So much was that the case that your own Government itself was going to take that water away from upper Montana and take it away down into lower Montana. So you see that there was no one there to be deprived or damaged or injured in any way whatsoever.

Mr. GLENN. Take that original draft by Mr. Gibbons, where he says:

> 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.

Now, I refer in that particularly to the words "(in the State of Montana and the Province of Alberta) and their tributaries." How would you construe that—to mean jointly in the State of Montana and in the Province of Alberta?

Col. MACINNES. No; I think that is simply a geographical description.

Mr. GLENN. Wouldn't that include rivers both in Montana and Alberta?

Col. MACINNES. Oh, yes, surely.

Mr. GLENN. Well, then, it is suggested by telegram that the words "and Saskatchewan" be added, and they were afterwards added and appear in the treaty. Does not that put a different light on it?

Col. MACINNES. No, Gov. Glenn—perhaps I misunderstand you.

Mr. GLENN. Well, suppose you take the draft of Mr. Gibbons—the first draft. Now, would you think the words there, "(In the State of Montana and the Province of Alberta) and their tributaries," refer to all the tributaries in the State of Montana and the Province of Alberta, whether they crossed the boundary or not?

Col. MACINNES. Oh, certainly.

Mr. GLENN. You would give it just as broad an interpretation as you would after the words "and Saskatchewan" were added?

Col. MACINNES. Yes; I think this was the reason that Saskatchewan was added. When some one 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. If it had been intended to change the sense at all I have no doubt there would have been negotiations on the subject.

Let us put it this way: Suppose there was a document in the United States which related to the city of Toledo. You would probably say the city of Toledo. But if it was something more important, referring to the whole of the United States or the whole of Europe, you would probably say the city of Toledo in the State of Ohio, so as not to confuse that Toledo with the city of Toledo in Spain. And here you put in in this article of the treaty where the River St. Mary is situated because there is another St. Mary River in Michigan, another in Nova Scotia, and another, I believe, in Florida. I think the attempt to read anything else into this will fail completely. My learned friend himself admitted that it would not do to try to read anything else into it.

Mr. POWELL. Well, Mr. MacInnes, you put it on a basis of compromise; that is, that the contentions of both parties seemed to be practically irreconcilable—that one country could practically take the whole of the St. Mary River and the other could take the whole of the Milk River, and neither could prevent the other, and that one country said to the other, "now you are in a hopeless position. You must either keep your dogs at home or we will scoop them in. If you allow the water to come in we are in a favorable position to take charge of the whole thing." And they say that their view is that they are entitled to all the water of the St. Mary River which will flow into Canada and all the water in the Milk River between the border and its return to the States. These are the two pretensions and they are in the horns of a dilemma, and they say, "Well, what proposition will you agree to?" And you say the arrangement was simply the result of a bargain made between two people.

Col. MACINNES. Yes; that is it exactly.

Mr. TAWNEY. But what was the consideration given to the United States for taking any water belonging to the State of Montana or

the citizens of Montana—I mean to say, what possible justification is there for the United States to take any such water and use it as part of the consideration for its compromise settlement between two nations?

Col. MacInnes. The answer to that, Mr. Tawney, and a very good one, which is worth many millions of dollars to the United States, even if an alternative were practicable as an engineering feat, is that they could get the water from the St. Mary River to the Milk River through a channel wholly in Canada, which channel they would have no right to use without the consent of Canada, which is probably worth one hundred millions or two or three hundred million dollars to the United States. They get the free use of that channel not merely for the water actually flowing through it, but for any water they might choose to put into it. In other words, they get a canal given them as a matter of international agreement. Surely that is a very considerable consideration.

Mr. Mignault. Is it not a fact that the history of the whole matter is this: The United States wanted to get water down to the lower Milk River Valley, and to do so they had considered several projects. These projects were found to be very expensive, although they might have been—as stated by Senator Walsh—physically feasible. However, the obvious and cheapest way to get it down from the St. Mary River, where there was an abundant flow, was through the Milk River, which happened to flow some two or three hundred miles through Canadian territory. And in order to get the consent of Canada they proposed this bargain, and they said, "We will divide the water and you will let our share come down through the Milk River, through Canada until it reaches the lower Milk River Valley, where we need it for irrigation." Isn't that the whole thing, Mr. MacInnes?

Col. MacInnes. Yes; that is a very good statement of it.

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. 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 they 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.

Mr. TAWNEY. There is one question which bothers me: On what theory can you justify the Government of the United States using the tributaries of the Milk River wholly within Montana, that are not international streams, as being the basis for the settlement of an international dispute, without compensation either to the State or to the people who own them?

Col. MACINNES. Well, if I may say so, Mr. Commissioner, you are begging the question, because you say they are taking that away and using these tributaries which are situated wholly in Montana as a consideration, and depriving the people of Montana of the use of those tributaries. If you will allow me to say so, they do not do anything of that kind. Those tributaries remain exactly where they were. It is impossible for us to take them away.

Mr. TAWNEY. But it is part of the consideration—the Government has no right to use them at all as a consideration.

Mr. POWELL. The Government of the United States may say, "I am managing this purely and simply as a trustee; I, the sovereign power, must deal with Great Britain, and I am dealing, and I must make the best use I can of what assets I have."

Mr. MIGNAULT. Who was interested to get the water down into the lower Milk River Valley, Mr. MacInnes?

Col. MACINNES. Oh, it would be the inhabitants of the State of Montana. Why, it is all Montana, Mr. Tawney. But, in any case, the thing would be perfectly good, I think, although perhaps open to criticism, even if one part was in one State and one part in another. But it is not, and there is no taking away of any water at all. The parties, of course, bore in mind what the circumstances were, just as if it was a case of having three eggs to divide between two persons, and the effect was to take into consideration that one of the parties had already had one egg. What I mean is, that the consideration is there, and is very plain if you take into consideration all the facts. And they wrote that all over this article, because they say that both the rivers are to be treated as one, and the waters divided so as to give beneficial use. How could it be beneficial use if one side is allowed the whole, disregarding what is beneficial?

Mr. TAWNEY. Well, they could get a more beneficial use under the terms of this treaty by the commission exercising its judgment, as to say that in the early spring of the year the State of Montana can use more of this water than they use on the Canadian side, because of course, spring is earlier in the State of Montana—and it is in the discretion of the commission to give Montana a larger amount than its share, temporarily. And, then, when the time should come for the utilization of more water on the other side of the line, on the Canadian side, then more water would go to that side. That could be worked out in the discretion of the commission from day to day or from month to month, as the case might be.

Col. MACINNES. Well, then, on that suggestion, Mr. Tawney, the result would be this, that when dealing with the situation so far as lower Montana is concerned, although the treaty says that you are to be guided by the beneficial use that may be made of the water, you are wholly to disregard or not to consider a lot of water which is there and which can be used. Because you say it is not covered by the treaty. Now, I think nothing could be more nonbeneficial

than that. All the factors of the situation must be considered, and that is what the article says.

Mr. TAWNEY. Under your construction by the use of the waters that are tributaries to the Milk River and wholly within the State of Montana for the purpose of apportionment, Canada gets a share of the appropriation of the water of Milk and St. Mary Rivers proper and their tributaries that cross the international boundary.

Col. MACINNES. By reason of this being included in the measurement, yes.

Mr. TAWNEY. And on account of that Canada gets more than one-half the water of the St. Mary and Milk Rivers and their tributaries that cross the international boundary.

Col. MACINNES. Well, I should not like to put it in those words.

Mr. TAWNEY. Well, she gets more than one-half.

Col. MACINNES. Yes.

Mr. TAWNEY. Then it would not amount to an equal division of the waters of the St. Mary and Milk Rivers between Canada and the United States.

Col. MACINNES. Yes; that is all we ask for, an equal division of all—we do not ask for an equal division of the tree with some of the branches cut off.

Mr. TAWNEY. You are asking for an equal division of the waters of the St. Mary and Milk Rivers, which are international streams, and their tributaries, including the tributary waters of the Milk River, which are situated wholly within the State of Montana and which are not international streams.

Col. MACINNES. Surely, and why not, on the contention that my learned friends are obliged to make? They have to admit that it is the tributaries that are wholly within Montana before they cross the boundaries that are included, but, for some mysterious reason, tributaries that are wholly within Montana, and empty into the river after the river crosses the boundary line, are excluded. They are forced into that position.

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 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 cross 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. Then we have Mr. Chandler Anderson saying one-half to be measured at points of crossing, storage, and diversion. Mr. Gibbons then puts it into the language, "The total amount to be diverted." If you can get any broader language to express that, I can not. First, it is measurement at the boundary; then it is measurement at the boundary at the points of storage and diversion; then you have the total amount that can be diverted.

I think that two things have been bothering the commission in the best of good faith—two things that are in the nature of bogies, if I may use the expression, as to what the result will be. One is that there is a terrible breach of State rights; the other is that, if the contention of Canada be accepted, the result will be disastrous to the United States, and that, therefore, what Judge King described as an absurdity is created. What I would like to say is that if Judge King had been in St. Paul, so that he had knowledge of the facts, and had been able to give the same study to them that he has given to the law, he never would have made any such statement or proposition; for let me point out that evidence was taken in this case two years ago in St. Paul, with the result that certain figures were put in, and with those figures a suggestion was made by Canada as to a possible basis of division. On these figures the result is that the United States would get all the waters of the Milk River, subject to certain flood waters, and would also get more water than is said to be required for the United States; at least that is what Mr. Newell says—more water than is required for the United States reclamation proposition.

Now, there is nothing horrible or terrible or disastrous in that. Two years have rolled by. Since then no application has been made to put in any figures to show that in any particular series of years, or as a result of the Canadian contention the United States would get nothing, so that this treaty would be disastrous for the United States. On the contrary, we have come here yesterday and have heard an argument advanced on behalf of the Reclamation Service of the United States that that would be the result. Nevertheless, the only figures on which any argument is based are exactly the same figures which we had before, and which, with all respect, to my mind prove exactly the contrary.

In other words, there is no evidence here whatever, and no suggestion has been made at any time that any evidence might be put in for the purpose of showing that Canada's contention would work out such a hardship that the treaty would resolve itself into an absurdity.

Mr. KING. Is it not a fact that I appeared before this commission and asked permission to get the very data, the lack of which is complained of, and that I was denied?

Col. MACINNES. I do not remember that, Judge King, at all.

Mr. KING. And now you complain that that data is not here.

Col. MACINNES. Well now, let me put it in this way—you are quite fair. The suggestion was to add something not included in those figures which we have before us. This statement is made at page 165 of the record. Mr. Wyvell is speaking, followed by Mr. Newell. I will read from page 165, near the bottom. Mr. Wyvell says:

Mr. WYVELL. There have been very few surveys of irrigable land and *practically* no measurements of water, because the water in the southern tributaries comes in such an erratic fashion that it has had practically no value for irrigation. It occurs in very short, sudden storms, and there are very few, if any, reservoirs, and so we have considered that waste water. For that reason we have made very few measurements of these tributaries or of the waters which escape out of the mouth of the Milk River, as that water is wasted and is of no practical use to anyone. For that reason we can not give you in such simple form as you desire information comparable to that obtained of the streams to the north. There is such a large number of these little tributaries to the Milk, as has been stated, some of which may not flow for several years in succession, that it does not seem possible with the funds available to attempt to make measurements.

Mr. TAWNEY. It would not be considered as water available for irrigation purposes.

Mr. NEWELL. It has not up to the present time, and no one has attempted to use it. We are not planning any reservoirs now to catch that water.

Mr. TAWNEY. The only tributaries of the Milk River that the Reclamation Service has given to the commission are the tributaries on the west near the source of the Milk River and the tributaries of the Milk River south of the eastern crossing in Montana.

Mr. NEWELL. Those are the only rivers we have measured on behalf of the Reclamation Service, the main Milk River.

Mr. TAWNEY. South of the eastern crossing?

Mr. NEWELL. East of the eastern crossing. We have not measured the tributaries to the south because of their erratic character; we have only measured a few of the tributaries in the north.

So that is the situation I wanted to make clear. I read this record to clear up that point possibly in the minds of the commission, and I think it is fairly clear now that Canada's contention, if it prevailed, would not produce any very great hardship. Now the result of Canada's contention on the figures proved is put forward, and will be found, as you remember, in a suggestion in the evidence, and also in a brief.

Mr. KING. What I wanted to say was this: As I remember it, Mr. Newell suggested a plan whereby the information you complained of not having could be secured, and at least one member of the commission, if not more, favored having that information. And then when the matter was suggested by myself as one of the representatives of the Reclamation Service, it was opposed by the commission on the theory that they must first interpret the treaty.

Col. MACINNES. I quite agree with that.

Mr. KING. And, unless I am mistaken, you insisted that it was not necessary to have this information in advance.

Col. MACINNES. Quite right.

Mr. KING. And the inconsistency of which I complain is that you are arguing now that we have not this information, and that of course we can not discuss that because it is not in the record.

Col. MACINNES. Well, Judge King, if I am inconsistent, I can only say that I regret it.

Mr. KING. Of course, I do not for a moment think you were intentionally inconsistent.

Col. MACINNES. Well, I submit I am not in any sense inconsistent. If any ruling was made by the commission against any evidence being submitted, I shall submit it on that point. I would feel very confident that the ruling was right, because to introduce evidence for the mere purpose of destroying the contention would surely be contrary to all legal rules. But what I was objecting to was, that an argument should be based on the evidence in hand and not on a hypothesis—an argument should be based on the facts already proved.

Mr. KING. My complaint is, that you would not permit us to introduce the evidence which you now complain of not having.

Mr. GLENN. I must say, Mr. King, that that was the fault of the commission; that was not the fault of the Canadian counsel. They offered to open it up, but we would not allow them.

Col. MACINNES. My learned friend takes a different view of the matter from mine. My learned friend based an argument on certain hypotheses, whereas the facts are to the contrary, as has been established.

I should like to mention a point raised by Senator Walsh as to the alleged action by the parties subsequent to the making of the treaty, in connection with the establishment of international measuring stations. The point made is this, that international stations were established at the boundary and not elsewhere, and that that, therefore, shows that the parties themselves thought that the measurements were to be made there and there alone.

The reason for that action is shown on the record already. It was mentioned at St. Paul. International stations were established at the boundary and not elsewhere for a very good reason. At those points there was on each side of the boundary a measuring station established by each of the two countries, and they said "Let us have one station instead of two." At the other point what was contemplated to be done was that measurements would be made by each country within its own territory and exchanged and given to the other. So there is absolutely nothing whatever in the action of Canada in being a party to the wiping out of dual stations at the boundary and turning them into joint ones.

We have dealt with the diplomatic correspondence which my learned friends have said that they have a right to look at. So far as we are concerned, we feel that that diplomatic correspondence, if looked at, will help our contention rather than their own. But we do assert, and in the strongest possible way, that on the doctrines of law which have been accepted between both countries such drafts are in this particular case not to be looked at in view of the clear and unambiguous language of the treaty. As I say, it is not for us to say that the commission should or should not roam far afield if they wish to do so, but it is a matter of the application of the law which has been, and we submit ought to be, applied to such documents as these. Such evidence is not admissible in view of the clearness of the language of the treaty. You will remember a passage I read at the previous hearing, which was at page 244 of Vattel. It is interesting to find that those particular remarks of Vattel have been approved by the Supreme Court of the United States in the case of Ware *v.* Hylton (3 Dallas, 199, pp. 239–240). It is Mr. Justice Chase who is speaking. I do not intend to read many authorities, but this particu-

lar case, I think, would be of interest to the commission. Mr. Justice Chase says:

> Before I consider this article of the treaty I will adopt the following remarks, which I think applicable, and which may be found in Dr. Rutherforth and Vattel. (2 Ruth., 307 to 315; Vattel lib. 2 c. 17, secs. 263 and 271.) The intention of the framers of the treaty must be collected from a view of the whole instrument, and from the words made use of by them to express their intention, or from probable or rational conjectures. If the words express the meaning of the parties plainly, distinctively, and perfectly, there ought to be no other means of interpretation; but if the words are obscure or ambiguous or imperfect recourse must be had to other means of interpretation, and in these three cases we must collect the meaning from the words or from probable or rational conjectures, or from both. When we collect the intention from the words only, as they lie in the writing before us, it is a literal interpretation; and, indeed, if the words and the construction of a writing are clear and precise we can scarce call it interpretation to collect the intention of the writer from thence. The principal rule to be observed in literal interpretation is to follow that sense in respect both of the words and the construction which is agreeable to common use.

Nothing could cover the ground more clearly and more absolutely than that.

Mr. POWELL. Senator Walsh is not quarreling with the statement of law. He says that while these drafts could be used to look at they could not modify the final treaty. He says you can look at those drafts to identify the subject matter of the treaty. Supposing there is an agreement in which reference is made to John Jones, of the parish of Clinton, in the county of Kent, and it turns out that there is a man there and there was a mistake in the description, and the real John Jones lives in Clinton, county of Essex, Province of Ontario. Surely you can show that by extraneous evidence.

Col. MACINNES. Of course you can.

Mr. POWELL. You can always identify the subject matter of the contract by oral evidence.

Col. MACINNES. Surely; only when there is no difficulty you do not go out and get your difficulty first and then bring it in.

Mr. POWELL. In that case you have to go out and get it. It is plain on the face of it that there is a John Jones in Clinton. You have to go outside of that to get your doubt. That, as I take it, is one of the distinctions in the admission of oral testimony. As a general proposition you can not admit oral testimony where the doubt is patent on the face of it, but you can where the doubt is latent.

Col. MACINNES. Yes, sir; but you do it only when the doubt is there, not when it is clear.

Mr. POWELL. But what could be clearer on the face of it than John Jones, of the parish of Clinton and the county of Kent? I am not arguing that I am in favor of that. I am pointing out the point you have to combat. Senator Walsh says that while it is true that it refers there to all tributaries that that is a mistake; the people were only negotiating about some of the tributaries.

Col. MACINNES. That is quite another question. My learned friend suggests that if he can find a draft between the negotiating parties which contains a more limited meaning, that he is entitled to take that draft and apply it to general language and to cut down that general language to something that is limited. Is not that his point?

Mr. POWELL. I do not understand his point to be that. What I understood his point to be is this: I can take that as some evidence, and if there is a series of those documents and a number of letters passing backward and forward along the same line the evidence then might be conclusive. Am I correct in that understanding of your argument, Senator Walsh?

Senator WALSH. I think that is quite accurately stated.

Mr. POWELL. Not that you are estopped by one document, but taking the whole thing together he argues that it is clear.

Col. MACINNES. He suggests that he can look at certain drafts. Every one of those drafts to which he points as a guide and as being limited is expressly stated to be limited. Now, my suggestion is this: If you take this and apply it to the language of the document, which is not so limited but is general, you are actually altering and varying a written document, which is something very different from the other proposition.

Some other authorities were cited by Judge King and by the learned Senator with reference to the Alaskan Treaty. You may remember that there was a dispute which was referred to a tribunal, the Alaskan Boundary tribunal, which rendered a decision in favor of the United States. In the decision or opinion which was rendered by Mr. Root, Mr. Lodge, and Senator Turner, and which was concurred in in part by Lord Alverstone, certain remarks were made which have been cited to this commission to-day. What I wish to point out is this, that however interesting, they are not applicable for this very good reason, which I am sure my learned friends would have mentioned if it had been called to their attention, and which throws a bright light on the whole situation; that in the reference of the difficulty to that tribunal it was expressly agreed and stipulated between the two countries that such other documents might and should be looked at. That is a very different thing from looking at them by reason of some rule of law which would make them permissible. They looked at them because they were authorized to look at them and were told to by the governments which created the arbitration board.

Mr. TAWNEY. Do you not think in a matter of this kind that there is a general authority under this treaty where we are acting in an administrative capacity and where the judicial function is merely an incident to such an administration, and that it is the duty of this commission to look into all extraneous matters for the purpose of ascertaining what the real intent of the parties was with respect to this particular writing?

Col. MACINNES. Look at everything if you will; look at all the material which is brought before you, but in coming to your decision you surely must be guided by the rules which have been laid down as applicable. Otherwise, it seems to me—and I am not arguing for one country at the moment more than for another—if you have no rules at all there would be grave danger of deciding according to which way the chips fell.

Mr. TAWNEY. We are simply endeavoring to ascertain a fact, which is the intent of the parties. Although I may be wrong, in my judgment the purpose of this ascertainment is to discharge an administrative duty, and, in order to ascertain that fact, it seems to

me that this commission is at liberty to gather its information concerning the fact from any source regardless of any strict rules of construction that may circumscribe the duties of a court on a question of litigation between individuals.

Col. MACINNES. Well, here you have a document before you which you are seeking to apply and which it is your duty to apply as a commission. I mean that the treaty so says. Surely you would hesitate long before construing that treaty under which you are acting and which you are called upon to apply, in any different way from that in which treaties are usually, in the absence of express stipulation, interpreted between two countries. I do not quite follow you yet as to the suggestions as to why this particular commission should be untrammeled, and untrammeled in a way that might lead to difficulty rather than help; untrammeled by the rules which have been accepted and applied by the courts of the countries. I mean, if not that rule, what rule?

Mr. POWELL. That is, we must investigate and decide this matter just as we would investigate and decide any other matter that comes before us.

Mr. MIGNAULT. But is not the whole question this? We are called upon to apply Article VI. Either Article VI is clear or it is not clear. If it be clear, all we have to do is to give effect to it without going behind it to ascertain whether the parties may not have made some mistake in the use of this or that expression. If it be not clear, then we can search their intentions by the extraneous circumstances or by the situation in which they were so far as that can be done. But if we have nothing else to do but to apply Article VI, and if it be clear and unambiguous, what can we do except to apply it?

Col. MACINNES. That is what I should think, Mr. Mignault.

