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MEMORANDUM RESPECTING THE APPROVAL, BY CONCURRENT LEGISIATION OF THE SENATE AND HOUSE OF REPRESENTATIVES, OF AN AGREEMENT BETWEEN THE UNITED STATES AND THE DOMINION OF CANADA, DATED MARCH 19TH, 1941, WITH PARTICULAR REFERENCE TO THE AIKEN BILL (S. 1385).

GEORGE STEPHENS REED
of the
New York State Bar
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THE BILL (S. 1385).

The Bill now under consideration provides for the improvement of the Great Lakes-St. Lawrence Basin, and for generating electric energy in the International Rapids section of the St. Lawrence River in accordance with an agreement between the United States and the Dominion of Canada, dated March 19th, 1941.

The first paragraph of such Bill reads as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of promoting interstate and foreign commerce and the national defense, and providing an improved waterway through the Great Lakes, the Saint Lawrence River, and connecting waters reaching to the Atlantic Ocean, and for the generating of electric energy as a means of financing, aiding, and assisting such undertaking, the agreement made by and between the Governments of the United States and Canada, published in House Document Numbered 153, Seventy-seventh Congress, first session, providing for the construction of dams and power works in the International Rapids section of the Saint Lawrence River, and the completion of the Saint Lawrence deep waterway, is hereby approved; and the President is authorized and empowered to fulfill the undertakings made in said agreement on behalf of the United States, and to delegate any of the powers and duties vested in him by this Act to such officers, departments, agents, or agencies of the United States as he may designate or appoint. ***"

## THE PROCEDURE

A similar bill was introduced in the House of Representatives in 1941, and hearings were had before the Committee on Rivers and Harbors, during the Seventy-seventh Congress, first session.

A large amount of testimony was offered, and a favorable report made.

During such hearings, the question was raised as to the regularity of the Agreement of 1941 and its approval by the Senate and House of Representatives, instead of by a formal treaty between the two Governments.

At the hearing before the Committee on Rivers and Harbors, such objection was over-ruled. Testimony was given by many witnesses in respect to the regularity of the procedure, and the Department of State, represented by Honorable Adolf A. Berle, Jr., Assistant Secretary of State, attested to the regularity of proceeding by Congressional action in the manner proposed. Later, in this memorandum, the testimony of Mr. Berle will be referred to.

Ever since the adoption of the Constitution, executive agreements similar to the Agreement of 1941 have been made for the purpose of effectuating understandings between the United States and other nations. It is well understood that in all matters of international concern, the President has undoubted authority under the Constitution to negotiate and that it is

not always necessary for the President to enter into a treaty upon "the advice and consent of the Senate," as provided in Article II, Section 2 of the Federal Constitution, which provides, in part, that the President

> "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."

The purpose of the Agreement of 1941 is to provide for the construction of further and additional works in the Great Lakes and St. Lawrence River in order to improve navigation and commerce, each government to provide for the installation of generators for hydroelectric power on its side of the boundary line.

The United States and Canada have already expended more than one hundred and forty million dollars to improve navigation and commerce on this great waterway. The agreement sought to be ratified is a construction undertaking allocating costs and giving credit to each government for the amounts already expended.

It is necessary to provide means through appropriation on both sides of the Border to carry into effect improvements and betterments necessary for the full use and enjoyment of this, the greatest fresh water system in the world. This appropriation on the United States side must be made by Congress.

Already navigation is possible from the Atlantic through the St. Lawrence and the Great Lakes to the head of Lake Superior. The works have been built and maintained by money appro-

priated by both governments, and, for the most part, without any direct treaty or agreement. The Welland Canal, between Lake Erie and Lake Ontario, and canals admitting ships having a draft of not over fourteen feet in the International Rapids section of the St. Lawrence, have been built by Canada. Great and important works permit navigation through the Detroit River and at Sault Ste Marie, and the waterway is usable all the way to the Atlantic. But bottlenecks exist which require additional works and deeper canals.

By formal treaty between the two governments, both countries have the full right to navigate all of the Great Lakes, including Lake Michigan and the St. Lawrence River to the Atlantic Ocean. The Treaty of Washington, 1871, declared the St. Lawrence River to the Gulf to be free and open to the commerce of both countries. Both countries also have the right to navigate the Welland and other canals.