Mr. TAWNEY. I would say, Col. MacInnes, in answer to your suggestion as to your not being able to follow me, that the question is whether or not the commission was authorized in the interpretation or construction of Article VI to go into the history of that article. That is, the right of the commission to do that has been questioned. It has been said that we were not at liberty to do that because the language of the treaty itself is so clear and distinct. Now, my position is that in the discharge of our administrative duty under Article VI, if the question between the parties themselves is presented to the commission, we do not need to hesitate about inquiring into the history of the entire article for the purpose of ascertaining what the intent of the parties was as to the amount of water that is to be measured and distributed or apportioned between the two countries.

Col. MACINNES. My position is this: The commission should be guided by ordinary rather than by extraordinary rules of construction; that when the two Governments made this treaty between each other they must have surely done so in the ordinary manner and on the assumption that that treaty would be construed if it ever came up in the manner usually applicable to treaties; that I do not think there would ever have occurred to them, and, therefore, it would be very dangerous to apply here, the idea that this particular treaty was coming before a particular commission which would decide it according to some rules quite different from those that had ever been applied before.

In other words, all I am suggestiing is that this commission will in this respect act in accordance with the rules which are universally accepted in construing documents of this kind. I am not asking you to do anything more or anything less.

Mr. TAWNEY. I understood you to contend that under this treaty it was not within the province of the commission to go into the history of this article at all for the purpose of ascertaining what the intent of the parties was.

Col. MACINNES. No; not at all. What I am saying is this, that if this or any other article of the treaty comes up for consideration and it is found to be unambiguous, then, in accordance with the regular rule, there is no resort to other material for the purpose of changing language which is clear; that before other evidence can be used to change clear language there must be an ambiguity shown, and my point is that after the fullest possible consideration no ambiguity has been shown or has been established by my learned friends.

Mr. TAWNEY. Well, is not the fact that the two Governments here are contending for a diametrically opposite construction or intent, evidence of ambiguity?

Col. MACINNES. Oh, no; I do not think so.

Mr. POWELL. Take a case of this kind: Supposing there is a franchise introduced so that every person of the age of 21 years having personal property to the amount of $100 shall have a vote. Do you suppose that would allow a woman to vote?

Col. MACINNES. Well, the word "person" is either clear language or it is not.

Mr. POWELL. But still those general terms are cut down in view of the long practice of the country that women have not a vote, and they want something more conclusive to give them a vote.

Col. MACINNES. But I do not think there are two meanings to be applied to the word "tributary."

Mr. POWELL. But I am speaking of the fact that there should not be any ambiguity. The word "woman" means a person, and still you limit a contract and restrict the general term in respect to the subject matter with which you are dealing.

Col. MACINNES. There is an inherent ambiguity there because there are two sexes in the human race. Obviously it might apply to both or to either.

Mr. TAWNEY. Col. MacInnes, what have you to say with respect to the argument of Senator Walsh and also of Judge King regarding the use of the word "and" in connection with these tributary waters in Montana, Alberta, and Saskatchewan?

Col. MACINNES. What have I to say to that?

Mr. TAWNEY. Yes; as applying only to the tributary waters of these two rivers that cross the international boundary.

Col. MACINNES. Well, as to that, Mr. Tawney, in addition to the remarks which I made earlier that the natural language must be given to these words, namely, that they are geographical and descriptive, I should point out that in order to give them the meaning that my learned friends contend for, you have to change one of those "ands" into the word "or"; they have to make it read, "The rivers and tributaries in Montana and Saskatchewan and in Montana and Alberta," whereas the language of the treaty is "In Mon-

tana and Alberta and Saskatchewan." In other words, for them to get any argument on the point they have to admit that the language of the treaty is nonsense, because there are no tributaries which are in all three. There are no tributaries in Montana and Alberta and Saskatchewan. To get any foundation for their argument they have to say that the treaty as it stands either has the geographical meaning which Canada contends for or else it is senseless; that it does not mean Montana and Alberta and Saskatchewan, but it does mean something else; and, therefore, it must be changed to read tributaries in Montana and Alberta in the sense of tributaries which flow through both and tributaries in Montana and Saskatchewan in the sense of tributaries that flow through both.

Mr. MIGNAULT. Col. MacInnes, you are not reciting the language of the treaty. It refers to the State of Montana and the Provinces of Alberta and Saskatchewan, apparently indicating two divisions, a State on the one hand and the two Provinces on the other. That is the argument as I understand it, that tributaries are indicated as being in these two divisions and that, therefore, they must necessarily cross the boundary.

Col. MACINNES. And that therefore you are to exclude any which are not in both.

Mr. MIGNAULT. Any that are not in the two divisions. That is the argument. I do not know that they would have to be in all three, because it seems to me the treaty distinguishes two geographical divisions, the State of Montana on the one hand and the two Provinces on the other.

Col. MACINNES. Then, let us take it at that. Let us assume that the treaty does say that—that it says the tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan bracketed together. The suggestion is that language of that kind has the effect of a limitation to tributaries which are in both and result in the exclusion of those which are in one and in one alone.

Now, first of all, on the practical side my learned friend was met with the objection that he does not contend for that himself because in respect of tributaries which are in one country, and in one country alone, he does include them provided they have joined the particular river before it has crossed the boundary; that his contention has to be cut down to that; and it is limited to tributaries which are in both countries and which join the river before it has crossed the boundary. Well, the plain answer to that is that there is no such language in the treaty. I mean that that brings in a complicated definition of inclusion of one part and the exclusion of the other, and he himself has to admit his own inconsistency in the sense that he does not apply it in that way.

Apart from all that, there is the natural, obvious meaning to those words which I have given and if my learned friends were to contend that they cut out all tributaries, whether they joined the river before or after it crosses the boundary, it would be a meaning which to my mind is quite unheard of. If you say, "My books in the library and in the dining room," surely it means your books which are in the library and your books which are in the dining room. It does not mean your books which are in both. I mean that that is not the natural way in which those words would be used to put a condition

that the article, whether it be a book or a tributary, must be not merely in the one but also in the other. It is a condition which is not found in the ordinary use of those terms. So whatever way you choose to put it you have first of all to assume that the Provinces of Alberta and Saskatchewan mean in a sense Canada.

Mr. GLENN. Article VI of the treaty says "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," and so forth. Sir George Gibbons wanted that amended. He sent a telegram and simply said, "Say Provinces of Alberta and Saskatchewan," showing that he just simply added the word "and."

Col. MACINNES. That is it exactly.

Mr. GLENN. If he had written a letter, he would have put it in better language.

Col. MACINNES. I do not know that he would have done that. Anyone who looks at the map when he gets home would see that this is a written geographical description, because there are some of them in Saskatchewan.

Mr. GLENN. It is ambiguous.

Col. MACINNES. I do not see how there is any ambiguity there, because the only alternative suggested by the other side is impossible.

Mr. MIGNAULT. Supposing the only river mentioned there was the St. Mary River. Leave out the Milk River for the moment. If it speaks of the St. Mary River and its tributaries in the State of Montana and the Province of Alberta, would there be any ambiguity there?

Col. MACINNES. Let me get that again.

Mr. MIGNAULT. Supposing the treaty merely referred to one of these rivers—for instance, the St. Mary River—coupling it with the parenthesis "in the State of Montana and the Province of Alberta," just one river, the St. Mary River and its tributaries in the State of Montana and the Province of Alberta. Would there be anything more than description there?

Col. MACINNES. I should not think so. The point when raised before at St. Paul was almost raised to be dismissed. It is for me a little difficult to take the point seriously, because, with all respect, it is so absolutely absurd. Take the suggestion you have made just now. That surely would include the water of that river either in Canada or in the States. It would not be limited to tributaries that flowed from one country and could be identified in the other. You have got to take language as it is used and understood, as the Supreme Court of the United States has said, in accordance with its common use, and I would defy anyone to cite an illustration that a thing of this kind said to be in Montana and Alberta—assuming that to be the language—would mean something which had to be in both, and not something which was used as descriptive language.

Mr. POWELL. All you would have to do would be to substitute "and" for "or." I can cite numerous cases where "and" has been construed as "or" and "or" has been used as "and."

Col. MACINNES. Supposing you said "or" in this case. That would not help it one way or the other. They have to say that it is something which is in both.

The suggestion was made by Judge King in his argument, and not concurred in by the learned Senator, that there was to be found and applied a restriction to the language arising out of a supposed limitation on the treaty-making power of the United States. Now, I think I can satisfy the commission that however interesting a decision on that point might be as to whether the United States is or was limited by treaty-making power in connection with this treaty, it will not be necessary for the commission to decide that point, because the necessity for its application does not arise.

Let us keep clearly in mind what this suggestion is. It is said that there is a certain limitation. We will not yet go into details as to what that limitation is. It is said that that limitation was so well known and so clearly and absolutely established that the authorities who made this treaty had it in mind, and when they used this language they impressed the language with their limitation. To establish that, as you will see, my learned friend has to go a great deal farther than he would have to go if he were arguing before this court or the Supreme Court of the United States that there was a balance of authority against the treaty-making power in this respect because, as you will see at once, what my learned friend has to do is to show not only that such a limitation exists by law of the United States, but that there was no doubt about it, that it was well known, that it was clearly known, that it was accepted.

Anything short of that is no good, because to suggest that Mr. Root or anybody making a treaty has in mind a point which is in dispute and as to which there are a long series of cases and a large number of articles of textbook writers and no definite conclusions reached by the gentlemen from the South and from the North, and to suggest that on a point of that kind which may not be definitely settled he writes a treaty with the effect that it is settled, shows the impossibility of my learned friend's contention, because it has to be commonly accepted knowledge to be written in unless it is found there itself. If the point were being raised as a matter of argument it might be put to you that there was a balance of authority in its favor and the authorities might be cited. But here he has to do more than that because here it is not found; it has to be brought in by implication. To bring it in by implication it has to be something which is accepted and fully accepted. In that he is bound to fail.

Mr. POWELL. Has not Mr. Root committed himself to the most plenary Federal power in respect to a treaty in an article in some magazine?

Col. MACINNES. Yes; quite right.

Mr. TAWNEY. You are referring to the arbitration treaties by Mr. John Hay.

Mr. KING. I did not catch what your honor said.

Mr. POWELL. I asked if Mr. Root had not committed himself to the theory of the fullest plenary powers in the Federal Government in regard to treaties.

Mr. KING. If I am permitted to answer it I would like to do so.

Col. MACINNES. If my learned friends were asking the Commission to say that Article VI on our construction of it was unconstitutional, it would be enough for them to show that though there is much difference of opinion, the better view was that the treaty-

making power did not extend to dealing in any way with tributaries wholly in Montana. Even on that I think they would fail.

Mr. TAWNEY. Do you maintain that in the measurement and distribution of these waters that this Commission should measure the tributary waters that are wholly in Montana and do not cross the international boundary at all, for the purpose of securing the total of the water to be divided?

Col. MACINNES. Let me follow that again.

Mr. TAWNEY. I say, do you maintain that it is the duty of this Commission to measure the waters of the tributaries to the Milk River that are wholly within the State of Montana for the purpose of arriving at the total amount of water to be divided between Canada and the United States under Article VI of this treaty?

Col. MACINNES. Surely. Why not?

Mr. TAWNEY. Is the Government of the United States justified in requiring such measurement of waters that do not belong to the Government but belong entirely to the State, for the purpose of making a division between itself and another nation?

Col. MACINNES. Do you draw any distinction between the waters of the St. Mary; and, if so, why is there any such distinction?

Mr. TAWNEY. That is an international stream.

Col. MACINNES. Let me see if I follow your distinction there. You say, as I take it, that they could measure waters which flow across the boundary and that they could not measure waters which are wholly within the country.

Mr. TAWNEY. Not for the purpose of getting the basis of a division between the United States and another nation.

Col. MACINNES. Where is it suggested that there is a lack of authority in that respect, and on what ground?

Mr. TAWNEY. Simply because the streams that are wholly within the State of Montana are not the property of the United States. The United States has no right whatever to deal with them in the settlement of an international dispute, whereas it has that right with respect to waters that are international.

Col. MACINNES. If that were so we should expect to find somewhere in the authorities or in the textbooks that they might deal with such property, that they might deal with the waters crossing the boundary in making a treaty, but not deal with the other waters even though they were making a treaty.

Mr. TAWNEY. In my judgment, the Federal Government on our side of the line has no authority whatever to deal with the property of a citizen or of a State in its negotiations with a foreign nation in the settlement of an international dispute or for any other purpose unless it proposes to compensate for the taking of that which is necessary to accomplish it.

Col. MACINNES. In the first place, of course, on the facts the point does not arise because those waters are not being taken or given to another country. We already dealt with that earlier in the afternoon. Those waters are not being taken.

Mr. TAWNEY. Of course they are not being taken in the sense of being transported up the stream into Canada for the purpose of being utilized there. But for the purposes of the division you main-

tain that this commission is required to measure in order to ascertain the total to be divided between the two countries.

Col. MACINNES. Yes.

Mr. TAWNEY. And I ask wherein the Government of the United States has power to use the waters belonging wholly to Montana or to its citizens for a purpose of that kind.

Col. MACINNES. Then let us assume for the moment, if you will, that that is so. With all respect, I absolutely challenge it, but assuming for the moment that it is so, how does the point arise here? This commission is bound by this treaty and will, as I understand it, carry it out. So it is not a question of argument as to whether the treaty is constitutional or not, but as to whether there is a limitation to be found in it which is not expressed. Is not that so?

Mr. TAWNEY. Yes.

Col. MACINNES. Therefore, as something which is to be implied, it must be something as to which there is no doubt.

Mr. TAWNEY. Inasmuch as the Supreme Court of the United States has never declared a treaty unconstitutional, I do not think this commission will establish the precedent.

Col. MACINNES. As it is sought to bring in the suggestion—I say it not offensively at all—by a side wind and not directly, it surely must be abundantly clear before the commission could or would adopt it to whittle down clear language. It must be a proposition of law which had not only been established but which was accepted as the law of the land in such a way as Mr. Root and those who made the treaty had it in their minds when they wrote that treaty. I mean that that is what our learned friends have to prove. It is not there. It is suggested that it is implied. How is it implied? Because it is in the minds of the negotiators. How would it be in their minds unless it were the clear law of the United States?

Mr. GLENN. There is no question but that they had the right to divide these waters that extend across the boundary line. You say that the abundance of evidence is on our side. There is a question of whether they can take the water in a river any more than they could that which is wholly within the State of Montana and put it over to Canada. If you take the authorities bearing on that question I think you will find that the great preponderance of them hold that you can not take water belonging to a State since the passage of Article X of the amendments to the Constitution of the United States.

Mr. MIGNAULT. If the State of Montana owns the tributaries which are entirely in Montana, it also owns the water of the St. Mary River a mile above the boundary line; and, therefore, the United States can not any more dispose of the waters of the St. Mary River than it can dispose, according to the contention, of the tributaries that are entirely in Montana.

Mr. GLENN. That is right, sir.

Mr. MIGNAULT. Then the whole article is unconstitutional.

Col. MACINNES. I want to avoid, if possible, burdening the commission with all the authorities and textbook writers on the subject of the treaty-making rights of the United States, and in dealing with that subject, I might say that I do so only with the greatest possible diffidence, not having the honor of being a member of the

United States bar. But I would say this, that with the assistance of the ability and industry of my learned friend, Mr. Christopher Robinson, all these cases and textbook writers have been gone through very carefully, and I have no hesitation in stating that it has nowhere been laid down that there is any such a limitation as would have an application here, but that on the contrary there is a very substantial body of opinion to the contrary. That being so, the point is one, which, to put it mildly, is in doubt, and in grave doubt. And that being so, it could not possibly have been in the minds of those who made the treaty, Mr. Root and others, as being something which was written in impliedly in the treaty—because you could only write in impliedly what is accepted law. You can not write in impliedly what is in doubt, and as I said before, to put it as mildly as possible, there is no authority in favor of this proposition, but there is considerable authority to the contrary. When I use the word "authority" perhaps I should say there is no decision—there is, of course, a textbook writer, for instance, the book of our friend, Mr. Tucker. So far as Mr. Tucker is concerned, he puts forward the most extreme view of treaty-making limitations in his book, and I might say that his book had not appeared at the time the treaty was signed, the book coming out only in 1915.

The latest discussion of the matter at the time the treaty was signed was in Butler's book, which came out in 1902, and Butler is the author who gives the widest possible scope and extension to the treaty-making power of the United States. But further than that, it was Mr. Root who directed the negotiations in connection with the making of this treaty on behalf of the United States and who signed this treaty on behalf of the United States. And he expressed, and expressed publicly in 1907 I think it was, the views which he held, and which are put with his usual lucidity, in this article, from which I think my learned friend cited the substance yesterday. This article will be found in the American Journal of International Law, Volume I, Part I. It is also in the proceedings of the society for April, 1907. I am reading from pages 49 and 50 of the proceedings. He says:

"Legislative power is distributed"—as this was already read to the court by Senator Walsh I shall not read it all.

Now, my learned friend, Mr. Robinson, suggests to me that members of the commission and others may hold different views, possibly, and so I do not want to go into that too extensively. But what I do urge as an absolute and complete answer to the suggestion of my learned friend that something is to be read impliedly into this treaty which is not there is this, that this is the opinion of the high official of the United States Government who guided the negotiations and who signed the treaty in question.

Mr. POWELL. So that if the intentions are material, then the contrary is the case.

Col. MACINNES. Yes.

Mr. TAWNEY. Do you think there is anything in that contrary to the opinion expressed here, that the property of the State or of the citizen can not be the subject of treaty by the Federal Government?

Col. MACINNES. I think undoubtedly Mr. Root is of the opinion that the Government can certainly make a treaty and by that treaty

can dispose of the property of a State or of a citizen—I have no doubt that it would probably have to compensate that State or citizen.

Mr. TAWNEY. I do not think Mr. Root ever meant that at all.

Col. MACINNES. I think you will find, Mr. Tawney, that that is what his article amounts to. You have in mind, I have no doubt, the possibility of the Federal Government infringing on State rights.

Mr. TAWNEY. No; it is not in regard to the usurpation of State rights at all, but in regard to the taking of property belonging to individuals or States, which is absolutely prohibited by the Constitution of the United States, except under due process of law and after compensation.

Col. MACINNES. Well, I know Mr. Commissioner Tawney is particularly interested in that point of the process of law and after compensation, and here is direct authority enough cited by Crandall, second edition, at page 223. It is the well-known case of Little and Watson, decided in 1850, 32 Maine, page 214. I refer to it at page 224. The decision is by Chief Justice Shepley, which I have no doubt is familiar to Mr. Commissioner Powell—I am citing the case of Little and Watson, cited in Crandall at page 223. You will see down near the end Shepley, C. J., said that the argument put forward amounts to practically this, that in a case of that kind the treaty would be suspended and not good as against Great Britain until the United States had made compensation to any owner whose rights had been taken away—which, I submit, is not the case. Then he goes on to say that such a construction would infringe upon the legislative power, etc. I shall not trouble the court with reading any more of it.

Mr. TAWNEY. There is also a decision cited on page 267.

Col. MACINNES. Yes, I am familiar with that case also.

Mr. TAWNEY. Justice Field said that the treaty power is in terms unlimited, except by those restraints which are found in that instrument against the action of the Government or its department—those arising from the nature of the Government itself—the limitation to the Constitution is clearly recognized there.

Col. MACINNES. But not in this respect, Mr. Tawney. The only limitation which has been really suggested has been the question of territory, and even as to territory these are only dicta of Mr. Justice Field in that case, as to which you will remember that Mr. Justice White said at page 225 something very much to the contrary.

But as to property there does not seem to be any doubt that if it is a legitimate treaty and not colorable, there may be a swapping of property in one place as against property in another. It has been done over and over again.

Now, let us refer to Butler, Volume II, page 293, at paragraph 443, where he starts off "Notwithstanding the fact that these claims are property rights," and goes on to show that they may be the subject of treaty-making power. You see here that it is property rights he is dealing with, not territory. Now, as Mr. Commissioner Powell said, it is really a domestic matter.

Mr. TAWNEY. Don't you find a distinction between a settlement of claims by treaties and the matter of dealing with vested rights of

citizens of a country? There is a distinction made by the Supreme Court of the United States.

Col. MACINNES. It seems to me that all that is necessary to establish is that the United States Government has been dealing with a foreign government in a matter which is properly and not colorably the subject matter of a treaty, and if that be so in that connection the United States, if it had a will, could give away the property rights of its citizens for the purpose of settling that dispute. And, if it does so, the right is quite regardless of whether these property rights have been compensated or paid for. But of course it would be open to the citizens to make a claim against their own country, and that claim would be presumably satisfied by that country.

Mr. GLENN. What about the case of the United States *v.* Fox on page 315? That was a case regarding a river—what have you to say as to that?

Col. MACINNES. I think I know the point there, Gov. Glenn. That held that the State had the rights over the river, just as it has been held both in your country and in ours; that the State, in our country the Provinces, have the rights over the rivers—such as fishery rights, for instance. However, even though the States have those rights it had been held, and the countries have acted on it, that they can make treaties regarding those fisheries or those rivers. Another point, which is an interesting one perhaps—perhaps the most recent illustration of that is the case of the Government dealing with property which is undoubtedly State or Provincial property—that is the recent treaty in respect to migratory birds, which is now a treaty between the two countries, and the Federal Government has undertaken to deal with the matter of making a treaty concerning it, although the property in the birds, as far as there is property in any animal that is ferae naturae, is in the State.

Mr. GLENN. The decisions in the United States have been different in the past, Col. MacInnes.

Col. MACINNES. Well, I am confident, Gov. Glenn, that you will find that the more recent decisions and the more recent textbook writers do not take that view. The whole thing has been thrashed out, as you know, and it has been pointed out very clearly that those who held that the State rights should prevail had not only argued them as much as possible, but had submitted amendments which covered the points that we are now discussing. But those amendments were rejected by the makers of the Constitution, and they knew quite well that the power was given and intended to be given to the Federal Government.

Mr. GLENN. I can not think of any decision where it says that the Federal Government could take control of a river. If I remember, there was a decision where the question of the control of a river was reduced to an absurd argument to the effect that the Federal Government could give away a State if they desired.

Col. MACINNES. Well, I think the answer to that is this one, which is recognized by the authorities: The dividing line is that anything, such as the illustration you were good enough to give me at St. Paul, anything in a treaty that seems to infringe upon State rights, is

checked by the limitation that the treaty must not be colorable. What I mean is that to give away a State except as a term of peace, perhaps, after a war could not be done.

Now, the distinction is that certainly if a property right is dealt with in connection with a subject which is properly the subject of a treaty the Federal Government has a right to deal with that property in that treaty.

Mr. GLENN. I think you will find the rule distinctly laid down that that is so with regard to the things over which the United States Government has a right to legislate, such as navigation, etc. They, of course, have a right to make any kind of a treaty with regard to those things, but if they attempt to deal with something that is wholly within the jurisdiction of a State, and with regard to which the United States Government has no right to legislate, you will find that they can not do it.

Col. MACINNES. Gov. Glenn, I may say with assurance that that is not the case, and that the law is quite correctly stated by Mr. Root in the citation that has already been read to the court, where he points out that while the judicial and legislative powers are divided the treaty-making power is not. My learned friend, Mr. Robinson, suggests to me that possibly what you have in mind is Mr. Tucker's book, because Mr. Root's observations were made in 1907.

Mr. GLENN. No; I haven't Mr. Tucker's book.

Col. MACINNES. Well, we heard a good deal of Mr. Tucker at St. Paul, as you will remember, but I must say that Mr. Tucker's observations are not borne out by the authorities.

Mr. POWELL. This observation occurs to me, that if there is this lack of power on the part of the Federal Government of the United States to enter into this treaty, that is, if this argument is correct, then we should throw the whole thing overboard, because in that case the treaty is invalid and we have no right to meet at all or discuss it. We must either go on what they have done or we have no power to investigate. If it is unconstitutional for one purpose, then it is unconstitutional for the other, and we are here without the slightest authority in the world if there is anything in that argument.

Mr. TAWNEY. Well, it is not claimed that the treaty is unconstitutional. The argument simply is that it is obvious that those particular tributaries could not be included in the treaty, because to include them would be unconstitutional.

Mr. POWELL. But everything there is on the same basis. What difference is there between a river which is absolutely in the State and one which runs across the boundary? I can hardly see that there is any difference between the two.

Col. MACINNES. To complete reference to the authorities, I would like to refer you to the case of Anderson *v.* Dunn (6 Wheaton, p. 204); I refer to it at page 226. I shall not take up the time of the court by reading it; I would just say that that was brought to my mind by some of the monsters that were conjured up by Judge King before the commission yesterday—some of his terrible suggestions as to what might happen if the treaty-making power would permit a Government of the United States to cede away the houses and homes of the people, and so on.

Then I would refer to Story on the Constitution, fifth edition, page 304, section 425, where he says:

A power, given in general terms, is not to be restricted to particular cases merely because it may be susceptible of abuse and if abused may lead to mischievous consequences. This argument is often used in public debate, and in its common aspect addresses itself so much to popular fears and prejudices that it insensibly acquires a weight in the public mind to which it is nowise entitled. The argument ab inconvenienti is sufficiently open to question from the laxity of application as well as of opinion, to which it leads. But the argument from a possible abuse of a power against its existence or use is in its nature not only perilous but in respect to Governments would shake their very foundation.

Every form of government unavoidably includes a grant of some discretionary powers. It would be wholly imbecile without them. It is impossible to foresee all the exigencies which may arise in the progress of events connected with the rights, duties, and operations of a government. If they could be foreseen it would be impossible ab ante to provide for them. The means must be subject to perpetual modification and change; they must be adapted to the existing manners, habits, and institutions of society, which are never stationary; to the pressure of dangers or necessities; to the ends in view; to general and permanent operations as well as to fugitive and extraordinary emergencies. In short, if the whole society is not to be revolutionized at every critical period, and remodeled in every generation, there must be left to those who administer the government a very large mass of discretionary powers, capable of greater or less actual expansion according to circumstances, and sufficiently flexible not to involve the nation in utter destruction from the rigid limitations imposed upon it by an improvident jealousy. Every power, however limited, as well as broad, is in its own nature susceptible of abuse. No constitution can provide perfect guards against it. Confidence must be reposed somewhere, and in free governments the ordinary securities against abuse are found in the responsibility of rulers to the people, and in the just exercise of their elective franchise, and ultimately in the sovereign power of change belonging to them in cases requiring extraordinary remedies. Few cases are to be supposed in which a power, however general, will be exerted for the permanent oppression of the people. And yet cases may easily be put in which a limitation upon such power might be found in practice to work mischief, to incite foreign aggression, or encourage domestic disorder. The power of taxation, for instance, may be carried to a ruinous excess, and yet a limitation upon that power might, in a given case, involve the destruction of the independence of the country.

Perhaps having read that long citation from Story it might be as well if I would read the quotation from Anderson and Dunn, which I referred you to a few moments ago. In that case it is said:

The idea is Utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeal to public approbation. When all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monster of imagination, but individual liberty can be in little danger.

So that we see that all this argument of monstrous things or inconvenience, and so forth, does not really amount to very much. I do not think it is necessary for me to deal further with the arguments which have been presented yesterday and to-day. Anything supplementary will be found in the material which has already been put in before this commission.

I am, however, called upon to deal very briefly with the memorandum of figures which was handed in yesterday by Judge King. I am informed by Mr. E. F. Drake, the Superintendent of Irrigation for Canada, that he has checked these figures and finds that, so far

as they stand, they are based on figures contained in the evidence, with, however, certain important exceptions.

Cottonwood Coulee, otherwise known as White Water Coulee, is given as having 7,700 acre-feet. It will be found at page 161 of the record at St. Paul that that should be 8,400 acre-feet.

Then Frenchman River is given as 48,900 acre-feet as being the average flow of 1914 and 1915. Now, the figures given in the record for the whole period are 76,600 acre-feet, and I understand the figures showed that these two particular years, 1914 and 1915, are abnormally dry years, so that it would be safer and more proper to take the figures given in the record as 76,600.

In the same way, Rock Creek should be given as 19,000 acre-feet, as it is in the record, instead of 4,760 as it is in this memorandum. The 4,760 acre-feet given in the memorandum are said to be the average for two years only, which would make a total of what is shown as coming from Canada to the United States in this paragraph 210,350 acre-feet, instead of 167,710 acre-feet, as shown in the memorandum. Attention must also be called to the fact of an omission, which I have no doubt was unintentional, of the waters exclusively in Canada. The memorandum shows waters situated all in the United States, waters flowing from the United States into Canada, and waters flowing from Canada into the United States, but the figures as to waters wholly in Canada are omitted. These figures were shown at St. Paul to be estimated, from an average of readings, as about 72,000 acre-feet.

Judge King did not state the object of this memorandum, but from its form it would seem that his intention is to underline the fact that the large proportion of the water of these two rivers arises in the United States, as against the portion that arises in Canada. That fact, however, is well known, and we have dealt with it at St. Paul. The answer, of course, to that is, that the United States by the arrangement, was getting the use of the Milk River in Canada, which was a very considerable advantage, so that obviously no weight can be attached to the fact emphasized by Judge King so far as the fairness or otherwise of this particular division is concerned.

It, however, should be borne in mind that one of the terms of this treaty, and a very important one, was that the United States acquired the use of the channel of the Milk River in Canada.

I thank the commission very sincerely for their patience in hearing me through.

But before I sit down, Mr. Chairman, might I ask two things—one that the name of Mr. F. H. Atwood, of Ottawa, should appear on the record as being present on behalf of the Water Power Branch of the Department of the Interior of Canada. He is present here, but was represented by the same counsel and officers who appeared for the other branches of the Dominion.

The other request I would make, Mr. Chairman, would be, if you would ask my learned friend Mr. Robinson whether he has any remarks to address to the commission. I know he will be very short, but there may be some things that I have omitted.

Mr. GARDNER. We would be very glad to hear you, Mr. Robinson, if you have anything to say.

Mr. ROBINSON. I must say, Mr. Chairman, that I feel I could add nothing whatever to what Mr. MacInnes has said, so that I shall not ask the commission to hear me.

Senator WALSH. Mr. Chairman, I rather gathered from what Mr. MacInnes said that he was desirous of leaving to-night, but I should like to ask for the privilege of replying for a very brief time, categorically to some of the views advanced by him. I do not imagine it would take me more than 20 minutes.

Mr. GARDNER. Would you like to proceed to-night?

Senator WALSH. I would prefer it to-morrow.

Mr. GARDNER. Then the commission stands adjourned until to-morrow morning at 10 o'clock.

THURSDAY, MAY 17, 1917.

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

Mr. GARDNER. At the time the commission recessed last night, as I understand, everybody had completed their arguments except Senator Walsh, who wished to make a brief additional statement this morning.

Senator WALSH. May it please the commission, I shall trespass upon your patience this morning only long enough to reply to some of the views and ideas advanced by the counsel for the Canadian Government in his address to you yesterday. I shall make a studious effort to confine my comments to a reply to those views.

The very keen-minded counsel suggested that the important phrase in the treaty with reference to the State of Montana and the Provinces of Alberta and Saskatchewan is a phrase of identification rather than a phrase of limitation. That is, it was inserted there so as to identify the St. Mary River as being the St. Mary River that is found in the State of Montana and the Province of Alberta rather than the St. Mary River that connects Lake Superior with Lake Huron or some other St. Mary River. But that seems entirely unnecessary, even though there should be two or more St. Mary Rivers, any one of which might be the one referred to.

My acquaintance with geography has not yet suggested to me that there are any more than two Milk Rivers that might become the subject of controversy between the two countries, and particularly it has not suggested that there is a St. Mary River in such close proximity to a Milk River anywhere else along the international boundary line as would suggest the need of a phrase of identification in that connection.

Mr. Commissioner Powell quite correctly stated my view with respect to the statement of counsel in the course of his remarks that there is really an elision there and that the phrase is to be read as though it were in the State of Montana and the Province of Alberta, or the State of Montana and the Province of Saskatchewan. I do not know whether it was in that connection or some other the contention he was attempting to refute was characterized as absurd. But it is equally absurd to have two "ands" in there, and perhaps more so if the phrase is one of identification only. If it is to be regarded as a phrase of identification rather than limitation, it would seem as though the proper language would be "the St. Mary

and Milk Rivers and their tributaries in the State of Montana, the Province of Alberta, and the Province of Saskatchewan."

Counsel concedes that down to the very eve of the final draft of this treaty the negotiations plainly indicated that the waters being considered and to be divided were those only which crossed the boundary line, and that the documents in the record disclose no reason whatever for a change so as to embrace the tributary streams noninternational in character. Yet he says it may be that in the course of the oral negotiations between the parties reasons were advanced for abandoning the original idea to embrace the additional waters. Of course, that is quite possible. But if your honors please, if it is a fact it is easily susceptible of proof. I did not read so far in Crandall as to call your attention to the fact that in reference to a most important treaty President Jefferson and President Adams at one time took the stand to testify orally to certain matters which it was believed would shed light upon the meaning of certain language therein used. And clearly the same rule of evidence which will admit the written negotiations between the parties and the earlier drafts of the treaty in order to enlighten the commission concerning the true meaning of the language which was eventually adopted will equally admit oral evidence concerning conversations had between the parties for the same purpose. And, as I understand it, Sir George Gibbons is available to the court; Mr. Anderson is available to the court; and Mr. Campbell likewise, I understand, is available. It would be a very simple matter for the learned counsel to produce these gentlemen to tell about conversations that were had that would indicate how it was that this sudden and radical change in the character of the negotiations came about and what were the reasons for it, if the fact be, as he claims, that such change of purpose did ensue.

Now, another important matter in this same connection. No explanation whatever is given by the record of how it was that this purported change came, from the consideration of the international waters only to embrace those that were noninternational in character. But the learned counsel tells you that the Canadian representatives were all the time insisting that they were not getting enough of the water and that they wanted more of the water. That is true. I adverted to that. I also called your attention to the fact that although they were always insisting that they were entitled to and ought to have more of the water, they never once suggested that the additional amount to which they said they were entitled was to be determined upon the basis of the entire flow of the stream measured at the mouth, including the noninternational waters.

But more significant than all that, if your honors please, is this: You will bear in mind that from the beginning down to the very conclusion of the negotiations the doctrine of an equal division of the waters was acceded to by both sides in effect. Mr. Root started out with that proposition and the gentlemen upon the other side accepted that principle.

Mr. POWELL. Would you let me call your attention to one thing that is operating on my mind somewhat to the contrary of that. The provisions before the last were for the measurement at the boundary line. Now, take those tributaries of the Milk River which

arise in the Province of Alberta. The complaint is made by the United States or by Montana, the riparian proprietors, those who wish the benefit of the water, that Canada was consuming too much of that water and depriving them of their share of it. Now, mark you, under the system of measurement that was then adopted, none of that water that was consumed by Canada would come in for measurement at all; it was all disposed of before it reached the boundary line, and the change that was made was giving the United States an additional supply of water. The change from the measurement at the boundary line to an equal division of the waters was quite a change, because Canada would be consuming, apparently, the major portion of the water up to that date and was to hand over one-half of the then consumption.

Senator WALSH. I confess that I am not able to follow you. Let us assume that Canada was taking all of the water out of the Frenchman River. The settlers in Montana complain about that. The settlers upon the lower courses of the St. Mary River expressed a dread and fear that the Government of the United States would do exactly the same thing upon the American side of the St. Mary River, namely, divert it all to their loss.

Mr. POWELL. Yes; that is transferred to the Milk. Take a hypothetical case. Supposing there were 200 second-feet of water in the Milk River and that 100 second-feet of that had been consumed by Canada before it reached the boundary line. The measurement at the boundary line would exempt that 100 feet from division altogether.

Senator WALSH. Not at all.

Mr. POWELL. Why not?

Senator WALSH. Because it all refers to the natural flow; that is to say, the flow as it would be if it were unintercepted. That is, the natural flow was so defined in the original Root draft and so defined in the draft made by Mr. Campbell.

Mr. POWELL. That is mentioned there.

Senator WALSH. Yes.

Mr. POWELL. That disposes of that.

Senator WALSH. Now, get back. Down to the very last—as we contend to the end, but as is contended by the counsel for the Dominion of Canada until the final draft—the Canadian Government was entirely satisfied with one-half of the water that crossed the boundary. Now, let us get that clearly in our minds. They contend now that that, however, was abandoned, and as it was expressed by Mr. Commissioner Tawney, they now claim that they have secured not only one-half of the water that crosses the boundary, but one-half of the water that does not cross the boundary, or rather they get of the water that crosses the boundary one-half and an additional amount equal to one-half of that which is contributed by the tributaries wholly within the State of Montana.

Now, bear in mind we go back to the very first, when the Dominion Government, through their representatives, repeatedly accepted the principle of an equal division of the waters crossing the boundary, but they said that under the specific method of dividing those waters, according to Mr. Root's proposal, they will not get their one-half, and they complain not of the principle that the waters shall be

equally divided, but they complain of the method by which the waters are to be divided, insisting that by the method proposed they do not get the one-half which was to be the basis of apportionment.

Accordingly, it must be shown not only that this change was actually made, but that the change was made so as to give the Canadians more water than they even asked for in the beginning of the negotiations. And upon what consideration, if your honors please? It was not an unimportant matter in the negotiation of the treaty at all that 75 to 80 per cent of these waters originate in the State of Montana. It is true that the Milk River in Canada offers a conduit for the transfer of waters of the St. Mary and it is likewise true that some injury or damage may possibly result to owners of land in Canada by reason of the transport of the water through the Milk River, but you will bear in mind that under the treaty the Government of the United States agreed to make good all damage that may thus result, and the suggestion that it is impossible that any serious damage shall result does not seem to be controverted; it is merely speculative as to whether it will or not, and the Government of the United States agrees to make good whatever harm is done.

I submit, particularly to the fair-minded men representing the Dominion Government upon this commission, upon what consideration can it be deemed that the representatives of the Canadian Government ever asked, or that the representatives of the Government of the United States would ever be willing to concede, not only one-half of the waters that flow across the boundary line, but one-half of the waters that never flow across the boundary line and that were not the subject of contention or dispute or controversy at all and upon the bare concession of the right to carry the stored waters through the Milk River.

Counsel referred to the Anderson draft. That draft states:

> It is agreed that each country shall have the exclusive right to one-half of the natural flow of 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.

The language "to be determined at the points of storage and diversion" was advanced by him as offering some basis for the contention that the tributaries exclusively in Montana were to be included. But I can not follow that reasoning at all. Why, if your honors please, the measurement would obviously be made at the mouths of these streams if the division was to be made so as to include the contribution of all these tributaries. For instance, at the point of diversion upon a tributary stream in Montana the amount flowing would be inconsequential. Here is a stream that is flowing down from the Bear Paw Mountains to the south into Milk River, flowing north, and up near the foot of the mountains a man has taken out a ditch and he carries water down the valley for a distance of 2, 3, 4, 5, or 10 miles and puts it on his land there. That is a point of diversion. Away up the mountains, right at the very foothills, where he takes it out, a measurement would afford no information whatever as a basis upon which to make a division such as is contended for by the counsel for the Dominion Government.

Now, as to the points of diversion and storage. That is perfectly plain. The amount that is stored in the storage basin at Swift

Current must be measured and the amount that is diverted from the St. Mary into the Milk River must be, as a matter of course, measured and the amount which crosses the international boundary line must be measured in order to make the adjustment as it is contemplated by the treaty. That is what the measurements at the points of diversion and storage refer to.

Mr. MIGNAULT. Senator Walsh, allow me to ask how the measurement should take place on Frenchman River, for instance, assuming that there are, as I think there are, diversion canals north of the international line?

Senator WALSH. Right at the boundary line, sir. If a storage basin should be constructed in Canada to conserve the flood and waste waters of Frenchman River you would measure the storage and Canada would be entitled to take out not only the natural flow, but to take out all of the storage.

Mr. MIGNAULT. What do you understand by the "natural flow"? Do you comprise therein the flood water or what?

Senator WALSH. Yes, sir; you include the flood waters. The natural flow is defined originally in Mr. Root's communication and again in the draft made by Mr. Campbell. Here is the definition as found in Mr. Campbell's draft, page 93 of the record:

> "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.

It means the natural, uninterrupted flow of the river.

Mr. MIGNAULT. What about the flood waters?

Senator WALSH. That is likewise the natural flow. In the month of June you have enormous floods. Those floods are a part of the natural flow. On the contrary, we impound the waters during the winter season—during the nonirrigating season—and put those waters in storage basins, and at certain seasons of the year we swell the volume of the water by letting out this storage flow. The natural flow is then increased by the storage flow.

Mr. MIGNAULT. You do not distinguish between the flood flow—if I may use the term—and the ordinary flow of the stream. You define "natural flow" as comprising all the water which, in the order of nature, would pass a certain point.

Mr. MAGRATH. I can not accept the doctrine you advanced that if you are measuring the water of a watershed you must go to the outlet of the stream as the place of measurement, because I have seen, for instance, in the Milk River no water flowing down the stream at Glasgow, whereas farther up there was at the time a good flow in the channel.

Senator WALSH. Your honor is quite right. It is not an easy thing to do. I appreciate that condition. It might be that the natural flow would be accurately ascertained by measuring the contributions of each tributary at its mouth where it empties into the main stream, but I scarcely think so. We take all those chances, and it is a very rare thing I believe, Mr. Commissioner, that when no water whatever is diverted from the Milk River it is dry anywhere. There is no doubt that there is an underflow, but my idea about it is that the Milk River is never dry.

Mr. MAGRATH. What I mean is that if you have a stream from which you are diverting water for beneficial purposes you must not expect that stream to discharge the full amount of water that it receives.

Senator WALSH. Surely not, because there is a large amount of seepage. It might be more accurate to make the measurement at the mouth of each tributary. Even that would not give the natural flow of the river, because I presume the aggregate would be more than the natural flow of the river.

Mr. MIGNAULT. I may be wrong, but I understand that there are sunken channels in the Milk River—that the water disappears at one point and probably comes up at another. I presume all that would be taken account of if the water were measured at the mouth of the stream.

Senator WALSH. Yes; because in that way you would get whatever the entire aggregate flow is, but the result would not be accurate without an allowance for evaporation and seepage.

Now, commenting upon our argument to the effect that a practical construction had been given to this treaty, that the intention of the parties at the time it was entered into was clearly disclosed by the fact that they established measuring stations at the international crossings, the learned counsel said that is easy of explanation because there were measuring stations close by and they just moved them to the international crossings. The measuring stations were put there, in the first place, by reason of the recognition of the principle that the waters crossing the boundary ought to be divided between the two countries.

If your honors please, in the proper construction to be given to the treaty the intention of the parties is to be gathered as much from their inaction as from their action. They did not establish any measuring stations at the mouths of these streams. This treaty was signed in 1909. This contention was first presented two years ago—in 1915. That is to say, six years had run by and no effort was made to establish stations anywhere which contemplated the measurement of this water upon the basis of the contention now made by the Canadian Government.