On January 11, 1909, there was signed at Washington, what is known as the Boundary Waters Treaty, which treaty was ratified by the advice and consent of the Senate on March 3, 1909. Great Britain ratified this Treaty on March 31st, 1910, and the ratifications were exchanged in Washington on May 5th, the same year. The treaty was proclaimed May 13th, 1910.

I am of the opinion that the executive agreement of 1941 has the unquestioned sanction of the Boundary Waters Treaty of 1909, which, so long as such treaty is in existence, provides a well-recognized working plan for the settlement of all

controversies between the two governments respecting boundary waters, and clearly recognizes the principle of special arrangements and agreements between the two governments relating to the use of such waters, and the ratification thereof by the Congress of the United States and by Parliament.

TREATY OF 1909

Before considering cases in which executive agreements have been effectuated by concurrent Congressional legislation, let us consider the Treaty of 1909 which so clearly indicates that the High Contracting Parties intended that, so long as such treaty should remain in effect, the two countries might, by mutual understandings, arrange for the further use and improvement of boundary waters by special agreements.

The fact that this Treaty was signed by Elihu Root, Secretary of State in behalf of the President, gives great weight to the conclusion that the provisions of the treaty were sufficiently definite and broad to achieve its purpose. Secretary of State Root undoubtedly prepared a large portion of the treaty as well as the proclamation.

The whole Treaty appears as Appendix I, but I wish to call particular attention to certain portions thereof:

"THE PROCLAMATION:

WHEREAS a treaty between the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada

involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, was concluded and signed by their respective plenipotentiaries at Washington on the eleventh day of January one thousand nine hundred and nine, the original of which treaty is word for word as follows:

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends, and for that purpose have appointed as their respective plenipotentiaries:

The President of the United States of America, Elihu Root, Secretary of State of the United States; and

His Britannic Majesty, the Right Honorable James Bryce, O.M., his ambassador extraordinary and plenipotentiary at Washington;

Who, after having communicated to one another their full powers, found in good and due form, have agreed upon the following articles:

****

ARTICLE I.

The high contracting parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

It is further agreed that so long as this treaty shall remain in force this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the high

contracting parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use thereof, but all such rules and regulations, and all tolls charged shall apply alike to the subjects or citizens of the high contracting parties and the ships, vessels and boats of both of the high contracting parties, and they shall be placed on terms of equality in the use thereof.

****

ARTICLE III.

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

****

ARTICLE XIII.

In all cases where special agreements between the high contracting parties hereto are referred to in the foregoing articles such agreements are understood and intended to include not only direct agreements between the high contracting parties, but also any mutual arrangement between the United States and the Dominion of Canada expressed by the concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion."

****

One cannot read this Treaty as an entirety, or the articles above quoted, alone, without reaching the conclusion that it was the intention of the two countries to arrive at a permanent and complete understanding in respect to the adjustment of all problems, present or future, growing out of the use, diversion, development and navigation of boundary waters without the enactment of any further or other formal treaty.

In order to carry into effect the main purpose of the treaty and guard against any dispute in that regard, the treaty refers to "special agreements between the high contracting parties" and states that "such agreements are understood and intended to include not only direct agreements between the high contracting parties, but also any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion."

The agreement of March 19th, 1941, between Canada and the United States, which is now proposed to be approved by reciprocal legislation of Congress and Parliament, is a simple understanding respecting the construction of works to improve navigation and commerce, and permitting each country, on its side of the boundary, to use the flow of the St. Lawrence at the navigation dam to develop hydroelectric power.

To hold that it is now necessary to enter into a new formal treaty with Canada to provide for the contemplated works is tantamount to weakening present treaty ties with

Canada and delaying the consummation of the acts now mutually and in good faith agreed upon.

The instrument of 1941 was negotiated by the United States and Canada as an agreement, pursuant to the Treaty of 1909, and is presented for approval as such.

The Treaty of 1909 clearly set at rest all questions at issue between the two countries in relation to the use of boundary waters. It prescribes the procedure whereby the United States and Canada, or any Province or State, may make use of boundary waters. If, however, such improvements, uses or diversions of boundary waters affect the water level or otherwise infringe upon vested rights, an application must be made to the International Joint Commission created under the Treaty of 1909, for permission to use water and construct works. The two governments may, however, agree. If the governments cannot agree then any and all controversies are to be submitted to and settled and adjusted by the International Joint Commission as provided in the Treaty, and their decision is binding upon both Governments.