Mr. TAWNEY. Senator, I do not think that is quite accurate. This commission very soon after its organization took up with the Secretary of the Interior the matter of establishing gauging stations. There was some communication between the two Governments with reference to it, and an arrangement was entered into between the Irrigation Service of the Dominion and the Geological Survey of the Interior Department, and gauging stations were established by the representatives of these two departments of the two Governments. My recollection is, although I may be inaccurate, that these stations were established at the point where the waters cross the boundary. The matter was referred to Judge Turner, who took it up with the Secretary of the Interior, and in that way there was some communication between the two Governments, and on our side the Geological Survey was authorized to establish and read these gauging stations, and on the other side I think it was the Irrigation Service. Mr. Drake is present here, and he knows more about it than I do. I simply wanted to correct you in that. My recollection is that these gauging stations were established at the crossings there.

Mr. DRAKE. That is quite correct. They were established at the streams crossing the boundary, and it was understood that either Government would establish such further stations as might be required in its own territory.

Mr. TAWNEY. But the stations were at the points where the rivers cross the boundary?

Mr. DRAKE. Those were the joint stations.

Senator WALSH. Now, a few words concerning the treaty power.

Mr. MAGRATH. Have you given any thought, Senator Walsh, to the significance of certain words in the treaty which I will refer to. In Article VI you will observe 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 as one stream for the purposes of irrigation and power." Bearing in mind that the object for which this treaty was created was to settle disputes and keep these two countries from disputes as far as possible, do you attach any significance to those words? When I think of a stream for use for irrigation and power it at once brings into my mind the watershed which supplies the water of that stream. If two streams are one stream it seems to me you bring into the limelight at once the watersheds of the two streams as one watershed. I would like you, if you do not mind, to say a few words as to that.

Senator WALSH. Well, I directed the attention of the commission on yesterday to the origin of that language in the treaty. You will recall that it was used in the draft of Secretary Root originally and then afterwards in a communication by Mr. Newell there was an expression that it seemed to me interpreted the language in the Root proposal. It is confirmed by language in the treaty here a little beyond that which your honor has read. The two rivers were to be united by the diversion canal so that the thing could operate reciprocally. And so the treaty provides that the amount to which either country is entitled may be taken from the one stream or from the other as best suits the purpose. We will assume, for purpose of illustration, that there have been abundant rains in the valley of the lower St. Mary River and there is a great dearth of water in the valley of the Milk River in Canada and that there is a diversion canal taken out there. Canada may say, "We will pass our three-fourths of the water of the St. Mary River or our 500 cubic feet, as the case may be, into the diversion canal and take it out by means of our diversion works on the Milk River for use in that part of Canada through which it flows. That is what, as I understand it, the uniting of the two rivers means.

Now, it is not my understanding of the contention made by counsel for the United States that this treaty is unconstitutional, or that the making of this treaty is beyond the power of the Federal Government, which, as suggested by Mr. Commissioner Powell, if true, would, as a matter of course, operate immediately to dissolve this tribunal, and the commission would have no powers at all. That, however, is not the contention. Appeal is made to the rule that when two constructions of a statute are admissible under the language used, the one of which would make the statute constitutional and the other of which would make it unconstitutional, that construction of the statute is to be given preference which would preserve the statute rather

than destroy it. So it is contended that if the construction given to this treaty—that construction contended for by counsel for the Canadian Government—were accepted, it would result in the destruction of the entire treaty as being beyond the treaty-making powers of the Government of the United States, and, therefore, that construction is to be rejected. That is the sum and substance of the argument.

Now, it is suggested by the learned counsel that that idea presupposes that the negotiators are thoroughly acquainted with the constitutional principle, and that it must be a well-established principle, concerning which there is no doubt whatever. Such knowledge being possessed by the negotiators, it is to be presumed that they did not intend to make a contract which would be violative of the Constitution of the United States. But that contention is not sound. Legislatures are presumed to know the law just the same as every individual is.

Of course, oftentimes it is a most unwarranted assumption, but it is a presumption of the law nevertheless, and so it is to be presumed that the negotiators of this treaty, whether they were fully advised upon the matter or not, knew all about the limitations of the United States Government with regard to the treaty-making power. When a court is called upon to apply the principle invoked it does not pause to inquire into the intellectual acumen or the legal learning of the individual members of the legislature at all. The principle is as applicable as applied to the acts of a legislature made up of ordinary men, even of men without any training at all, as it is to the acts of the Congress of the United States or even those of the United States Senate, which, of course, is supposed to know most everything. So oftentimes a court will take up a statute and consider the question as to whether it is constitutional or not, giving to it the construction which is contended for by one of the parties. Such a question is often difficult to determine. The court finally, after careful study of the matter and inquiry into the authorities, reaches the conclusion that although there may be very grave doubt about it the construction contended for would make the statute unconstitutional, and accordingly rejects it; that is, it rejects the construction of the statute which would make the statute unconstitutional.

Mr. MIGNAULT. I entirely accept your rule of construction, Senator Walsh, that where there are two constructions possible, that one should be adopted which is within the jurisdiction of the legislature enacting the law. But my difficulty is this, and I have expressed it more than once: It is said that the United States could not deal with the water of the southern tributaries of the Milk River, those tributaries being entirely in the State of Montana. If that is true, how could the United States dispose of the waters of the main rivers, that is, the St. Mary River and the Milk River, while that water was within the State of Montana? That is a point of doubt in my mind, and I have expressed it more than once.

Senator WALSH. Of course, the answer to that, Mr. Commissioner, is that from the necessities of the case, the controversy arising with regard to waters crossing the boundary, must be adjusted, either by negotiations, by a treaty, which is entirely within the scope of the Federal Government, or it must remain unsettled, and resort must then be had to mutual reprisals, and possibly to war. Accordingly

it is argued that the power to settle a controversy concerning international waters is in the Federal Government, and it may make whatever disposition is necessary in order to reach a satisfactory adjustment with respect to these waters, but that it is without its power to deal in any way with the waters of the valley, which are not international waters.

Mr. MIGNAULT. You see, Mr. Walsh, the distinction between national and international waters is not a distinction that is written in the law. It may be that you could say, especially in your system, that there are interstate waters, that flow from one State to the other, and therefore there should be international waters; that is, waters that flow from one country to the other. Well, now, so far as the jurisdiction of the United States is concerned, do you make a distinction—I assume that the United States has jurisdiction over interstate matters; of course, I may be wrong, but that is my understanding—well, do you say that the United States has a similar jurisdiction over international matters, when they refer especially to a stream flowing from one country to another, like the St. Mary River and the Milk River? I mean entirely independent of controversy—take the question of jurisdiction—in the absence of any controversy, has the United States jurisdiction over the waters of a river which flows from one country to the other, irrespective of any treaty or any controversy between nations?

Senator WALSH. No, sir; I think I can make the matter clear. The Federal Government has jurisdiction over interstate commerce, and so in the case of a stream flowing from one State into another, so far as commerce is concerned, the jurisdiction of the United States extends over that stream.

Mr. TAWNEY. Provided of course that stream is navigable.

Senator WALSH. Oh, yes; provided it is navigable, but in the case of a nonnavigable stream there is no jurisdiction by reason of the subject matter in the Federal Government. The jurisdiction of the Federal court is ordinarily invoked in that case by reason of diversity of citizenship. That is to say, a citizen of Wyoming comes into the Federal court in the State of Montana and complains that later appropriators in the State of Montana are diverting the waters in the stream to his injury and damage and thus the jurisdiction of the Federal court is invoked, not because the court has any jurisdiction over the subject matter of streams flowing from one State to another, but the jurisdiction is invoked solely on the ground of diversity of citizenship.

Mr. MIGNAULT. Then you say that this diversity of citizenship gives jurisdiction to the Federal power.

Senator WALSH. Yes; but the subject matter itself does not give that jurisdiction.

Mr. MIGNAULT. And I presume, therefore, if there were a controversy between two nations—that is, another country and the United States—then the United States could deal with that controversy and settle it by means of a treaty.

Senator WALSH. Exactly; as I indicated yesterday the Supreme Court settled the controversy between the State of Colorado and the State of Kansas, it being, for that broad purpose, an arbitral tribunal.

Mr. POWELL. Do you draw a distinction, Senator Walsh, between the right of the States over the lower tributaries of the Milk River on the right branch and the upper portion of the Milk River where it crosses the boundary line—I mean between its source and where it crosses the boundary line?

Senator WALSH. No.

Mr. POWELL. The jurisdiction would be the same?

Senator WALSH. Yes, sir.

Mr. POWELL. Well, that being so let us get at the kernel. You say the United States could, in the matter of a treaty, deal with the upper portion of the Milk River, but could not deal with the tributaries on the lower right bank?

Senator WALSH. I take the stand that the United States might negotiate a treaty with Canada looking to the division of the waters which cross the boundary.

Mr. POWELL. Why?

Senator WALSH. Just because the only possible way to settle the differences which exist between countries is by means of a treaty and therefore it is a proper subject of international negotiations. The authority which was read here yesterday clearly discloses that the treaty-making power extends to all subjects which may properly be a subject of international negotiations, within certain definite limitations not important here.

Mr. POWELL. Then you would limit the treaty-making power of the United States to what is immediately connected with the subject in dispute?

Senator WALSH. I should say so.

Mr. POWELL. What is indirectly or secondarily connected with it you would exclude?

Senator WALSH. I would not like to lay down a general rule of that character. I have not in mind the extent to which the rule might go or the limitations.

Mr. POWELL. Take this—the United States can not go outside of the territory in question to find some factor which could be used to settle the difficulty.

Senator WALSH. It can not seize upon private property within the country and dispose of that private property for the purpose of settling the dispute. That brings me to the next point to which I desire to address myself to the commission.

Reference was made yesterday to one of the authorities which questions the powers of the United States to cede any portion of the territory of the State without the consent of that State. Now, if your honors please, it is essential to distinguish in these matters between political sovereignty and ownership of the soil. That the Government of the United States may by treaty cede political sovereignty over a portion of any State, I entertain no doubt whatever. That it could not, while retaining political sovereignty over a State, cede the title to the property within that State to a foreign Government and transfer it out of the hands of the people who own it, it seems to me admits of no controversy at all.

Mr. MIGNAULT. Then, Senator, if the United States could not dispose of the waters that would be the property of the State, how could it agree to make a division of the waters of the Milk River or of the

waters of the St. Mary River—because as that implies, of course, that the United States will not take away water so as to render that division useless, so it implies that the United State will prevent the water while in the State of Montana from being diverted to the prejudice of the inhabitants of the State of Montana?

Senator WALSH. Here is the reason, Mr. Commissioner, as it appeals to me. Every man who digs a ditch to take water out of the Milk River within the State of Montana digs it in recognition of the fact that Canada may be able finally to divert that water. He digs his ditch practically as a servient estate, and the only guaranty he has is in the treaty power of the United States to negotiate with Canada to allow a portion of that water to come down to him. But when you take the case of a tributary flowing into the Milk River from the south, why he is perfectly immune from any interference with his right to the water on the part of Canada.

Mr. MIGNAULT. But it seems to me that this treaty means that the United States has disposed of one-half of the natural flow of the St. Mary River, so that according to your argument it disposes of something which belongs to the State of Montana, that is to say, it prevents the State of Montana from taking that out, and prevents it reaching the boundary.

Senator WALSH. Yes; but the State of Montana owns that, of course, subject to the natural right of Canada to have a portion of its waters. And in the same way, it is subject to the legal application of the treaty.

Mr. TAWNEY. In so far as the international waters are concerned, isn't the right of the State of Montana subject to the right of the Federal Government to use those waters in settlement of any international controversy between the two nations, and therefore the right of the State of Montana is burdened with a servitude, you may say, to the extent that it must surrender where the rights of the Federal Government are in danger?

Senator WALSH. I think that is correct. But to illustrate a point I was making a moment ago. If the Republic of Mexico should enter into a coalition with Germany for the purpose of recovering her so-called lost provinces, as suggested some time ago in the Zimmerman note, the loss of which she had quite forgotten until thus reminded of it, and if under the hard fortunes of war the United States felt obliged to cede to Mexico any or all of the States of Arizona, New Mexico, or Texas, or one-half of those States, I do not imagine anyone could question the validity of that treaty. But, on the contrary, if the United States should retain political sovereignty over all of them, but should undertake to transfer the title to the south half of those States from those who now hold the land to the Government of Germany, why I undertake to say that those States would not recognize that title. Of course, the State regulates the passage of title to real property.

So that, if your honors please, we must distinguish in these matters between political sovereignty and title to property.

Mr. POWELL. It strikes me that in this case you are retaining your political sovereignty over the Milk River, and still the proprietary rights are being invaded.

Senator WALSH. Exactly. I did not speak of it as applicable to the extent of the case; I simply referred to it in connection with a dis-

cussion that arose with reference to the right of the United States to deal with private property.

Mr. POWELL. Well, take the case of Mexico, as you suggested. As I understand it, the United States would be justified, as a treaty-making function, in ceding to Mexico any portion of that territory it wished to settle the matters with Mexico, but it could not take a portion of another State—say, some of the States immediately contiguous; we might say Mississippi—they could not give Mexico a portion of Mississippi in settlement of a war with Mexico where Texas and other States on the border had been invaded.

Senator WALSH. I do not doubt that at all.

Mr. POWELL. It must confine itself to the property and rights which are the immediate subject of controversy and which are the matters in dispute.

Senator WALSH. Well, I would not even so limit it. By way of illustration, suppose in our war with Spain the fortunes of war had gone against us and Spain had prevailed. Now Spain says: "We will make a treaty with you, but you must cede back Florida to us." Now, the State of Florida was not in the controversy in the Cuban war at all. But suppose that the United States went ahead and ceded back Florida to Spain. I do not doubt the power of the United States to make a treaty of that kind. Although there is no express provision in the Constitution authorizing the Federal Government to acquire territory, the Supreme Court said it followed as a matter of course from the power to make war and to enter into treaties. And in exactly the same way it follows from the power to make war and negotiate treaties that the United States may cede away a portion of its territory. But bear in mind that it is only sovereignty over it that is ceded away. It can not dispose of the private right or the title to the ownership of the land within the territory ceded.

But in that connection, if your honors please, a suggestion comes to me that I think is exceedingly worth while. There is a rule applicable to the construction of treaties to the effect that a cession of sovereignty is never to be presumed, and a construction which implies anything of that kind is to be rejected.

As Mr. Commissioner Powell said a moment ago, there is here no cession whatever of sovereignty; if there is a cession of anything it is a cession of property rights to the use of water. But there is something that approaches dangerously near a cession of sovereignty in the suggestion made by the counsel for the Canadian Government. It will be necessary under that contention to establish measuring stations at the mouth of the Milk River, or possibly at the mouths of all the tributaries of the Milk River on this side, and it will be necessary for us to invade the Dominion of Canada with our officials and establish ourselves at the mouth of the St. Mary River—that means going into your territory with our officials to discharge a governmental function.

Mr. MIGNAULT. Oh, as far as that is concerned, it seems to me that the commission will do it. This commission is an international body and will have power, I assume, to carry out its decisions and establish all measuring stations, etc.

Senator WALSH. Yes; but I submit, if your honors please, that that was not to be presumed to have been intended. And so the measur-

ing stations have been established at the international boundary line, where they are properly placed. Of course that does amount, in a way, to an invasion by each country of the territory of the other, because presumably the station is cut by the international boundary line, and is occupied by both Governments, much the same as an international customhouse would be if placed there. But that is quite a different affair from the establishment of a governmental station by one nation some hundred or more miles within the territory of another. A strong presumption is to be indulged, I venture to say, that neither country contemplated anything of the kind.

Mr. TAWNEY. We have here correspondence with reference to this subject from the Canadian Government, and it strikes me that for the convenience of the commission it should be put into the record to show where these stations are and when they were established.

Mr. WYVELL. I think that is a very wise suggestion.

Mr. TAWNEY. If there is no objection, I think it would be well to file the correspondence from both Governments for the convenience of the parties. I have here a letter from the Secretary of the Interior, together with a letter from the Canadian Government, and I think they should be inserted in the record.

Col. MACINNES. I would suggest that we should look over the correspondence and see how much of it is already in the record and how far it is complete.

Mr. TAWNEY. I think it is well to put all the correspondence in. This correspondence I am referring to is information as to when these measuring stations were established and where they are located.

Col. MACINNES. Well, it is a matter with which Mr. Drake is much more familiar than myself.

Mr. TAWNEY. There is nothing new in the correspondence; but I am suggesting that it be put in merely for the convenience of all concerned. It will be convenient to have it in the record.

Mr. WYVELL. Might I make a further suggestion that it would be wise to put in the direct correspondence between the Reclamation Service and Mr. Drake's service in Canada. I have copies of that with me, and I will be glad to put them in if there is no objection to it.

Mr. POWELL. Of course, the bearing of that correspondence on the question that we are now considering is very remote.

Mr. TAWNEY. Well, it may be remote, and it may not. This is a practical interpretation which the two governments or the two services of the two governments have made for themselves.

Mr. MAGRATH. Then I think the correspondence which has been submitted regarding the locations of all the stations should be added as well.

Col. MACINNES. My recollection is, Mr. Tawney, that the matter was considered at the hearing at St. Paul, and that there is already some evidence on the subject.

Mr. TAWNEY. Of course if it is in already, I don't want to have it in again.

Col. MACINNES. Of course, it should be borne in mind and established by correspondence if necessary that there were other stations in contemplation or in existence in the two countries themselves quite apart from anything which might be placed at the boundary.

Mr. WYVELL. That is in Mr. Drake's statement.

Mr. POWELL. I remember being a party to negotiations of that kind with Mr. Turner.

Mr. WYVELL. That will appear in the correspondence. I think it should all go into the record for what it is worth.

Col. MACINNES. Well, naturally we have no objection to its being placed on the record subject to its being checked up; as to anything additional, of course, I do not want the record encumbered.

Mr. WYVELL. The whole story will be told by the correspondence between the Canadian Irrigation Service and our Reclamation Service or the Geological Survey. It is covered by Mr. Drake's statement at St. Paul, but I think the enlightening facts would more fully appear by this correspondence. And I intended at the proper time to make a suggestion that the correspondence ought to be in the record.

Mr. MIGNAULT. So far as it might be a statement of fact it might be objectionable, because the understanding was that we were to wait and decide the legal point first.

Mr. TAWNEY. It seems to me that it is quite immaterial whether it is printed in the record or not. It is on file in the offices of the secretaries of the commission, and if there is the slightest objection to its going in, I do not want it to go in. My suggestion was only for the convenience of those who have not access to our correspondence files.

Col. MACINNES. So far as we are concerned, we have no objection to it going, provided it all goes in. My suggestion would be that Mr. Drake and a representative of the United States Reclamation Service, probably Mr. Newell would be the best one, should go over all this correspondence and select those letters which are applicable and which are agreed upon by both parties, and then these letters should be handed to the secretary of the commission, and if the commission wishes they could be inserted in the report of the sitting exactly at this point, so that they would appear in the printed report.

Mr. TAWNEY. I should think that would be a very good idea.

Mr. GARDNER. Now, Mr. King, have you anything further to say. If you have I think it would be a good idea if you would move up close to the desk, because the acoustic properties of this room are not of the best.

Mr. KING. I very much appreciate the compliment of the suggestion that I should stand closer, because it might indicate that you would expect me to say more than I intend to say. But I fully appreciate that with the able argument to which you have just listened the subject is completely covered and that there is nothing more that I can add to what has already been said. I thank the commission for the invitation to address you further, but I think the subject has been fully covered by the counsel who have addressed the commission. I thank you, gentlemen.

Mr. WYVELL. If your honors please, I haven't a thing more to say. I have listened with great interest and admiration to the very clear and eloquent argument of Senator Walsh. It would be presumption on my part to say anything further. I merely want to call the attention of the commission to the request which I made at the direction of the Secretary of State with regard to an opportunity to be given to the Attorney General to examine the facts and to appear and

make an argument if he so desires. Joined with that is the request of Mr. Dennis that counsel for the Canadian Pacific Railway also desire to submit a brief.

Mr. TAWNEY. Is your request for submission of a brief or an oral argument?

Mr. WYVELL. My request is for an argument if the Attorney General so desires, after studying the matter.

Mr. TAWNEY. I was going to suggest that possibly when the Attorney General has the record of this argument he may conclude that further discussion of the matter is not necessary.

Mr. WYVELL. I quite agree with that suggestion, but I am quite sure that the commission will see that an opportunity should be afforded to the Attorney General for such an argument, if he so desires. When the proceedings here have been printed or typewritten, so that the Attorney General shall have the opportunity of seeing them, I have an idea that he will conclude that further argument is unnecessary. However, I am instructed to ask that he should have the opportunity.

Mr. MIGNAULT. I think the very able arguments we have listened to have exhausted the question, and I wish to express my appreciation of them and thanks to the learned counsel for the very great assistance they have given us in their discussion of the most important issues involved in the consideration of Article VI of the treaty.

Mr. MAGRATH. I have been much pleased with the high plane of the arguments presented by the various counsel in connection with this matter. The very able way in which it has been dealt with, and particularly the fair-minded manner in which Senator Walsh, as representing the Montana water users, has treated the question, is especially gratifying to me. Of course, I have heard a great deal about the St. Mary and Milk Rivers controversy. I believe it is generally known and understood that at one time I was intimately associated with it on the Canadian side.

It is rather a noteworthy fact that the first chairman of the United States section of this commission was a distinguished predecessor of Senator Walsh. I refer to the late Senator Thomas Carter. In the earlier years of the controversy, and preceding the creation of this commission, he was active on the United States side of this issue, just as I was active on the other.

I have listened with a great deal of attention to the case as it has been dealt with from time to time, and I was much impressed with the remark made to-day by one of the counsel to the effect that there has been a good deal of irrelevant matter introduced. Now, I do not think there is anything more trying to a man who has had a close and intimate association with an issue than to have to listen to others deal with that question; and yet I have kept silent—I have never even tried to educate my brother commissioners in regard to the early history of the controversy, because—well it may be that I have discovered they are difficult to convince.

To be more serious, I would like to give a message to the representatives who are here from Montana—that is, to Senator Walsh and the deputy attorney general of Montana, as it is possible there may be a feeling of uneasiness among the people of Montana on account of my past activities in connection with the use of these

waters. I disassociated myself from the Canadian Canal on the 31st of December, 1906. That canal system, as Mr. Dennis said yesterday, is now the property of the Canadian Pacific Railway Co. I have not one penny's interest in the Canadian Pacific Railway, either directly or indirectly, nor in the Canadian Canal. I can not say as much for the Great Northern Railway, which is on the Montana side of the boundary line.

I criticized at one time the treaty dealing with this St. Mary-Milk River issue. However, it is not for me to say whether Canada in article 6 of the treaty made a good bargain or a bad bargain. As long as Canada has made a bargain, be that bargain good or bad, so far as I am concerned Canada will live up to her bargain, whether it is to her advantage or otherwise. Of all the various treaties made between nations, the treaty under which this commission operates, created for the purpose of settling differences between two great nations, is, in my judgment, the greatest treaty that exists. It seems to me that the very stars above us are calling out for the privilege of being able to group themselves so as to write in the firmament of heaven the principles embodied in this treaty, so that all men may be able to read them—especially at this time when the very foundations of civilization are tottering through international strife. A treaty, to bring harmony out of the differences between nations, must be interpreted regardless of national interests. I wish to make it clear that I fully appreciate my responsibilities as a member of the Canadian section of this commission.

Again, let me ask you gentlemen from Montana to carry back to the people of Montana who may be more or less concerned because of my activities in the past in connection with the use of these waters, that the past is a closed chapter while I am a member of this commission. I would like them to know that when I went on this commission I came on here not at my own desire but at the request of the Government, and my sincere desire is to carry out the high and broad principles which must prevail in the interpretation of all treaties between highly civilized peoples that respect their obligations.

Col. MACINNES. Mr. Chairman, my learned friend Mr. Wyvell recently presented to the commission a request made on behalf of the United States Government, as I understand it, a request for an opportunity for the Secretary of State or the Attorney General to make an argument in this matter. I would like to say that if support of such an application were necessary, it is very willingly granted on the part of Canada. I believe that a request made in that way in the conduct of a case before this commission by either of the Governments involved should certainly be granted in the interest of the proper adjudication of the case. I can at any rate say that cordial consent will always be given by counsel for the Canadian Government.

Mr. GARDNER. That application will be taken up by the commission in executive session.

Mr. WYVELL. I would like to say something personally for a moment, to express my personal appreciation of the words of the chairman of the Canadian section, and I am sure that the members from Montana, as well as everyone who has had anything to do with the case, will very greatly appreciate the words that Mr. Magrath has said to us here.

Mr. GARDNER. I would like to say to those present that those of us who are associated with the chairman of the Canadian section of this commission have no fear but what every question that comes before this commission for its determination will be decided, so far as he is concerned, according to his conception of equity and justice, no matter which side of the line it appears to favor.

Now, I wish certainly to thank the very eminent gentlemen who have addressed the commission. On behalf of the commission I wish to express the appreciation of this commission to those very eminent gentlemen for the very elaborate, intelligent, and fair-minded manner in which they have presented this matter at issue. Thank you, gentlemen.

Senator WALSH. Mr. Chairman, I feel like saying, in view of the remarks of Mr. Commissioner Magrath, that I can assure him that while I have followed this controversy with some degree of attention since its initiation I have never heard a suggestion that by reason of any prior association he may have had with the subject matter, or anything that has transpired during the course of the controversy, that there was the slightest reason to apprehend anything but a fair and just decision from him; and I beg to assure him and the other members of the commission now that the utmost confidence is placed by the people of the State of Montana in this commission, and they desire that this commission shall carry out the treaty, no matter in whose favor the decision should be.

(This concluded the hearing on this question.)

MEMORANDUM RELATIVE TO GAUGING STATIONS AT INTERNATIONAL BOUNDARY ON ST. MARY AND MILK RIVERS.[1]

[Prepared by E. F. Drake, Superintendent of Irrigation, Canada, and John C. Hoyt, hydraulic engineer, United States Geological Survey, July 24, 1917.]

The following gauging stations are now maintained jointly by the United States Geological Survey, acting on behalf of the United States Reclamation Service, and the Irrigation Branch, Department of the Interior, Canada.

No.	Stream.	Location.	Date joint operation began.
1	St. Mary River	Near Kimball, Alberta (4½ miles north of boundary)	Spring of 1913.
2	South Fork Milk River.	At Croff's ranch near Browning, Mont. (6 miles south of boundary).	Do.
3	North Fork Milk River.	At Peters's ranch near Kimball, Alberta (2 miles north of boundary).	Do.
4	Milk River	At international boundary (eastern crossing at Spencer's ranch).	Do.
5	Lodge Creek	At Willow Creek police station at international boundary (this is the old Canadian station).	Fall of 1916.
6	Battle Creek	At international boundary (½ mile north of boundary)	Do.
7	Frenchman River	At international boundary (¼ mile north of boundary)	Do.

The locations of these stations were determined by engineers of the two Governments acting jointly. In their maintenance they are visited by engineers of both Governments, the data collected are interchanged, and the final determinations decided upon by joint conferences.

The St. Mary River station near Kimball, Alberta, takes the place of the United States station established September 4, 1902, near the boundary line, and the Canadian station established in 1905 near Kimball.

[1] See list, pp. 193–194.

The South Fork of Milk River station at Croff's ranch is at the location of the United States station established April 28, 1905, on the South Fork of Milk River at Croff's ranch.

North Fork of Milk River station at Peters's ranch takes the place of the United States station established May 8, 1911, at Dubray's ranch, 2 miles south of the boundary, and the Canadian station established July 21, 1909, about 2 miles downstream from the present site.

Milk River station at International Boundary takes the place of the Canadian station established August 7, 1909, and is at practically the same site.

The Lodge Creek station is at the location of a station established by Canada April 25, 1910.

Battle Creek and Frenchman Creek stations were established jointly in the fall of 1916.

Following is a brief history of the negotiations which led to the joint operation of these stations:

Prior to 1912 various conferences of the engineers of the water resources branch of the Survey, held at Washington, were attended by engineers from organizations in Canada who are investigating the water resources of that country. Among these engineers were representatives from the Irrigation Branch, Department of the Interior, and the question of the maintenance of stations on St. Mary and Milk Rivers near the international boundary line was informally discussed by engineers of the two Governments. As a result of this discussion a letter, dated January 25, 1912, was addressed by the Director of the United States Geological Survey to the Commissioner of Irrigation, Canada, suggesting that joint stations be established on international streams to take the place of the independent stations which were then maintained. On March 12, 1912, the Commissioner of Irrigation replied that the suggested cooperation was favored by his department.

The remaining correspondence in reference to this matter follows:

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
OFFICE OF THE DIRECTOR,
Washington, January 25, 1912.

Mr. F. H. PETERS,
Commissioner of Irrigation,
Department of the Interior,
Calgary, Alberta, Canada.

SIR: Since 1902 the water resources branch of the United States Geological Survey has maintained a gauging station on St. Mary River near the international line, and I am informed that your department has for some years maintained a gauging station near this point. As the records of the two stations are practically the same, I believe that a cooperative arrangement for the maintenance of a single station to take the place of the two stations would be to the advantage of both your department and the United States Geological Survey. Such a cooperation will enable the establishment of a station with more refined apparatus, which will increase the value of the records and not materially increase the expense of maintenance to either Government.

It is therefore suggested that a single station be selected by a representative of your department and a representaive of the Geological Survey, and that this station be equipped with the latest type of automatic gauge, a cable and car, and such other apparatus as may be necessary.

In the operation of the station, duplicate copies of the gauge records should be furnished to each office. The hydrographers of each office should visit the station at such times as they are in the vicinity, and the results of all measurements should be exchanged. This will enable each office to check the work of the other and thus insure data of the highest standard.

If agreeable to your department, the Geological Survey will be glad to cooperate to the extent of paying half of the expense of the installation of the station and half of the maintenance after installation. As the number of discharge measurements will depend upon the desires of the respective departments, these should be paid for by the party making them.

Very respectfully,

GEO. OTIS SMITH, *Director.*

IRRIGATION OFFICE,
Calgary, Alberta, February 5, 1912.

SIR: I beg to attach hereto for your information a copy of a letter which has been received from the Director of the United States Geological Survey, in which he takes up the matter of the United States and Canada establishing a joint stream-measuring station on the St. Mary River at a point near the international boundary.

The matter is set forth clearly in the director's letter, and I may say that all his suggestions appear to me to be good ones. In my opinion it would be a very friendly and a very beneficial action for this department to meet the suggestion of the United States Geological Survey in regard to this matter, and I therefore submit the same to you for your favorable consideration.

Your obedient servant.

F. H. PETERS, *Commissioner of Irrigation.*

The SECRETARY, DEPARTMENT OF THE INTERIOR,
Ottawa, Canada.

DEPARTMENT OF THE INTERIOR,
Ottawa, Canada, February 20, 1912.

SIR: I beg to acknowledge the receipt of your letter of the 5th instant, forwarding a copy of a letter received by you from the Director of the United States Geological Survey, with respect to a proposal for the establishment of a joint stream-measuring station on the St. Mary River, at a point near the international boundary.

The department recognizes that it is of the utmost importance that records of stream flow, both on the St. Mary and Milk Rivers, should be not only accurate but accepted as such by both Governments, and that the use of a modern, up-to-date gauging station, equipped with the latest devices and constructed under the supervision of officers of both Governments, offers the easiest and most practical method of obtaining such results.

It has been decided, therefore, that this department will cooperate with the United States Geological Survey in establishing and maintaining such a station on St. Mary River near the international boundary line. You are, therefore, authorized to communicate with the Director of the United States Geological Survey and inform him to this effect.

You should arrange with the director for the establishment of such a station at the most convenient point and for its equipment with the best modern devices. You should report your action to the department from time to time and, should it become necessary to purchase any expensive equipment in connection with the station, you should submit a full explanation in connection with the matter.

It might also be well to suggest to the Director of the United States Geological Survey the advisability of establishing a similar station on Milk River at the most easterly point where that stream crosses the international boundary. This, as you are aware, is a matter which you have previously discussed, and it might be well to ascertain the views of the United States authorities with respect to it as well as the station on the St. Mary River.

In connection with the expense of installing a station on St. Mary River, I am to suggest that it would be well for you, after consultation with the director, to submit an estimate of the equipment required and the probable cost of installing the station. It might then be advisable for one Government or the other to bear the full cost of installation and for the other Government, afterward, to pay its fair proportion of such cost.

Your obedient servant,

L. PEREIRA, *Assistant Secretary*

F. H. PETERS, Esq.,
Commissioner of Irrigation,
Calgary, Alberta.

DEPARTMENT OF THE INTERIOR,
IRRIGATION BRANCH,
Calgary, Alberta, March 12, 1912.

SIR: With reference to your letter of the 25th January, in which you suggested that the United States and Canada might join in establishing and operating an up-to-date stream measurement station on the St. Mary River

near the international boundary line, I beg to say that your communication was forwarded by me to the Secretary of the Department of the Interior, at Ottawa, and I attach hereto for your information a copy of the reply that has been received from him.

On reading this letter it will be made clear to you that the Canadian Government is most willing to enter into the agreement suggested by yourself, and that in addition to the St. Mary River, they would look favorably upon the joint erection of an up-to-date station on the Milk River at its eastern crossing out of Canada.

The letter from our Secretary, of which a copy has been attached, places this matter in a position where we, on our side, can now go ahead and deal with this matter from our office here in Calgary, and I would therefore be glad to now take the matter up with you definitely as regards the installation of the station.

In this respect I would say that I think the simplest and the quickest way to arrange this matter will be to arrange a meeting between myself and such officer of your department as you may see fit, and that we should then go into the matter together and actually pick out the proper location of the station, the gauge rod, etc., on the ground, and decide upon the type of equipment to be installed. If such a meeting could be arranged and your representative be given fairly wide powers, I think that this matter could be satisfactorily and quickly arranged.

With regard to the estimate of the cost of the installation of the stations, in my judgment it will not be possible to prepare this until the style of equipment and particularly the location of the station has first been decided upon.

In conclusion I would say that in my opinion the establishment of a joint station at the eastern crossing of the Milk River is quite as important as the establishing of a joint station on the St. Mary River, and therefore I would ask you to give this matter your special attention.

Your obedient servant,

F. H. PETERS, *Commissioner of Irrigation.*

GEORGE OTIS SMITH, Esq.,
Director U. S. Geological Survey, Department of the Interior,
Washington, D. C.

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
OFFICE OF THE DIRECTOR,
Washington, March 21, 1912.

Mr. F. H. PETERS,
Commissioner of Irrigation,
Department of the Interior, Calgary, Alberta.

SIR: Your letter of March 12, relative to the establishment of gauging stations on St. Marys and Milk Rivers near the international boundary line is greatly appreciated.

Suitable authority and directions have been forwarded to Mr. W. A. Lamb, district engineer, Helena, Mont., so that he may arrange to meet you by appointment for the purpose of locating and equipping the measurement stations. You will probably receive a letter from him within a few days and I hope that the establishment of the two stations may speedily be effected.

Very respectfully,

GEO. OTIS SMITH, *Director.*

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
OFFICE OF THE DIRECTOR,
March 21, 1912.

Hon. JAMES A. TAWNEY,
Chairman The International Joint Commission,
Southern Building, Washington, D. C.

SIR: I have the honor to inform you that an agreement has recently been perfected with the Commissioner of Irrigation, Department of the Interior, Calgary, Alberta, under which there will shortly be established stream-flow measurement stations on St. Mary and Milk Rivers near the international boundary line.

The cost of installation and maintenance of these two stations will be borne jointly by the Geological Survey and the Irrigation Branch of the De-

partment of the Interior of Canada, and duplicate copies of all records will be furnished to each office.

Gauging stations are now being maintained by both Governments on these two streams and the aforesaid consolidation has been arranged for the purpose of avoiding further duplication of work and cost and procuring a continuous record, concerning which there can be no subsequent disagreement.

I shall be very glad to receive from you any comments and suggestions that you may have to make in this matter.

Very respectfully,

GEO. OTIS SMITH, *Director.*

INTERNATIONAL JOINT COMMISSION,
Washington, D. C., March 25, 1912.

Hon. GEORGE OTIS SMITH,
Director United States Geological Survey,
Washington, D. C.

DEAR SIR: I am in receipt of your communication of the 21st instant addressed to Mr. Tawney, the chairman of this commission, announcing that an agreement has recently been perfected with the Commissioner of Irrigation, Department of the Interior, Calgary, Alberta, under which there will shortly be established stream-flow measurement stations on St. Mary and Milk Rivers near the international boundary line and requesting any comments and suggestions the chairman may have to make in the matter.

Mr. Tawney will be in Washington this week, and upon his arrival your letter will be laid before him for his attention.

Very truly yours,

L. W. BUSBEY, *Secretary.*

INTERNATIONAL JOINT COMMISSION,
March 28, 1912.

Hon. WALTER L. FISHER,
Secretary of the Interior,
Washington, D. C.

Sir: I herewith inclose a copy of the rules adopted by this commission to govern its procedure in all cases where applications are made and the approval of the commission is sought under Articles III, IV, and VIII of the treaty—a copy of which treaty is also printed with the rules. Under Article VI of the treaty you will observe the measurement and apportionment of the waters of the St. Mary and Milk Rivers must be made jointly by the reclamation officers of the United States and the irrigation officers of His Majesty's Government under the direction of this commission. At the last meeting of the Commission the following action was taken for the purpose of ascertaining the pleasure of the reclamation officers on the part of our Government and of the irrigation officers on the part of the Dominion Government with respect to the measurement and apportionment of these waters:

> "*Ordered*, That the chairmen of the commission in the two countries address a communication to the proper reclamation officials of their respective countries, informing them that the commission is ready to cooperate with them in the measurement and apportionment of the waters of St. Mary and Milk Rivers, as provided for in Article VI of the treaty, and asking them for their views as to the proper method of proceeding, and when in their judgment it would be proper to take the matter up." (Order of Jan. 30, 1912.)

Will you kindly advise me of your wishes in the premises, as the commission will meet on Tuesday next, and greatly oblige

Yours very respectfully,

JAMES A. TAWNEY, *Chairman.*

MARCH 28, 1912.

Hon. GEORGE OTIS SMITH,
Director United States Geological Survey,
Washington, D. C.

MY DEAR MR. SMITH: I am in receipt of yours of the 21st instant, which the Secretary of the Commission has acknowledged.

I note your statement with reference to your having effected an agreement with the Commissioner of Irrigation, Department of the Interior, Calgary,

Alberta, under which you say there will shortly be established stream-flow measurement stations on St. Mary and Milk Rivers near the international boundary line.

In the treaty between the United States and Great Britain, a copy of which I herewith inclose together with a copy of the rules of procedure adopted by the International Joint Commission for the guidance of those who have matters to present for our consideration and determination, you will observe that Article VI provides that the St. Mary and Milk Rivers and their tributaries on both sides of the line are to be treated as one stream for the purposes of irrigation and power and that the waters thereof shall be apportioned equally between the two countries, etc. Also that 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 this commission. The data, which you now no doubt have, as gathered by the gauging stations heretofore maintained on both sides of the line will no doubt be valuable to the irrigation officers of the two Governments and to the commission in making the apportionment provided for in Article VI. At the last meeting of this commission the chairmen of the commission on both sides of the line were instructed to address a letter to the proper officers with a view to ascertaining when it would be most convenient or advisable to take up the question of the apportionment with the International Joint Commission. I shall, therefore, address a letter to the Secretary of the Interior on this subject, and if you have any suggestions to offer in the premises I would be very glad to receive them.

Yours very truly,

JAMES A. TAWNEY, *Chairman.*

DEPARTMENT OF THE INTERIOR.
UNITED STATES GEOLOGICAL SURVEY,
Washington, March 30, 1912.

Hon. JAMES A. TAWNEY,
Chairman International Joint Commission,
Southern Building, Washington, D. C.

MY DEAR MR. TAWNEY: In reply to your letter of March 28:

Article 6 of the rules of procedure of the International Joint Commission makes it appear that the agreement that has been effected with the Commissioner of Irrigation of Alberta might have appropriately been referred to you before it had proceeded so far. I hope that the agreement will not interfere with or embarrass in any way the arrangements that your Commission has made, and I shall be glad to suspend or postpone any action in the matter on advice from you.

I inclose herewith copies of the letters from the Assistant Secretary of the Interior of the Dominion of Canada and from the Commissioner of Irrigation of Alberta.

I have only one suggestion relative to your proposal to address the Secretary of the Interior on the matter referred to in your letter. The final paragraph of Article VI appears to provide that the measurement of water in St. Mary and Milk Rivers upon which apportionment shall be based will be made "from time to time." It is not believed that any equitable apportionment can be assured if made on such a basis. Moreover, there would ultimately be considerable economy in the continuous maintenance of the proposed stations, for after the two stations had been properly rated the flow of the rivers at those points could be ascertained by wire at any time and the apportionment based on the results, without any field procedure on the part of agents of either of the two Governments. The proposed stations can be maintained very cheaply along with regular work in the vicinity, and it is my belief that from every point of view you would find the arrangement more satisfactory.

Very respectfully,

GEO. OTIS SMITH, *Director.*

INTERNATIONAL JOINT COMMISSION,
Washington, D. C., April 1, 1912.

Hon. GEORGE OTIS SMITH,
Director United States Geological Survey,
Washington, D. C.

DEAR MR. SMITH: In reply to yours of March 30 will say that at the same time I wrote you I wrote to the Secretary of the Interior on the subject of the measurement and apportionment of the waters of the St. Mary and Milk Rivers in Montana. I have not yet heard from the Secretary. The commission meets to-morrow. Inasmuch as these measurements and apportionment of these waters must be made under the supervision and direction of the International Joint Commission under the treaty of January 11, 1909, I think it would be advisable to defer any further action on your part until we have had some understanding with the Reclamation Service in both countries, or until the plan for such measurement and apportionment can be agreed upon. If you can possibly assist in securing prompt action on the part of our Government in the premises, so that the Commission may adopt some plan of investigation at its present session, I would appreciate it.

Yours very truly,

JAMES A. TAWNEY, *Chairman.*

INTERNATIONAL JOINT COMMISSION,
Washington, D. C., April 3, 1912.

Hon. ROBERT ROGERS,
Minister of the Interior, Ottawa, Canada.

DEAR MR. ROGERS: I herewith inclose a copy of the rules adopted by the International Joint Commission to govern its procedure in all cases where applications are made and the approval of the commission is sought under Articles III, VI, and VIII of the treaty, a copy of which treaty is also printed with the rules. Under Article VI of the treaty you will observe the measurement and apportionment of the waters of the St. Mary and Milk Rivers must be made jointly by the reclamation officers of the United States and the irrigation officers of His Majesty's Government under the direction of this commission. At the last meeting of the commission the following action was taken for the purpose of ascertaining the pleasure of the reclamation officers on the part of the United States and of the irrigation officers on the part of our Government with respect to the measurement and apportionment of these waters:

> "*Ordered:* That the chairmen of the commission in the two countries address a communication to the proper reclamation officials of their respective countries, informing them that the commission is ready to cooperate with them in the measurement and apportionment of the waters of St. Mary and Milk Rivers, as provided for in Article VI of the treaty, and asking them for their views as to the proper method of proceeding and when, in their judgment, it would be proper to take the matter up."

Will you kindly advise me of your wishes in the premises and greatly oblige,

Yours faithfully,

TH. CHASE-CASGRAIN, *Chairman.*

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
OFFICE OF THE DIRECTOR,
Washington, April 4, 1912.