The agreement of 1941 provides for the improvement of navigation and commerce and for the construction of facilities in these boundary waters, each country to build its own works as stipulated in the agreement. No new policy or principle is involved, which would in any event require a formal treaty, for Congress clearly has the power to regulate commerce and navigation and to appropriate funds for improvements and works on navigable streams.

RATIFICATION BY CONGRESS OF THE AGREEMENT OF MARCH 19, 1941 BY CONCURRENT LEGISLATION IS THE SIMPLEST AND BEST PROCEDURE AND CONSTITUTIONALLY LEGAL.

As has already been noted, the greater part of the agreement is devoted to the construction of works for the use and benefit of each nation. It has to do mainly with the internal affairs of each nation. When ratified by Congress, the agreement will become law. Congress for the United States and Parliament for Canada might, quite properly, provide by legislative enactment for the construction of the same works specified in the agreement and each build the works on its side of the boundary line. But a mutual understanding is necessary in respect to the location of the works, their common design, the height of the navigation dam, and other common matters including the equitable allocation of costs, having in mind the sums already spent by the two countries in the process of developing the waterway from the Atlantic to Lake Superior.

Chairman Mansfield of the Rivers and Harbors Committee of the House, in commenting upon the agreement, quite properly said:

"Congress has power with or without an advance agreement. We frequently cross the boundary. Why not with the St. Lawrence?" In his statement he mentioned the Livingston Channel around Bais Blanc Island in Canadian waters, which was improved by an Act of Congress. The bill then being considered

by the Rivers and Harbors Committee of the House, identical in terms with the Aiken Bill, was favorably reported by the committee.

At these hearings every phase of the question was examined. Assistant Secretary of State Adolf A. Berle, Jr., appeared for the State Department and testified at length upholding the procedure. He presented a letter from Secretary of State Cordell Hull and a brief prepared by Mr. Green H. Hackworth, the Legal Advisor of the State Department, both declaring that the Agreement is in due form and legally negotiated and recommending that it be approved by both Houses of Congress.

We thus have under consideration an executive agreement negotiated by the Executive of the United States, with another sovereign government in the form and substance deemed most fitting and appropriate to effectuate the understandings reached after solemn consideration. The compact is designated on its face as an agreement and is submitted as hundreds of executive agreements have, in past years, been submitted for consideration of both Houses of Congress. There is nothing strange or novel in this procedure, derived from precedents established as far back as the administration of George Washington.

Returning again to the hearings before the Rivers and Harbors Committee, we find that Mr. Berle also submitted a letter from Honorable Robert H. Jackson, Attorney General of the United States. These communications all agree that "the arrangement may be effectuated by an agreement signed under

the authority of the executives of the two countries, and approved by legislative enactments by the Congress and the Canadian Parliament."

Mr. Berle in his testimony stated that in his opinion the agreement "differs from many treaties in that the effect of it is quite as great in terms of domestic matters as in terms of foreign affairs. It differs, for instance, from the kind of treaty one might make, as for instance, a treaty of alliance or a treaty regarding arms limitations, or things of that kind. *** I should like to add that that form of submission of agreement is in no way unusual in our history." Mr. Berle stated that, in his opinion, even in the absence of the Treaty of 1909, it has become the policy between the United States and Canada to negotiate for mutual domestic benefits without resorting to formal treaties. Mr. Berle's reasoning was stated in part as follows:

"The reasoning was that the additional works, improvements or structural changes, which might be needed along that Waterway, really came under the head of ordinary river, harbor and similar improvements and that, therefore, they might be dealt with in the ordinary course of legislation rather than as a matter of international treaty, since the policy has been established."

Representative Culkin interrogated Mr. Berle, as follows:

MR. CULKIN: (referring to Section 13 of the Treaty of 1909 and the policy of Canada and the United States) "And that was the reason that Section 13 was written

into the Treaty, I assume."

MR. BERLE: "I believe so."

MR. CULKIN: "And there was not anything sinister about it?"