Mr. F. H. PETERS,
Commissioner of Irrigation,
Department of the Interior,
Calgary, Alberta, Canada.

SIR: I have the honor to inform you that it appears necessary to postpone action with respect to the establishment of gauging stations on Milk and St. Mary Rivers under joint agreement, arrangements for which were confirmed by my letter of March 21, 1912. It is evident that under the treaty of January 11, 1909, the measurement and apportionment of these waters must be under the supervision and direction of the International Joint Commission. I have

been advised by the chairman of the United States section of this commission to defer action in the establishment of the stations until the Joint Commission has considered the matter and has come to some understanding with the reclamation service of both countries.

I trust that the necessary delay in the establishment of these joint stations will not be protracted.

Very respectfully.

GEORGE OTIS SMITH, *Director.*

APRIL 4, 1912.

HON. JAMES A. TAWNEY,
Chairman International Joint Commission,
Southern Building, Washington, D. C.

MY DEAR MR. TAWNEY: In compliance with the advice contained in your letter of April 1, I have directed that the establishment of the stations on St. Mary and Milk Rivers in Montana, near the boundary line, be postponed and have advised the Commissioner of Irrigation of Alberta concerning the action. I shall be glad to assist in every way possible in securing prompt action that will enable the Commission to adopt some plan of investigation.

Very respectfully.

GEO. OTIS SMITH, *Director.*

DEPARTMENT OF THE INTERIOR,
IRRIGATION OFFICE,
Calgary, Alberta, April 12, 1912.

SIR: I beg to acknowledge the receipt of your letter of April 4, in which you state that it appears necessary to postpone action with respect to the establishment of gauging stations on the Milk and St. Mary Rivers under joint agreements of the Governments of the United States and of Canada.

I regret that we will not be able to proceed with this arrangement immediately, and I trust that the International Joint Commission will at an early date take such steps as will enable us to establish these joint gauging stations.

Your obedient servant,

F. H. PETERS, *Commissioner of Irrigation.*

GEORGE OTIS SMITH,
Director United States Geological Survey,
Washington, D. C.

MINISTER OF THE INTERIOR,
Ottawa, Ontario, Canada, April 16, 1912.

MY DEAR MR. CASGRAIN: Mr. Lawrence Burpee called at my office recently in reference to your letter written from Washington on the 3d instant, regarding the measurement and apportionment of the waters of the St. Mary and Milk Rivers. Your letter came to hand during my absence, but was at once referred to the proper officer for attention, and I may say that systematic measurements of the flow of the St. Mary and Milk Rivers in Canada have been made under the direction of the Commissioner of Irrigation for several years past, and complete records of the results obtained will soon be available for submission to the Commission if required.

A full statement of the case, together with certain suggestions as to the apportionment of the waters of these streams between Canada and the United States, under the provisions of the waterways treaty, is now being prepared and will be submitted within two or three days.

You will be further advised as soon as possible in reference to this matter.

Yours sincerely,

R. ROGERS.

T. CHASE-CASGRAIN, Esq.,
Chairman International Joint Commission,
Montreal.

HELENA, MONT., *April 20, 1912.*

Mr. R. H. CAMPBELL,
Superintendent Forestry Branch,
Department of the Interior, Ottawa, Canada.

DEAR SIR: It is desired to secure daily discharge measurements of the following streams in the Milk River drainage basin in Canada at the various stations established and maintained by the Department of the Interior, Canada:

North Branch of Milk River at Peters's ranch.
North Branch of Milk River at Mackie's ranch.
North Branch of Milk River at Knight's ranch.
North and South Branches of Milk River at junction.
Milk River at Milk River station.
Milk River at Writing on Stone.
Milk River at Pendant D'Orielle.
Milk River at Spencers lower ranch (eastern crossing).
St. Mary River at Kimball.

In November, 1910, you furnished this office with copy of publication showing these stream measurements during 1909. If similar publications have been issued for 1910 and 1911 these would be desired. However, if this data has not yet been published you would greatly oblige this office if you could furnish tabulation showing daily discharges for 1910 and 1911.

Very truly yours,

H. N. SAVAGE,
Supervising Engineer.

MINISTER OF THE INTERIOR.
Ottawa, Ontario, Canada, April 23, 1912.

MY DEAR MR. CASGRAIN: You wrote me on the 3d in reference to the measurement and apportionment of the waters of the St. Mary and Milk Rivers, under Article VI of the waterways treaty, and I inclose for your information a copy of a report and schedule prepared in the branch of the department dealing with irrigation matters.

Yours sincerely,

R. ROGERS.

TH. CHASE-CASGRAIN, Esq.,
International Joint Commission, Montreal.

DEPARTMENT OF THE INTERIOR, IRRIGATION BRANCH,
Ottawa, April 13, 1912.

Reference 4573. Request from the secretary of the International Joint Commission for the minister's views re the measurement and apportionment of the waters of St. Mary and Milk Rivers, under Article VI of the waterways treaty.

MEMORANDUM:

With reference to the above I beg to say that systematic measurements of the flow of St. Mary and Milk Rivers in Canada have been made under the direction of the Commissioner of Irrigation for several years past and complete records of the results obtained will soon be available for submission to the International Joint Commission if required.

A full statement of the case, together with certain suggestions as to the apportionment of the waters of these streams between Canada and the United States, under the provisions of the waterways treaty, is now being prepared and will be submitted within two or three days.

Respectfully submitted.

R. H. CAMPBELL.

W. W. CORY, Esq., C. M. G.,
Deputy Minister, Department of the Interior.

INTERNATIONAL JOINT COMMISSION, OTTAWA, CANADA,
Montreal, April 25, 1912.

Hon. ROBERT ROGERS,
Minister of the Interior, Ottawa, Ontario.

ST. MARY AND MILK RIVERS.

DEAR SIR: I am in receipt this day of your favor of the 23d instant, with copy of a report and schedule prepared in the branch of the department dealing with irrigation matters, for which I beg you to accept my thanks. The Canadian section of the commission is to have a meeting in Ottawa at the beginning of May, when I will bring the whole matter up before my colleagues.

As to the question of the interpretation of the treaty, I am of opinion that this is a point which will have to be submitted to the Joint Commission, and I have no doubt that it will be considered at our next meeting to take place in Washington toward the end of May.

Yours faithfully,

TH. CHASE-CASGRAIN.

DEPARTMENT OF THE INTERIOR, IRRIGATION BRANCH,
Ottawa, May 1, 1912.

MEMORANDUM:

Attached hereto is the statement called for by the deputy minister's memorandum of the 12th instant re international boundary waters, etc., as follows:

1. Schedule showing the character and extent of all privileges granted to the use of such waters and such applications for the use of water as have been refused or are still under consideration.

2. Copies of orders in council, authorization for the construction of works, licenses to divert and use water, and applications to use water.

3. Copies of measurements of such waters up to December 31, 1910.

NOTE.—The record for 1911 has not yet been received from the Commissioner of Irrigation, but is expected shortly, and will be submitted as soon as received.

4. A statement of such matters as should be brought before the International Joint Commission for consideration in connection with Article VI of the waterways treaty.

NOTE.—All the above are submitted in triplicate.

Respectfully submitted.

R. H. CAMPBELL.

W. W. CORY, Esq., C. M. G.,
Deputy Minister, Department of the Interior, Ottawa.

Statement re the division of the waters of St. Mary and Milk Rivers and their tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan, under the provisions of Article VI of the international waterways treaty.

1. It is highly important that the Canadian Government should know at an early date, and with some degree of exactness, what quantity of water it is privileged to divert from these streams within Canadian territory. Many applications to divert and use the waters of some of these streams for irrigation purposes have been received, but can not be granted, owing to uncertainty as to Canada's share of the waters. This matter is of special importance in so far as it affects Frenchman River, Lodge Creek, and Battle Creek, tributaries of Milk River, and their several tributaries in the Provinces of Alberta and Saskatchewan, as settlement is rapidly extending in this district and many more applications for water for irrigation purposes would doubtless have been received but for the uncertainty as to the available supply at the disposal of the Canadian Government.

2. Article VI of the treaty provides that the waters of the St. Mary and Milk Rivers, including all their tributaries, are to be apportioned equally, but that more than half may be taken from one stream and less than half from the other by either country. This implies that the details of the division of the waters of the several tributaries shall be arranged between the proper officers of the respective countries, with due regard to the equal division of the total flow of the combined streams; but it is impossible, under the general provisions of the treaty, to calculate the proportion of the flow of any particular stream or tributary that may be dealt with by Canada.

To equally apportion the flow of the combined streams the total flow must first be determined, and this requires a decision as to the points at which such total flow shall be measured. It is suggested that the International Joint Commission should decide upon the approximate location of the necessary gauging stations on the St. Mary and Milk Rivers and any or all of their tributaries, and that the construction of such stations and the obtaining of the necessary records of stream flow be intrusted to the officers of the United States Reclamation Service and to the officers of the Irrigation Branch of the Department of the Interior of Canada within their respective countries. It is further suggested that where such gauging stations are established at or near the international boundary, such stations be under the joint control of the officers of both countries, in order that the methods of determining the flow be satisfactory to both countries and the records be accepted as accurate by both.

3. It is understood that the water to be divided is the "natural flow" of the streams, which may be interpreted as the flow of each river system which would pass the points of final measurement if no artificial obstruction had been placed in the stream or any of its tributaries and if no water had been diverted from or added to the flow before reaching such points of measurement.

In determining the total flow of Milk River it is regarded as important that the subsurface flow as well as the visible flow should be measured, as the subsurface flow of this stream is believed to be considerable. It will probably be found necessary to construct a gauging station of special design for the purpose of measuring this subsurface flow, and it is suggested that the design and construction of such station should be intrusted to the officers of the United States Reclamation Service and the Irrigation Branch of the Department of the Interior of Canada.

4. Under the provisions of Article VI of the treaty the channel of Milk River in Canada may be used for the conveyance of the water diverted by the United States from St. Mary River. The quantity of water to be so diverted into the channel of Milk River is understood to be approximately 1,000 cubic feet per second. The effect of diverting such a quantity of water into the channel of Milk River in Canada will undoubtedly be to the prejudice of the rights of property owners along the course of the stream. The extent or character of the damage can not be definitely ascertained until the actual diversion is made, but some of the effects can be foreseen, and it is suggested that special provision be made in advance regarding such damages as can now be definitely predicted. These are:

(*a*) The provision of permanent highway bridges to permit of convenient travel across the river by settlers. (In its present condition the stream is readily fordable at convenient points except during its brief flood period.)

(*b*) The provision of checks and other structures to prevent scour and to confine the river within its present bed as far as may be possible. (At certain points the river bed is shallow and the turning into it of such a large additional quantity of water will cause it to overflow the banks and submerge and damage lands now used for grazing and farming.)

Provision is made in Article XI of the treaty for the redress of injuries sustained as the result of interference with or diversion from their natural channel of such waters on either side of the boundary, but such provision apparently contemplates the taking of legal action by the parties so injured after the injury has occurred. It is suggested that, with respect to the particular classes of damage above cited, provision should be made, under the authority of the International Joint Commission, for preventing such damage or avoiding such interference with convenient travel.

5. Sage Creek, which flows southward across the boundary in township 1, range 2, west of the fourth meridian, has heretofore been considered a tributary of Milk River, but is not such in fact. Sage Creek, after leaving Canadian territory, spreads out over a large (ordinarily dry) lake bed, from which it has no outlet. This dry lake lies wholly in the State of Montana and is about 10 miles long by an average width of some 1½ miles, its general location being from northwest to southeast close to the boundary. The lake is bounded on the south by a low range of hills and at some time has probably held from 2 to 3 feet of water in its deepest parts, but has been dry since 1908. Sage Creek can not be considered as a tributary of Milk River.

DEPARTMENT OF THE INTERIOR.
FORESTRY BRANCH.
Ottawa, April 26, 1912.

Reference No. 4573. Request from the secretary of the International Joint Commission for the minister's views re the measurement and apportionment of the waters of St. Mary and Milk Rivers under Article VI of the waterways treaty.

MEMORANDUM.—Mr. Campbell—Stream Measurements.

Systematic measurements of the flow of St. Mary and Milk Rivers in Canada have been made for several years, and complete records of the results obtained at the several gauging stations since 1909 are available for the use of the International Joint Commission whenever required. Some measurements were made prior to 1909, but are of comparatively little value, as they do not cover any complete season. A schedule is appended showing the points at which regular discharge measurements are now being made.

An arrangement was recently made for the establishment of an automatic gauging station on St. Mary River, near the international boundary line. It was the intention that this station should be established and used jointly by the officers of the United States Geological Survey and the Irrigation Branch of this department and that it should be equipped with the best obtainable apparatus for accurately measuring the flow of the stream at this point.

The arrangements for the establishment of this gauging station were well under way when we were informed by the Director of the United States Geological Survey that he had been advised by the Chairman of the United States section of the International Joint Commission to defer action in the establishment of station until the question has been considered by the commission and some understanding reached between the two countries. The project has therefore been abandoned for the present.

It will doubtless be found necessary to establish gauging stations similar in character to the one above described on Milk River at or near the most easterly crossing of the international boundary by that stream, as well as on St. Mary River, and it is suggested that the question be taken into consideration by the International Joint Commission at the earliest possible date, in order that suitable stations may be established at an early date at such points as may be considered necessary.

It is assumed that measurements have been made by the officers of the Geological Survey or the Reclamation Service of the flow of those portions of St. Mary and Milk Rivers within the United States, and it is suggested that such measurements, both in Canada and the United States, be continued under the direction of the Reclamation Service and the Irrigation Branch of this department, and that the records so obtained be exchanged between the Commissioner of Irrigation and the Director of the United States Reclamation Service; also that these officers be authorized to establish such additional gauging stations as they may consider necessary and to cooperate with a view to securing the further data necessary to the proper apportionment of the waters of these streams between the respective countries.

APPORTIONMENT.

Under the terms of the treaty the apportionment of the waters of St. Mary and Milk Rivers (*and their tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan*) shall be made jointly by the officers of the United States Recamation Service and the Irrigation Branch of this department, under the direction of the International Joint Commission.

It is suggested that preliminary to any final apportionment the above-mentioned officers should, by the exchange of records of stream flow and water rights, by correspondence, and, if necessary, by personal inspection, endeavor to reach an agreement as to the quantities of water which either country should be permitted to use from the several streams comprised in the system and the periods during which such diversion should be made; the result of such preliminary work to be submitted by the respective Governments to the International Joint Commission for approval or for the adjustment of any differences which may arise.

SUGGESTED DATE FOR CONSIDERATION BY COMMISSION.

It is suggested that action by the International Joint Commission might be deferred until the preliminary investigation above referred to has been carried out by the officers referred to. It might, however, be advisable to have the question of the interpretation of the treaty with respect to the streams tributary to Milk River taken up and decided at an early date, as such a decision would facilitate the working out of a basis for the apportionment of the water.

Schedule of points at which gauging stations have been established on St. Mary and Milk Rivers and their tributaries in Canada.

Stream.	Location of station.	When established.	Regular observations taken since—
St. Mary River	Sec. 25-1-25-4..	1905.....	April, 1908.
Milk River, North Branch	Sec. 13-1-23-4..	July, 1909...	July, 1909.
Do	Sec. 13-2-21-4..	.....do.....	Do.
Do	Sec. 19-2-18-4..	.....do.....	Do.
Milk River, main stream	Sec. 23-2-18-4..	.....do.....	Do.
Do	Sec. 28-2-16-4..	.....do.....	Do.
Do	Sec. 35-1-13-4..	August, 1909	Do.
Do	Sec. 16-2-8-4....	.....do.....	Do.
Do	Sec. 3-1-5-4.....	.....do.....	Do.
Middle Creek, branch of Lodge Creek	Sec. 30-5-29-3..	July, 1908...	Do.
Battle Creek	Sec. 22-5-30-3..	August, 1909	August, 1909.
Do	Sec. 33-5-29-3..	June, 1909...	June, 1909.
Frenchman River	Sec. 31-6-21-3..	July, 1908...	April, 1909.
Frenchman River, North Fork	Sec. 16-7-22-3..	.....do.....	August, 1908.
Tributaries of Frenchman River:			
Fairwell River	Sec. 30-6-24-3..	June, 1909...	June, 1909.
Davis Creek	Sec. 29-6-25-3..	May, 1909...	May, 1909.
Belanger Creek	Sec. 18-7-25-3..	June, 1909...	June, 1909.
Lone Pine Creek	Sec. 27-7-26-3..	July, 1909...	July, 1909.
Sucker Creek	Sec. 24-6-26-3..	May, 1909...	May, 1909.
Oxarart Creek	Sec. 20-6-27-3..	June, 1909...	June, 1909.

E. F. DRAKE.

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
Washington, May 13, 1912.

Hon. JAMES A. TAWNEY,
Chairman International Joint Commission,
Southern Building, Washington, D. C.

MY DEAR MR. TAWNEY: In reference to your letter of April 1 advising the Survey to defer action in making changes in the installation and equipment of the gauging stations in Montana near the international line:

The United States Reclamation Service, for which the Geological Survey is maintaining these stations, has requested that the Survey arrange for the reequipment of the stations at as early a date as possible in order to obtain the flood run-off which will take place within the next month. It is therefore urged that you advise the Survey, at an early date, your wishes in the matter. Allow me to state again that the proposed cooperation is not for starting any new work, but only in connection with changes at stations which are already being carried on by the Geological Survey in cooperation with the Reclamation Service. Furthermore, the records at points near these stations are being duplicated by the Irrigation Department of Alberta.

Very respectfully,

GEO. OTIS SMITH, *Director.*

INTERNATIONAL JOINT COMMISSION,
Washington, D. C., June 4, 1912.

Hon. GEORGE OTIS SMITH,
Director United States Geological Survey,
Washington, D. C.

MY DEAR MR. SMITH: Your letter of May 13 addressed to me here at the office of the International Joint Commission was not forwarded to me at my

home by Mr. Busbey for the reason that I was expected in Washington very soon after that date. I did not arrive, however, until the last part of last week, and, therefore, did not receive your letter until then.

I note what you say in regard to the desirability of my communicating to you the wishes of the International Joint Commission with respect to arrangement for reequipment of the gauging stations in Montana in the Milk River and St. Mary River as soon as possible in order to obtain the flood run-off. I have no doubt of the desirability of this work being done and that the record would be of material advantage to the commission in the matter of the measurement and apportionment of the waters of these two rivers which must be conducted under direction of this commission by the provisions of Article VI of the treaty of January 11, 1909. For the purpose of ascertaining the wishes of the Secretary of the Interior in respect to the measurement of these streams and to determine the time that would be most convenient and appropriate for the commission in conjunction with the Reclamation Service of the two Governments to take the matter up, I addressed a letter to the Secretary of the Interior on March 28, 1912, copy of which I herewith inclose. The Secretary did not reply to this letter and for that reason nothing has been done in the premises, as the commission has been waiting to hear as to when it would be most desirable for the commission to take the matter up with the Reclamation Service. Owing to important official engagements which certain members of the Canadian section of the commission have in England between now and the 1st of September it will not be possible for the commission to hold another meeting until then. Inasmuch as you have already negotiated with the representatives of the Canadian Government with respect to these measurements and arranged for the same, I can see no objection to your going ahead under that arrangement. At the next meeing of the commission we can then take up this matter and endeavor to arrange for the apportionment of the waters in accordance with the terms of the treaty, provided it is then found to be convenient for the Reclamation Service of the two Governments to act in conjunction with us.

Yours very truly,

JAMES A. TAWNEY, *Chairman.*

WASHINGTON, *June 17, 1912.*

Mr. F. H. PETERS,
Commissioner of Irrigation,
Department of the Interior, Calgary, Alberta, Canada.

SIR: With reference to your letter of March 12, in regard to cooperative stations on international streams:

The Survey is now in position to enter into this cooperation, and instructions have been issued to Mr. W. A. Lamb, district engineer for Montana, to arrange with you for their establishment. The matter has been fully discussed with the United States Reclamation Service, and that Service is much interested in the proposed cooperation and suggests that eventually cooperative stations be established on all the principal international streams. As Mr. Lamb will represent the Geological Survey in this cooperation, it is suggested that you carry on future correspondence with him.

Very respectfully,

GEO. OTIS SMITH, *Director.*

DEPARTMENT OF THE INTERIOR,
IRRIGATION OFFICE, *June 27, 1912.*

SIR: I beg to acknowledge receipt of your favor of the 17th inst. respecting cooperative gauging stations on international streams. Mr. Peters is in communication with Mr. Lamb and will meet him on the ground as soon as possible and make final arrangements for the establishment of the stations. We, too, hope that eventually cooperative stations will be established on all the principal international streams.

Your obedient servant,

P. M. SAUDER,
Acting Commissioner of Irrigation.

GEORGE OTIS SMITH, Esq.,
Director United States Geological Survey, Washington, D. C.

DEPARTMENT OF THE INTERIOR,
IRRIGATION OFFICE,
Ottawa, September 17, 1912.

SIR: I beg to submit the following report of my actions in arranging for the establishment of joint permanent gauging stations on the international boundary at the crossing of the St. Mary River and at the three crossings of the Milk River:

On August 20, at Lethbridge, I met Mr. W. A. Lamb, engineer in charge of stream-measurement work in Montana under the United States Geological Survey. I was with Mr. Lamb from August 20 to 29, and during this time we made an inspection of the St. Mary River near Kimball and of the North Branch of the Milk River near Peters's ranch and of the South Branch of the St. Mary River near Croft's ranch in Montana, and also of the main branch of the Milk River at its eastern crossing.

In connection with the establishment of the joint gauge on the St. Mary River authority had already been granted to me to make the necessary arrangements and go ahead with the establishment of this station. We therefore picked out a suitable location for the joint station about half a mile above our old station in the northwest quarter of section 25, township 1, range 25, west of the fourth meridian, and I have made arrangements for the construction at this point, before the end of this month, of a permanent concrete water-gauge register house. The general design of this house was discussed with Mr. Lamb, and I attach hereto a blue print showing the design made by myself, and this will be adhered to except that some slight alterations may be made by Mr. Lamb, who is going to be at Kimball to superintend the commencement of work on building this gauge house. A Friez automatic gauge has been delivered at Kimball by the United States Geological Survey, and it is the intention to establish this type of automatic gauge at this station.

In connection with the three stations on the Milk River no authority has yet been given me for the actual construction of gauge houses, and I beg to recommend that this authority be given to me immediately, the gauge houses to be constructed at such places and in such manner as is described hereafter.

It was decided to establish the joint automatic gauge on the North Branch of Milk River at a point in section 11, township 1, range 23, west of the fourth meridian. This location is about 1 mile upstream from the old gauging station at Peters's ranch and the location is shown on a sketch, a blue print of which is attached hereto. Because of the fact that the turning into the channel of the North Branch of Milk River by the United States of about 800 second-feet of water, as is proposed, will create decidedly different conditions in the river to those which at present exist, it is decidedly undesirable at present to build a permanent concrete gauge house. It was decided to establish at this point a gauge house constructed of wood, as shown by the blue print of the plan attached hereto entitled "Plan of wooden automatic water-stage house to be erected on Milk River." It was understood that the construction of this station would be carried out by our office and that the type of automatic gauge installed would be the Stevens continuous water-stage recorder.

It was decided to establish the joint automatic gauge on the South Branch of the Milk River at Croft's ranch in Montana at a point distant from the boundary crossing about 15 miles upstream, following the course of the river. The location of this station is really too far away from the boundary to be desirable as a joint station, but, owing to the sparse settlement in this section of the country, it is not possible to get any situation where a suitable gauge-rod recorder could be obtained at any point very much closer than this to the boundary, and, as the United States Geological Survey has had a station at this point for several years in the past, it was thought desirable to continue the joint station at this point. As this station is so far away from the boundary, and as it might be possible a few years hence to move it closer to the boundary, it was decided to establish only a wooden gauge house at this point, of the same design as that to be built on the North Branch of the Milk River. It was decided to install at this point a Stevens continuous water-stage recorder and it was understood that the construction of this station would be undertaken by Mr. Lamb's office.

At the eastern crossing of the Milk River at Spencer's lower ranch, which is just south of section 3, township 1, range 5, west of the fourth meridian, and probably in section 3, township 37, range 8, east of the Montana principal meridian, it was decided to establish the joint automatic gauge at a point about a quarter of a mile below the old cable station. The location of this station is

shown by the blue print of a sketch attached hereto. On account of the change of conditions that will be brought about when the water is turned into the channel of Milk River by the United States, as was noted for the North Branch station, it was thought undesirable to construct a permanent concrete gauge house at this point and the gauge house will therefore be constructed of wood, of the same design as that decided upon for the other two stations. It was understood that the construction of this station would be carried out by our office and that the type of gauge installed here would be the Haskell automatic water gauge register.

I may say that the different types of automatic water gauge registers were decided upon in order that all the various types might be tried, so that probably in a year or two one type would be found which would have decided advantages over the other types, and then this type might be exclusively used.

Your obedient servant,

F. H. PETERS, *Commissioner of Irrigation.*

R. H. CAMPBELL, Esq.
Director of Forestry,
Ottawa.

DEPARTMENT OF THE INTERIOR,
FORESTRY BRANCH.
Ottawa, September 18, 1912.

MEMORANDUM:

Authority was some time ago given to the Commissioner of Irrigation to arrange with the Director of the United States Geological Survey for the erection of a gauging station on St. Mary River near the international boundary, the cost of erection to be borne equally by the two countries and the gauge to be used jointly by them. This station is now in course of erection.

The commissioner was also authorized to discuss with the Director of the United States Geological Survey suitable locations for gauging stations on Milk River and to report to the department with a view to securing authority for the erection of such stations as might be considered necessary in connection with the division of water between Canada and the United States, in accordance with the provisions of the waterways treaty.

In the attached letter, dated the 17th instant, the commissioner has reported very fully upon the steps which he has taken in connection with these matters, and has recommended the establishment of three gauging stations on Milk River and their equipment with suitable devices for accurately measuring the flow of water.

The station which is now in course of construction on St. Mary River will be erected under the commissioner's supervision, and the United States Geological Survey will thereafter refund to this department one-half of the cost. It has been arranged by the commissioner that if authority is given for the erection of the three additional stations, two of them will be erected under his supervision and one under the supervision of the United States Geological Survey, and that the cost of these stations shall be divided equally between the two countries.

As these stations are necessary in connection with the administration of water rights, in accordance with the provisions of the waterways treaty, I beg to recommend that authority be given the commissioner for constructing and equipping these stations and for making the necessary arrangements with the United States authorities for the proper apportionment of the cost thereof.

Respectfully submitted.

E. F. DRAKE.

W. W. CORY, Esq., C. M. G.,
Deputy Minister,
Department of the Interior.

DEPARTMENT OF THE INTERIOR,
FORESTRY BRANCH,
Ottawa, September 21, 1912.

SIR: I beg to acknowledge the receipt of your letter of the 17th instant, recommending the establishment of three gauging stations on Milk River in connection with the division of the flow of the waters of that stream between Canada and the United States under the provisions of the international waterways treaty, and to inform you that your recommendations have been approved.

You are therefore authorized to arrange with the Director of the United States Geological Survey for the establishment of three gauging stations on Milk River at the points suggested by you and for the equipment of such stations with suitable devices for accurately measuring the flow of water. It is understood that two of these stations will be erected under your supervision and that the erection of the station on St. Mary River will also be under your supervision; also that the station to be erected on the South Branch of Milk River at Croft's ranch in Montana will be constructed under the supervision of the Director of the United States Geological Survey. It is further understood that the entire cost of erection and equipment of the four stations will be borne equally by the two countries. It will therefore be necessary for you to procure from the Director of the United States Geological Survey full particulars as to the vouchers that should be submitted to him in connection with this work, and you should inform the director also of the nature of the vouchers that will be required from him in connection with the station which will be erected under his supervision.

You are authorized to defray all the expenses in connection with the erection and equipment of the stations which are to be constructed under your supervision, and thereafter to arrange with the Director of the United States Geological Survey for a refund of one-half the cost thereof. The refund should be deposited by you to the credit of the Receiver General and accounted for in the usual manner. The sum so refunded by the United States authorities will be again available for expenditure as part of our appropriation. You are also authorized to procure from the Director of the United States Geological Survey such vouchers as may be required in connection with the cost of the station to be erected under his supervision and to pay to him one-half the cost thereof, procuring the necessary vouchers and submitting them as part of your accounts.

I attach hereto, for your information and for record in your office, a copy of your letter of the 17th instant, together with a copy of an approved memorandum dated the 18th instant in connection with this matter.

Your obedient servant,

R. H. CAMPBELL, *Director*.

F. H. PETERS, Esq.,
Commissioner of Irrigation, Calgary, Alberta.

Summary of expenditures for the four international gauging stations.

Location.	Canada.	United States.	Total.
Summary of cost of each station:			
St. Mary River at Kimball	$564.11	$125.00	$689.11
North Branch Milk River at Peters's ranch	149.73	111.25	260.98
South Branch Milk River at Croff's ranch	.....	328.43	328.43
Milk River at Spencer's lower ranch	231.98	170.00	401.98
Total	.....	.....	1,680.50

One-half expenditure	$840.25
Amount expended by United States	734.68
Balance due by United States	105.57

JANUARY 13, 1913.

Hon. JAS. A. TAWNEY,
Chairman of the International Joint Commission,
Southern Building, Washington, D. C.

SIR: In response to your request of March 28, 1912, the following is submitted as representing the view of this department as to the proper method of proceeding in the measurement and apportionment of the waters of St. Mary and Milk Rivers.

In August, 1912, a meeting was arranged between the district engineer of the United States Geological Survey and the Canadian Commissioner of Irrigation

for the purpose of determining on the location of gauging stations deemed necessary to obtain the data required as a basis for the apportionment of the water of the two rivers between the two countries.

Four gauging stations were determined on to be jointly installed, operated, and maintained by the two Governments, to be located as follows:

St. Mary River gauging station, located about 5 miles north of the international boundary line, and measured along the channel a distance of about 7 miles north of the international boundary line, near Kimball. This station is about 5 miles below the station formerly maintained by the United States Geological Survey and about 1 mile above the station formerly maintained by the Canadian Government. The discharge of the stream at this point is practically the same as at the points at which separate gauging stations were formerly maintained by the United States and the Canadian Government.

North Fork of Milk River gauging station, located about 1 mile north of the international boundary line, a channel distance of about 1½ miles from the international boundary line, near Peter's ranch. This station is located about 3 miles below the site of the gauging station formerly maintained by the Geological Survey and about 1 mile above the location of the station formerly maintained by the Canadian Government.

South Fork gauging station, about 5 miles south of the international boundary line, a channel distance of about 10 miles from the international boundary line near Croff's ranch. This station is at the same location as the station formerly maintained by the United States and about 15 miles above the station formerly maintained by the Canadian Government.

Milk River station, at eastern crossing, practically on the boundary line, near Spencer's ranch, is about one-quarter of a mile below the station formerly maintained by the Canadian Government.

The United States has not previously maintained a gauging station on Milk River in Canada.

The joint gauging station on St. Mary River was installed, equipped with automatic registering devices, and put into operation in September, 1912.

The joint gauging stations on North Fork of Milk River, South Fork of Milk River, and Milk River at eastern crossing will be installed and put into operation about April, 1913. These stations will also be equipped with automatic registering devices.

The expense of installation, operation, and maintenance of all the four stations is to be equally divided between the two countries.

Representatives of each country will make measurements at these stations, and each party will be supplied with all data collected by the other.

The records at these stations will show the amount of water in St. Mary River and North and South Forks of Milk River leaving the United States and flowing into Canada, and the amount of water in Milk River returning to the United States at eastern crossing.

It is proposed that the data obtained at these several stations will be worked up by the representatives of each nation and checked with each other in order to secure an agreement as to the discharge of water.

As provided in the last paragraph of Article VI of the treaty the apportionment of the waters shall be made jointly by the constituted reclamation officers of the United States and the properly constituted officers of His Majesty under the direction of the International Joint Commission. It is the understanding of this department that the provisions of this paragraph could best be carried out by allowing the local representatives of the two Governments to arrange for the apportionment from day to day according to the provisions of the treaty, reporting their actions through the proper channels to the commission, and reporting also any cases of disagreement to the commission for determination of the questions at issue.

Very respectfully,

WALTER L. FISHER, *Secretary.*

INTERNATIONAL JOINT COMMISSION,
Ottawa, September 29, 1913.

DEAR MR. DRAKE: As a matter of record, I shall be glad if you will let me know if the accompanying letter represents your understanding of the situation in relation to the measurement and apportionment of the waters of St.

Mary and Milk Rivers, and if you agree that the suggestions contained therein furnish a satisfactory solution of the question. Please return the letter, I am

Yours very truly,

LAWRENCE J. BURPEE.

E. F. DRAKE, Esq.,
Superintendent of Irrigation,
Department of the Interior, Ottawa.

DEPARTMENT OF THE INTERIOR, CANADA,
IRRIGATION BRANCH,
Ottawa, September 30, 1913.

DEAR MR. BURPEE: I have your letter of the 29th instant, with an inclosure in the form of a copy of a letter from the Secretary of the Interior for the United States with reference to the treaty between Canada and the United States for the division of the waters of St. Mary and Milk Rivers and their tributaries.

An arrangement for the construction and equipment of four gauging stations—one on the St. Mary River and three on Milk River and its branches—was reached between an officer of the United States Geological Survey and the Commissioner of Irrigation, and all of these stations have been constructed and equipped. The stations are now being operated for the joint convenience of the respective countries and the records will be at the disposal of the proper officers of either country. In so far, therefore, as the Hon. Mr. Fisher's letter refers to these stations no further comment is necessary.

I consider the suggestion a good one that the actual division of the water shall be made by arrangement betwen the local representatives of the respective Governments. The treaty provides for the apportionment of the water by the properly constituted *reclamation* officers of the United States and the properly constituted *irrigation* officers of His Majesty. So far, however, the arrangements respecting the establishment of joint gauging stations have been carried out on the part of the United States by an officer of the United States Geological Survey. The arrangements for Canada were made under the direction of the Commissioner of Irrigation.

As the Commissioner of Irrigation will probably be the officer appointed to look after Canada's interests under this treaty, I should like to have an opportunity of securing his views and of referring the question to my minister before replying definitely to your inquiry as to whether the suggestions made by the Secretary of the Interior would be entirely satisfactory. I will advise you further with reference to this as soon as I have received a reply from the commissioner and have laid this matter before the Minister of the Interior.

Yours very truly,

E. F. DRAKE.

LAWRENCE J. BURPEE, Esq.,
Secretary, International Joint Commission, Hope Building, Ottawa.

DEPARTMENT OF THE INTERIOR, CANADA,
IRRIGATION BRANCH,
Ottawa, December 16, 1913.

DEAR MR. BURPEE: With further reference to your letter of the 29th September last, and my reply of the 30th idem, respecting the measurement and apportionment of the waters of the St. Mary and Milk Rivers between Canada and the United States, under the provisions of the waterways treaty, I beg to inform you that, in so far as this department is concerned, the suggestions made by the Secretary of the Interior for the United States may be considered as satisfactory.

Will you kindly let me know whether this department will now be warranted in dealing with this case in the manner suggested, or if we should await the definite approval of this plan of action by the International Joint Commission.

I may add that the proposed method of measuring and apportioning the waters of these streams was referred by me to the Commissioner of Irrigation

and was later submitted to the Minister of the Interior, who agrees with my views.

Yours very truly,

E. F. DRAKE.

LAWRENCE J. BURPEE, Esq.,
Secretary, International Joint Commission, Hope Building, Ottawa.

INTERNATIONAL JOINT COMMISSION,
Ottawa, December 17, 1913.

DEAR MR. DRAKE: I beg to acknowledge receipt of your letter of December 16, in regard to the measurement and apportionment of the waters of the St. Mary and Milk Rivers.

As the commission meets in Washington on January 13, it may be as well to let the matter rest until then, when it will be brought before the commissioners for consideration.

Yours very truly,

LAWRENCE J. BURPEE, *Secretary.*

E. F. DRAKE, Esq.,
Superintendent of Irrigation,
Department of the Interior, Ottawa.

INTERNATIONAL JOINT COMMISSION,
Washington, D. C., December 30, 1913.

HON. FRANKLIN K. LANE,
Secretary of the Interior,
Washington, D. C.

SIR: Recurring to the letter of the predecessor to Mr. Tawney, chairman of the International Joint Commission, of date January 17, 1913, the commission, having considered that letter, has directed the undersigned to call your attention to the concluding paragraph of Article VI of the treaty between the United States and Great Britain, signed January 11, 1909, and to say that it feels a sense of responsibility by virtue of the duty devolved on it by that treaty which is not fully met and satisfied by the course outlined in the letter of Mr. Fisher. No doubt the steps being taken by the representatives of the two Governments in the matter of preliminary measurements are all that could be desired, and the commission has no inclination to interfere therewith; but at some time the results arrived at should be laid before the commission, so that it may proceed intelligently in the performance of its duty to direct the reclamation officers of the United States and the properly constituted irrigation officers of the Dominion in "the measurement and apportionment of the water to be used by each country."

I have the honor to again inquire when, in the judgment of the department, it will be possible to lay before the commission the measurements and other data necessary to enable it to perform that duty?

Very respectfully,

GEORGE TURNER, *Acting Chairman.*

DEPARTMENT OF THE INTERIOR,
Washington, January 9, 1914.

HON. GEORGE TURNER,
Acting Chairman, International Joint Commission.

MY DEAR MR. TURNER: I beg to acknowledge receipt of your letter of December 30, 1913, calling attention to the provisions of the concluding paragraph of Article VI of the treaty between the United States and Great Britain, signed January 11, 1909, as bearing on the method of proceeding in the measurement and apportionment of the waters of St. Mary and Milk Rivers, which was the subject of a previous letter from the commission dated March 23, 1912. The Reclamation Service has been called on for a report upon receipt of which the matter will be given careful consideration and the commission further advised.

Cordially yours,

A. A. JONES, *First Assistant Secretary.*

MAY 14, 1914.

Hon. A. A. JONES,
First Assistant Secretary, Department of the Interior,
Washington, D. C.

DEAR SIR: In a letter written by you January 9, 1914, to Hon. George Turner, acting chairman of the International Joint Commission, you use this language: "The Reclamation Service has been called on for a report upon receipt of which the matter will be given careful consideration and the commission further advised."

Since then the commission has heard nothing further from your office and has received no report from the Reclamation Service.

Hon. H. A. Powell, of Canada, and myself have been appointed a committee to visit the Milk and St. Mary Rivers and make a report to the commission as to what is being done in regard to the distribution of the waters of those rivers. For the purpose of giving us all the information possible, will you kindly furnish me the report of the Reclamation Service, with any suggestions you may have to make in regard to this matter? As there seems to be some confusion in regard to our mail, and as I am anxious to get a reply as soon as possible, please direct your letters to the International Joint Commission, Room 635, Southern Building, Washington, D. C.

Sincerely yours,

R. B. GLENN, *Acting Chairman.*

DEPARTMENT OF THE INTERIOR,
Washington, May 18, 1914.

INTERNATIONAL JOINT COMMISSION,
635 Southern Building, Washington, D. C.

GENTLEMEN: Further reference is made to letter of December 30, 1913, relative to measurement and apportionment of waters of St. Mary and Milk Rivers. Your letter of May 14, 1914, on the same subject has also been received.

There are inclosed four blue prints showing tabulations of daily discharges for the year 1913, compiled by the district engineer of the United States Geological Survey, for Milk River, North Fork, South Fork, and St. Mary River, which were received by the Reclamation Service on May 11, 1914.

An additional set of these blue prints will be furnished as soon as received from the field.

Cordially yours,

A. A. JONES, *First Assistant Secretary.*

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE,
Washington, D. C., January 2, 1915.

Hon. JAMES A. TAWNEY,
International Joint Commission, Southern Building, City.

DEAR MR. TAWNEY: Referring to our conversation of December 14 I have endeavored to find your original letter of October 17, but without result. It appears that it was so carefully taken care of during my absence that all record of it has disappeared.

I have been studying the copy which you gave me, together with copy of report of October 6, and have been looking up the data on the St. Mary-Milk River situation, getting these together for informal discussion with you. In this connection I find that the Geological Survey is maintaining with Mr. F. H. Peters, Commissioner of Irrigation for the Dominion of Canada, four river stations at or near the boundary.

These are presumably in accordance with the last paragraph of Article VI of the treaty proclaimed May 13, 1910, where it states:

> "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."

The question arises in my mind as to whether we are carrying on these measurements through the "properly constituted" officers and "under the direction of the International Joint Commission."

I am submitting this memorandum to you with a view to meeting you at an early date and talking over the situation, so as to obtain a better grasp of it.

Cordially yours,

F. H. NEWELL.

January 5, 1915.

Hon. F. H. NEWELL,
United States Reclamation Service,
Department of the Interior, Washington, D. C.

DEAR MR. NEWELL: Your letter of the 2nd instant, addressed to Mr. Tawney, as chairman of the commission, was opened by me and I have carefully noted contents. Mr. Tawney is at his home in Winona, but I am expecting Mr. Gardner, who was recently elected chairman, in Washington in a few days. I will be glad to phone you when Mr. Gardner arrives in order that you may talk the St. Mary and Milk River situation over with him as suggested in your letter.

Very truly yours,

WHITEHEAD KLUTTZ, *Secretary.*

DEPARTMENT OF THE INTERIOR, CANADA,
IRRIGATION BRANCH,
Ottawa, July 27, 1915.

DEAR SIR: You will doubtless remember that at the recent hearing at St. Paul before the International Joint Commission repeated reference was made to the desirability of the establishment of further joint gauging stations, with particular reference to the establishment of stations on Battle and Lodge Creeks and the Frenchman River, at or near the point where those streams cross the international boundary.

Some two or three years ago, in 1912, I think, an arrangement was made between the United States Geological Survey and the Irrigation Branch of the Department of the Interior for the establishment and maintenance of four stations, one on St. Mary River, one on Milk River at the eastern crossing of the international boundary, and two on the upper branches of Milk River near the boundary. The arrangement then made was that the stations should be established at points mutually agreed upon, that the cost of installation and equipment should be divided equally between the two countries, and that the records should be available to both. So far as I am aware, the arrangement has worked out very satisfactorily.

I suggest for your consideration the advisability of the establishment of stations on Battle and Lodge Creeks and the Frenchman River under somewhat similar arrangements. If you think favorably of the proposal and are prepared to discuss it further, I will be glad to take it up with you in detail and to arrange for one of our officers, probably Mr. R. J. Burley, to cooperate with an officer to be named by you for the purpose of selecting the most suitable sites for these stations and arranging for their construction and equipment. Will you kindly let me hear from you at your early convenience.

Yours very truly,

E. F. DRAKE, *Superintendent of Irrigation.*

N. C. GROVER, Esq.,
Geological Survey,
Washington, D. C.

DEPARTMENT OF THE INTERIOR,
UNITED STATER GEOLOGICAL SURVEY,
WATER RESOURCES BRANCH,
Washington, July 29, 1915.

Mr. E. F. DRAKE,
Superintendent of Irrigation,
Department of the Interior,
Ottawa, Canada.