MR. BERLE: "I cannot see what it would be."

MR. CULKIN: "The treaty was adopted in the Senate and now confers jurisdiction on this whole question by joint resolution; is that true?"

MR. BERLE: "By a majority action of the two legislatures."

MR. CULKIN: "Of both Houses?"

MR. BERLE: "Yes."

MR. CULKIN: "That was the action of the Congress of the United States?"

MR. BERLE: "That was the action of the Congress of the United States."

MR. CULKIN: "So if there is anything impure or sinister about it, it comes within the category of Congressional action?"

MR. BERLE: "Yes. Well this is one of the historical ways by which we have traditionally arranged matters with Canada. Even President Taft when he proposed his reciprocity agreement, which failed of passage, proposed it in the form of an agreement." *****

MR. BERLE: "**** We did not relate this agreement directly to Article XIII, but we considered that this was an expression of policy employed in a formal treaty between the two countries on which we could appropriately rely in suggesting or choos-

ing this method as against the treaty method."

MR. CULKIN: "And that treaty was solemnly ratified by the United States Senate?"

MR. BERLE: "**** It was signed by Elihu Root."

MR. CULKIN: "And that would, of course, remove any sinister influence or sinister suggestion in connection with the propriety of the present procedure, would it not?"

MR. BERLE: "I think it is generally recognized that Elihu Root, who was then Secretary of State, was one of the great constitutional lawyers of his time, *** and I cannot imagine that he would have laid down a policy like that in Article XIII if he had thought there was anything sinister in it."

MR. CULKIN: "I wanted to calm the fears of my distinguished friend from California" (Mr. Carter, ranking minority member of the Committee).

MR. CARTER: "I have not had any fears, and so expressed myself to Mr. Berle."

It is clear that our President, our State Department and the Department of Justice all agree with Mr. Root that valid compacts can be made by the United States and Canada relating to their boundary waters, through the medium of executive agreements ratified by the majority in both Houses of Congress and by Parliament.

Various reasons have been advanced why the framers of the

Constitution placed therein the proviso that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." It is probable that this provision was not originally intended to hamper the chief executive in making treaties, but rather to guide and restrain him whenever important and binding international compacts were made which might affect the life, liberty and property of citizens, or deprive the Union of territory or seek to bind the United States and its people by some permanent change of policy. Moreover, it was thought that when the President needed advice respecting foreign relations more secrecy would attend a conference with a few senators than with the larger membership of both Houses. This was before the creation of a foreign relations committee and the present custom of unlimited debate in the Senate upon foreign compacts submitted to it. The plan adopted thus envisaged a few senators and the President sitting about a council table and without public clamor or debate discussing the form of proposed international compacts. Washington, in 1789, found the theory unworkable, when he for the first time went in person to the Senate and instead of getting advice, had his questions referred to a committee, and left in a rage. (See Corwin "The Constitution and World Organizations" p. 33).

Hundreds of executive agreements have been expressed by Acts of Congress and thus enacted into "the law of the land."

When the United States rejected the covenant of the League of Nations in 1919 and 1920, peace was declared with enemy nations, by an Act of Congress. Texas was annexed by an Act of Congress after the Senate had failed to ratify a treaty to accomplish the same purpose. Without the consent of either Congress or of the Senate, an exchange of notes in 1817, between the British Minister Bagot and Acting Secretary of State Rush, resulted in a limitation of naval forces on the Great Lakes before the arrangement was submitted to the Senate. Afterwards the Senate approved the provisions of such agreement. Theodore Roosevelt concluded a treaty with Santa Domingo, which was then bankrupt, which resulted in placing custom houses of that nation under American control, and prevented their seizure by European creditors. The Senate failed to ratify such arrangement, but, nevertheless, the President put it into effect by an executive order. Afterwards under apparent compulsion, the Senate ratified the agreement, but after it had become effective.

President McKinley arranged to furnish 5,000 men and a large naval force to undertake the rescue, release and protection of legations in China, at the time of the Boxer Rebellion. Congress was not consulted. Later, President McKinley negotiated in behalf of the United States and accepted the Boxer Indemnity Protocol. This Protocol also contained provisions respecting other intervening powers.