DEAR SIR: Your letter of July 27, suggesting that arrangements be made for the installation and maintenance jointly by Canadian and United States officials of gauging stations on Battle and Lodge Creeks and Frenchman River, has been

received. I will take the matter up at once with Mr. Newell and others and make further definite reply at a later date.

Yours very truly,

N. C. GROVER, *Chief Hydraulic Engineer.*

JULY 30, 1915.

DIRECTOR AND CHIEF ENGINEER RECLAMATION SERVICE.

SIR: By letter of July 27, addressed to Mr. Grover, Mr. E. F. Drake, Superintendent of Irrigation, Department of the Interior of Canada, has suggested the establishment and operation jointly by officials of the two Governments of gauging stations on Battle and Lodge Creeks and Frenchman River in connection with the administration of the treaty relative to the division of the waters of Milk and St. Mary Rivers. The Geological Survey already cooperates with the Irrigation Branch of the Department of the Interior of Canada in maintaining four stations on these rivers and their tributaries. At the St. Paul hearing it was repeatedly suggested that stations be maintained near the international boundary on the three tributaries of Milk River to which Mr. Drake now calls attention. Is it your opinion that the Geological Survey or the Reclamation Service should now arrange to cooperate in the establishment and maintenance of the three additional stations until such time as the International Joint Commission may see fit to assume jurisdiction? If so, will the Reclamation Service cooperate in the expense of establishing and operating the stations?

A copy of Mr. Drake's letter is inclosed for your information.

Yours very truly,

PHILIP S. SMITH, *Acting Director.*

UNITED STATES RECLAMATION SERVICE,
OFFICE OF THE CHIEF ENGINEER,
Washington, D. C., July 30, 1915.

THE DIRECTOR GEOLOGICAL SURVEY.

SIR: I have received letter of July 30 from the acting director transmitting copy of letter from Mr. E. F. Drake, Superintendent of Irrigation in Canada, to Mr. N. C. Grover.

This correspondence concerns the establishment and operation jointly by officials of the two Governments of gauging stations on Battle and Lodge Creeks and Frenchman River in connection with the administration of the treaty relative to the diversion of the waters of Milk and St. Mary Rivers.

The State Department has requested this office to nominate an official to study and have charge of this work on behalf of the United States, and pending the transfer of jurisdiction to the International Joint Commission this office does not care to undertake the establishment of any new stations.

Yours truly,

A. P. DAVIS, *Director and Chief Engineer.*

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
OFFICE OF THE DIRECTOR,
Washington, August 4, 1915.

MR. E. F. DRAKE,
Superintendent of Irrigation,
Department of the Interior,
Ottawa, Canada.

DEAR MR. DRAKE: In reply to your letter of July 27, addressed to Mr. Grover relative to the establishment of gauging stations on Battle and Lodge Creeks and Frenchman River, I fully agree with you that stations should be established as soon as practicable on these streams and shall be glad to cooperate in any way possible to bring about the establishment and maintenance of such stations.

I find on inquiry, however, that the International Joint Commission will hold a meeting in Minnesota next month at which the matter of gauging stations on Milk and St. Mary Rivers and their tributaries will probably be discussed, and it is hoped that some decision will be reached relative to the jurisdiction of the

commission over such stations. In view of this conditon it would not seem desirable for officials of the two Governments to take steps looking to the establishment of additional stations until after this meeting of the commission.

Very truly yours,

PHILIP S. SMITH, *Acting Director.*

Memorandum of the discussion at Washington, D. C., on May 3, 1916, between E. F. Drake, Superintendent of Irrigation, Department of the Interior, Canada, and N. C. Grover and J. C. Hoyt, of the Water Resources Branch of the United States Geological Survey.

1. Re the establishment of joint gauging stations on Battle Creek, Lodge Creek, and Frenchman River, at or near the international boundary.

Messrs. Grover and Hoyt are agreed that stations should be established as near as possible to the international boundary, and that it is desirable that the location should be agreed upon between officers of both countries and the expense shared in the same manner as in the case of the existing international stations on St. Mary and Milk Rivers.

As these new stations are, in so far as the United States is concerned, to be established for the benefit of the United States Reclamation Service, Mr. Hoyt discussed with Mr. A. P. Davis, chief engineer of the Reclamation Service, the question of bearing the United States share of the cost of the new stations. Mr. Davis was of the opinion that these stations should be established at once. He asked, however, that Mr. Hoyt take the matter up with him in writing, so that he might have a record of it. Mr. Hoyt has promised to write Mr. Drake as soon as he receives a definite reply from Mr. Davis.

When word to the above effect is received from Mr. Hoyt, Mr. Drake will instruct Mr. Peters, and Mr. Hoyt will instruct Mr. Lamb, his representative in Montana, to confer re the location and construction of the three new stations.

2. Re unsatisfactory conditions of the present automatic gauging station at Kimball on St. Mary River.

Messrs. Lamb and Peters are to be instructed to investigate this station, and if conditions are found to be unsatisfactory it is suggested that they endeavor to secure a satisfactory site for a new station in that neighborhood.

3. Re stream-flow data generally.

It is the understanding of the Irrigation Branch of the Department of the Interior, and of the United States Geological Survey, that stream-flow records subsequent to 1914 will not be filed with the International Joint Commission unless by request of the commission, but that copies of the published reports of both countries on stream flow will be forwarded to the commission for reference purposes.

It is suggested by Mr. Hoyt that before either country undertakes to publish records of stream flow on international streams affected by the waterways treaty the records shall be exchanged, examined, and, if necessary, that the officials of both countries meet for the purpose of satisfying themselves that the records are absolutely correct.

4. Mr. Hoyt will write Mr. Drake, naming one or more officers of the United States Geological Survey, who may find it necessary in connection with hydrographic work to cross the international boundary. Mr. Drake will endeavor to arrange that such officers of the United States be permitted to enter Canada without interference or detention by Canadian customs officials. Mr. Hoyt will endeavor to arrange for similar privileges from the United States customs officials for Mr. R. J. Burley on behalf of Canada.

MAY 3, 1916.

The DIRECTOR, UNITED STATES RECLAMATION SERVICE.

SIR: The United States Geological Survey, about three years ago, established, in cooperation with the Canadian Hydrographic Survey, cooperative stations on the Milk and St. Mary Rivers near the Canadian boundary, in order that data might be available in connection with the division of water between Canada and the United States on the Milk and St. Mary Rivers.

At these stations automatic gauges have been installed and measurements are made both by the Canadian engineers and the Geological Survey engineers and the data collected are accepted by both Governments.

At the conference of the International Commission held at St. Paul last May, the desirability of establishing additional stations at the international

crossing on French, Lodge, and Battle Creeks was recognized by the conferees from both countries, and it was understood that the commisssion would take formal action in regard to their establishment. Such action, however, has not been taken by the commission, and Messrs. E. F. Drake and R. J. Burley, engineers, representing the Canadian Government, are now in Washington and have requested that the Survey should go ahead with the establishment of the stations in order that the data may be available for future hearings.

The Survey would be glad to proceed with the establishment of the stations on the same basis as the stations on Milk and St. Mary Rivers were established, that is, that the Canadian and United States Governments divide the expense of establishing the stations, and that the Reclamation Service and the Geological Survey divide equally the United States' part of the expense. Will you kindly advise me if this meets with your approval?

Very truly yours,

GEO. OTIS SMITH, *Director.*

DEPARTMENT OF THE INTERIOR.
UNITED STATES RECLAMATION SERVICE,
OFFICE OF THE DIRECTOR,
Washington, D. C., May 4, 1916.

The DIRECTOR, UNITED STATES GEOLOGICAL SURVEY.

SIR: I have just received your favor of May 3 in regard to the establishment of additional gauging stations on the Milk and St. Mary Rivers with the understanding that half the expense will be borne by Canada and half by the United States, and the expense of the United States be divided equally between the Geological Survey and the Reclamation Service.

This arrangment is satisfactory in connection with any stations which may hereafter be approved by this office, but no provision is made as to how many stations are to be established nor where they are to be, and they have not yet been requested by the International Commission nor formally approved by them.

When the proposition is better defined, this office will then be able to take appropriate action in the premises.

Yours truly,

A. P. DAVIS, *Director and Chief Engineer.*

DEPARTMENT OF THE INTERIOR.
UNITED STATES RECLAMATION SERVICE,
OFFICE OF THE DIRECTOR,
Washington, D. C., May 9, 1916.

DIRECTOR OF THE GEOLOGICAL SURVEY.

MY DEAR MR. SMITH: In further reply to your letter of May 3, 1916, regarding the establishment of stations at the international crossings on Frenchman, Lodge, and Battle Creeks, Montana-Canada, I wish to state that the Reclamation Commission will not adhere to the information therein given that it was not desired to establish these stations until requested by the International Commission.

It is deemed for the advantage of all concerned that these stations be established as soon as practicable, and the Reclamation Service will cooperate in the manner suggested in your letter, by bearing one-half the expense of establishment chargeable to the United States.

As soon as you are able to give information as to the location and other details the Reclamation Service will be ready to approve the proposed expenditure.

Very truly yours,

A. P. DAVIS, *Director and Chief Engineer.*

MAY 17, 1916.

The DIRECTOR, UNITED STATES RECLAMATION SERVICE.

SIR: In reply to your letter of May 9.

Mr. Wm. A. Lamb, in charge of stream-gauging work in Montana, has been directed to take the necessary steps for the establishment of stations at the international crossings on Frenchman, Lodge, and Battle Creeks, Montana-Canada.

Very truly yours,

GEO. OTIS SMITH, *Director.*

DEPARTMENT OF THE INTERIOR,
UNITED STATES GEOLOGICAL SURVEY,
Washington, May 17, 1916.

Mr. E. F. DRAKE,
Superintendent, Irrigation Branch,
Department of the Interior, Ottawa, Canada.

DEAR MR. DRAKE: The Director of the Reclamation Service has authorized the establishment ofl stations at the international crossings on Frenchman, Lodge, and Battle Creeks, Montana-Canada, with the understanding that half the expense of the establishment of these stations will be borne by your office, as outlined by you when you were in Washington.

Accordingly, instructions have been issued to Mr. William A. Lamb, who has charge of the work in Montana, to cooperate with your engineers in the selection and installation of the stations. Arrangements as to the time for taking up the work should be made with Mr. Lamb.

Very truly yours,

GEO. OTIS SMITH, *Director.*

DEPARTMENT OF THE INTERIOR, CANADA,
IRRIGATION BRANCH,
Ottawa, May 19, 1916.

DEAR MR. SMITH: Upon receipt of your letter of the 17th instant, advising that the Director of the Reclamation Service has authorized the establishment of certain additional gauging stations on Lodge and Battle Creeks and Frenchman River, I communicated with Mr. F. H. Peters, Commissioner of Irrigation, at Calgary, instructing him to get in touch with Mr. Lamb, of the Geological Survey, and to make whatever arrangements may be required for the installation of satisfactory gauging stations at these points.

Yours very truly,

E. F. DRAKE,
Superintendent of Irrigation.

GEO. OTIS SMITH, Esq.,
Director United States Geological Survey,
Department of the Interior, Washington, D. C.

DEPARTMENT OF THE INTERIOR, CANADA,
IRRIGATION BRANCH,
Ottawa, May 19, 1916.

SIR: With further reference to my letter of the 6th instant, respectiug the proposed installation of some additional joint gauging stations on Lodge and Battle Creeks and the Frenchman River, I inclose herewith, for your information, a copy of a letter which I have just received from Mr. Geo. Otis Smith, Director of the United States Geological Survey. You will observe that arrangements have been made with the Director of the Reclamation Service for the establishment of stations on these streams at points to be mutually agreed upon, and that half the cost of the establishment of these stations will be borne by each country.

You will therefore kindly take this matter up directly with Mr. Wm. A. Lamb, who has charge of the work of the United States Geological Survey in Montana, and arrange with him and with Mr. Burley for the selection of satisfactory stations and for the installation of the necessary apparatus.

A full account should be kept of the cost of installation and the procedure to be followed in all matters pertaining thereto should be reduced to writing and memoranda exchanged between yourself and Mr. Lamb, so that there may be no misunderstanding about the case. Generally, the matter should be handled in precisely the same way as when the four existing stations on St. Mary and Milk Rivers were installed.

Your obedient servant,

E. F. DRAKE, *Superintendent of Irrigation.*

The COMMISSIONER OF IRRIGATION,
Calgary, Alberta.

NASHLYN, *September 21, 1916.*

SIR: As I have already reported, Mr. W. A. Lamb and myself have chosen a location for joint stations on Lodge, Battle, and Frenchman Creeks, and I beg to submit herewith a full report regarding the action agreed upon between us.

Station on Lodge Creek.—We are satisfied to leave this station in its present location unless Messrs. Grover and Drake consider that an automatic gauge is necessary on this stream, when it would be necessary to move the station some 300 to 400 yards above its present location.

We do not consider such action necessary or advisable at the present time as automatic gauges are more or less experimental in streams such as this where the water supply is so erratic, and do not think that the expense would be justified in view of the fact that our present results are so satisfactory.

Station on Battle Creek.—We originally intended to place this station at some point south of the boundary, with the idea of balancing the unmeasured drainage area north of the line against a similar area south of the line, but investigation proved that this would be impracticable so it was decided to locate the station at the boundary and to maintain the stations at Nash's and Snedecor's as checks until we could determine approximately the proportionate run-off from the intermediate areas.

The station finally selected lies about 400 feet north of the boundary on section 4–1–26–3, about a quarter mile above the point of crossing.

The control is of blue clay, gravel, and boulders and gives every appearance of being permanent, while the section is deep, smooth, and confined to one channel at all stages. At low water it is probable that moss will grow in it, but so far as we were able to judge this will not affect the gauge control in any way and good wading sections can be obtained either above or below for low stages. This section gives an excellent location for the cable and gauge house.

The Dowen and Buckley dam, at the boundary, is almost completely destroyed and has little, if any, effect at the site chosen, but care must be taken that it is not rebuilt as it would then become the control and would probably not be permanent.

On the grounds of economy, and with the idea of having the station as well constructed as possible, Mr. Lamb and I agreed that it would be best to construct it jointly with our own men, and Mr. Lamb and his helper will meet Mr. Rowley and helper at this point early in October, if this meets with your approval. Mr. Rowley can supply one or two tents, stove, and provisions, together with the lumber, turnbuckles, and tools, etc., while Mr. Lamb will supply and have at the station site the following material, viz, cable and clips, etc., gauge, cement for deadmen, car irons and pipe.

I am supplying Mr. Lamb with sketches and notes of survey, etc., so that he can design the station, length of cable, etc., and he will advise you and Mr. Rowley as to the material required and of the date on which he will be able to meet Mr. Rowley to do the work.

I am forwarding herewith a copy of my field notes covering the survey of this station for your information.

Station on Frenchman River.—The site selected on this stream lies on the Canadian side of the boundary within a very short distance of the line, immediately east of the buildings on the Ball ranch. As I have already written a description of its location it is unnecessary to repeat it here.

The control is a gravel ford and gives every appearance of being as permanent as can be found along this stream. The section is fairly wide, smooth, and with a moderate velocity at low water. There is a small island, probably the remains of an old beaver dam, immediately below the section which may act as a secondary control, but it appears to be solid and should not shift.

Mr. Chamberlin, living about one-half mile south on the Montana side, has agreed to look after the gauge three times a week for $5 per month.

Mr. Lamb and I agreed that this station should be constructed jointly in the same manner as the one on Battle Creek, with the exception that Mr. Lamb will supply all the material from Saco.

In my previous report, I asked that Mr. Miles be instructed to survey this station and forward his notes to Mr. Lamb, and I would ask that instructions be issued to Messrs. Rowley and Miles to carry out the agreement between Mr. Lamb and myself as outlined in this report.

Your obedient servant,

R. J. BURLEY.

F. H. PETERS, Esq.,
Commissioner of Irrigation, Calgary, Alberta.

LIST OF CORRESPONDENCE RELATIVE TO GAUGING STATIONS.

(The following letter, with inclosure, from Mr. Tawney to Secretary Lane, is that referred to by Mr. Newell in his letter of January 2, 1915, as having been lost. It is here inserted to complete the record and at the request of Mr. Newell, who has found the original since the foregoing memorandum of correspondence was agreed upon and printed, therefore too late for inclusion therein.)

INTERNATIONAL JOINT COMMISSION,
Washington, D. C., October 17, 1914.

Hon. FRANKLIN K. LANE,
Secretary of the Interior, Washington, D. C.

DEAR SIR: Some time ago Commissioner Powell, of the Canadian section, and Commissioner Gardner, of the United States section of the International Joint Commission, at the direction of the commission visited the Milk and St. Mary Rivers in Montana and Alberta for the purpose of obtaining information for the commission concerning division of these rivers under the provision of the treaty of January 11, 1909. At its regular session in Ottawa last week Messrs. Powell and Gardner submitted a written report on this subject, a copy of which I herewith inclose. You will observe on reading this report that the committee have found as a result of their visit to these two rivers that there are certain difficulties in connection with the work of the commission on the division of the water.

After considering this report, the commission ordered a hearing for the purpose of allowing those interested on both sides of the line, and especially the representatives of the two Governments within whose jurisdiction these waters belong, an opportunity to be heard both in respect to the physical facts as well as their interpretation of the treaty. The chairmen of the commission were directed to communicate with these respective departments of both Governments for the purpose of ascertaining the time and place that it would be most convenient for them to appear and be heard.

The commission will hold a session at Detroit, Mich., on the pollution of the boundary waters November 10 and 11. The chairmen were requested to respectfully suggest to their respective Governments that it would be more convenient for the commission to hold the hearing on the Milk and St. Mary Rivers about the time or as soon after the hearing at Detroit as possible. Will you kindly advise me at your earliest convenience as to the time and place it would be most convenient for the representatives of your department to appear before the commission on this subject, and greatly oblige,

Yours, very respectfully,

JAMES A. TAWNEY, *Chairman.*

INTERNATIONAL JOINT COMMISSION:

We, the undersigned members of the commission, having been appointed a committee to look into the matter of the division of the Milk and St. Mary Rivers, beg to report as follows:

Having decided that it was necessary to visit the locality where these waters are and to personally investigate matters, we went to southern Alberta and the State of Montana in the month of July last. We first spent a few days at Calgary looking into reports which had been prepared by the Irrigation Branch of the Department of the Interior, in charge of Mr. Peters. Having obtained from him the necessary data, we examined the operation of the irrigation system of the Canadian Pacific Railway Co. to the eastward of Calgary, after which we proceeded to Lethbridge and there inspected the operation of the irrigation canals which tap the waters of the St. Mary River. We next motored down through southern Alberta to the lakes which are the source of the St. Mary River, in the State of Montana; inspecting on the way the irrigation system of the Canadian Pacific Railway in southern Alberta, which uses the waters of the St. Mary River; and also the construction of the canal which is being

built by the United States Government to carry its share of the waters of the St. Mary River to the Milk River; and the construction of the storage reservoirs being built by the same Government in the State of Montana.

The task of dividing the waters of the two rivers devolves upon the commission by the terms of the treaty of 1909, and the primary object of our trip was to consider what was necessary to be done in order to perform the duty thus assigned to the commission.

The irrigation is essential to the development and the well-being of both southern Alberta in Canada and the valley of the Milk River in Montana. The needs on the United States side of the line have been recognized by its Government, and the works now in process of construction will involve an expenditure on the part of that Government of somewhere between $10,000,000 and $15,000,000. It appears to your committee that the present is an opportune time for the commission to consider certain difficulties that arise in connection with the work devolving upon it.

In the first place there are certain difficulties on construction of the treaty which must be settled before the work of the division of the waters can be undertaken. These grow out of the wording of Article VI of the treaty. This article provides for the equal apportionment of the combined waters of the two rivers and the commission is not limited to an apportionment in moiety of the waters of either river. The article provides, however, that in the division of the waters the United States is entitled to a prior appropriation of 500 second-feet in the waters of the Milk River, and that Canada is entited to a prior appropriation of 500 second-feet in the waters of the St. Mary River, the qualification in each case being in the following words: "or so much of such amount as constitutes three-fourths of its natural flow."

The opinion prevailed among some interested that the two countries were entitled to an absolute preference in the respective waters up to 500 second-feet, and then in addition were also entited to three-fourths of the flow where such three-fourths exceeded 500 second-feet. Other constructions suggest themselves and your committee are of the opinion that the first step to be taken by the commission is to have a hearing of the parties interested with a view of determining the correct construction to be placed upon the words of Article VI.

In addition to the above a difficulty is likely to arise in connection with the storage of the waters of these rivers. At the time of your committee's visit there were not 500 second-feet of flow in the St. Mary River. During freshet season the flow of both rivers is quite large, and the storage facilities which are being provided by the United States Government will impound a large percentage of the freshet waters for use during the dry season when it is necessary to resort to irrigation in both countries. The division of this freshet water will be a difficult matter and one which your committee thinks should be settled by this commission as soon as possible, especially in view of the fact that large expenditures are being made by the United States Government, and that a survey is being made by the Canadian Government, with a view of providing storage facilities in Canadian territory.

There are other problems involved, such as the point at which the waters of the Milk and St. Mary Rivers are to be measured for purposes of apportionment. Your committee is also of the opinion that inasmuch that under the treaty both countries are interested in the waters of both rivers, it is essential, in order to secure an equitable division of the waters of these rivers, that the distribution should be under the supervision of a joint board consisting of two competent persons, one to be appointed by the United States and one by Canada.

In submitting this report we may say that we have not touched upon all matters which may be subjects of controversy or upon which differences of opinion may be entertained. We have merely touched upon certain salient features which call for consideration by the commission in the near future.

Dated this 6th day of October, 1914.

O. GARDNER.
H. A. POWELL.

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