The construction of the Alaskan highway, the acquisition

of naval bases and the delivery of destroyers to Great Britain through the Hull-Lothian Agreement, and the well-known trade agreements with many nations are other instances of executive agreements made without ratification by two-thirds vote in the Senate. One might also mention the Lend-Lease Act of March 11, 1941, which is the basis of the mutual aid agreements undertaken by our government, and which has resulted in most extensive and necessary relief and aid to our Allies.

Certainly when such special agreements are ratified by both Houses of Congress they become the law of the land. The agreement of March 19, 1941, clearly falls within the well recognized class of compacts which can be constitutionally effectuated by concurrent legislation adopted by both Houses of Congress.

In B. Altman & Co. v. U.S. 224 U.S. 583, Mr. Justice Day, referring to the Commercial Reciprocal Agreement with France, which was negotiated under the Authority of the Tariff Act of 1897, said in relation thereto:

> "Generally, a treaty is defined as a compact made between two or more independent nations, with the view to the public welfare ***** while it may be true that this commercial agreement, made under the authority of the Tariff Act of 1897 (Para. 3), was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact negotiated between the representatives of two sovereign nations, and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries,

> and was proclaimed by the President. If not technically a treaty, requiring ratification, nevertheless, it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President."

The language of Judge Day clearly recognizes that agreements such as the 1941 agreement between the United States and Canada, having to do almost purely with domestic matters, and the construction of works necessary for navigation and commerce, can be effectuated in the manner proposed.

Again, in the Case of the U.S. v. Curtis-Wright Export Company, 299 U.S. 304, Mr. Justice Sutherland, in his opinion, comments upon the fact that "the investment of the Federal Government with the power of external sovereignty, did not depend upon the affirmative grants of the Constitution." He said:

> "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. (Citing cases) **** The power to make such international agreements as do not constitute treaties in the constitutional sense none of which is expressly affirmed by the Constitution, nevertheless exists as inherently inseparable from the conception of nationality. This the Court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations."

Citing B. Altman & Co., v. U.S. 224 U.S. 583
Crandall, Treaties, Their Making and Enforcement, 2d Edition, P. 102

Burnett v. Brooks, 288 U.S. 378.
Carter v. Carter Coal Co., 298 U.S. 295.

Beyond question the President has full and complete power under the Constitution to negotiate treaties, compacts and agreements with foreign powers and sovereignties. This power is derived not only under Article II, Section 1 of the Constitution, but also by reason of the fact that he is the chief executive of this sovereign nation. Such power is not limited by any provision of the Constitution. Having been negotiated, such international compacts become the law of the land after ratification in whatever manner the Constitution, the law of nations, or established custom necognizes as legal.

Since the President has such powers it has been usual for the President and the State Department to determine in what manner ratification shall be sought and whether or not such compacts have the dignity of treaties and should on that account be submitted to the Senate for its advice and consent pursuant to Article II, Section 2 of the Constitution. This has been the practice since George Washington was President and has been followed in almost countless cases.

While there are no exact and complete lists showing all treaties, compacts and executive agreements which have been negotiated and authorized, careful study indicates that during the first fifty years of government under the Constitution the

President entered into some twenty-seven international compacts which were not submitted to the Senate for its consent and that more than fifty became laws as treaties with the consent and approval of the Senate. During the second half century more than two hundred and twenty-five executive agreements and some two hundred treaties were entered into with foreign nations and during the last fifty years at least nine hundred executive agreements and five hundred treaties were enacted.

It must be admitted that it is difficult in many cases to determine from the context of the instruments themselves whether it would be more appropriate to submit them for ratification of the Senate or to proceed along the line of joint legislation of Congress or to put them into effect by the order of the chief executive. It is plain that in such outstanding cases as the Annexation of Texas the President and the State Department, without being in any wise embarrassed, frankly stated that the exigency demanded that the ratification of the annexation agreement made by the President should be by joint resolution of Congress.

This has been true also of most of the postal agreements and compacts in respect to reciprocal trade relations. Executive agreements have also played a leading part in effectuating essential economic policies evidenced by understandings between the United States and the governments of many foreign powers.

Never, so far as I have been able to discover, has a con-

test arisen on so narrow an interpretation of the Constitution as is now indicated by those who oppose the legislation now before Congress which seeks to ratify and effectuate the Agreement of 1941 between the United States and Canada.

As we have shown, there is nothing in the agreement which is not contemplated by the Boundary Waters Treaty of 1909. Those representing the two countries reached the conclusion that an agreement, and not a formal treaty, is all that is necessary to carry into effect their common purpose.

The agreement is not labeled a treaty and it would be highly inconsistent and contrary to established precedent to re-name the compact after it has been negotiated. This would only serve to prevent the House of Representatives from passing upon the terms of the agreement which has already been presented to it by a pending bill.

Not infrequently Congress has authorized the President to make international agreements and compacts on specific subjects. By so doing, Congress itself has recognized the unquestioned right of this sovereign nation to negotiate with other nations and make compacts without the advice and consent of two-thirds of the Senate. As a matter of fact, Congress has no constitutional power to negotiate treaties. Nevertheless, such legislation is exceedingly useful because it advises the President in advance in respect to the matter in hand. But, in reality, such legislation simply prejudges a proposed compact as to its necessity and propriety and legislates in respect

thereto in advance.

The procedure, however, is in reverse of that indicated in respect to the Aiken Bill. Commenting on the prize essay of Quincy Wright on the subject of "The Control of the Foreign Relations of the United States" (April 1921) John Bassett Moore said,

> "In regard to what the author of the essay, following the phraseology so often employed, discusses under the head of 'congressional delegation of power to make international agreements,' I have long, indeed I may say always, been inclined to think that no 'delegation' of power whatever is involved in the matter. As Congress possesses no power whatever to make international agreements, it has no such power to delegate. All that Congress has done in the cases referred referred to is to exercise beforehand that part of the function belonging to it in the carrying out of a particular class of international agreements. Instead of waiting to legislate until an agreement has been concluded and then acting on the agreement specifically, Congress has merely adopted in advance general legislation under which agreements, falling within its terms, become effective immediately on their conclusion or their proclamation."
>
> (See Wallace McClure, International Executive Agreements, P. 331).

It, therefore, follows that Congress itself has frequently set in motion the machinery which has ground the grist of many executive agreements with other nations.

Respectfully submitted.

Dated, November 11, 1944.

GEORGE STEPHENS REED,
of the
New York State Bar
and also
Trustee of the Power
Authority of the
State of New York.

NOTE: Appendix I. The Treaty of 1909.

Appendix II. The Niagara Diversion.
(Art. IX, Agreement of 1941)

Appendix III. Some Selected Agreements
Approved by Congress.

Appendix IV. Letter of Gen. Markham, Chief
of Army Engineers, (1934),
respecting Chicago Diversion.

# APPENDIX I.

## TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN.

BOUNDARY WATERS BETWEEN THE UNITED STATES AND CANADA.
(Signed at Washington, January 11, 1909; ratification advised by the Senate, March 3, 1909; ratified by the President, April 1, 1910; ratified by Great Britain, March 31, 1910; ratifications exchanged at Washington, May 5, 1910; proclaimed, May 13, 1910.)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS a treaty between the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, was concluded and signed by their respective plenipotentiaries at Washington on the eleventh day of January one thousand nine hundred and nine, the original of which treaty is word for word as follows:

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends, and for that purpose have appointed as their respective plenipotentiaries:

The President of the United States of America, Elihu Root, Secretary of State of the United States; and

His Britannic Majesty, the Right Honorable James Bryce, O.M., his ambassador extraordinary and plenipotentiary at Washington;

Who, after having communicated to one another their full powers, found in good and due form, have agreed upon the following articles:

PRELIMINARY ARTICLES.

For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

ARTICLE I.

The high contracting parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

It is further agreed that so long as this treaty shall remain in force this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the high contracting parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use thereof, but all such rules and regulations, and all tolls charged shall apply alike to the subjects or citizens of the high contracting parties and the ships, vessels and boats of both of the high contracting parties, and they shall be placed on terms of equality in the use thereof.

ARTICLE II.

Each of the high contracting parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other, as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control

over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the high contracting parties intends by the foregoing provision to surrender any right which it may have to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

ARTICLE III.

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

ARTICLE IV.

The High contracting parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary, unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

ARTICLE V.

The high contracting parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both parties to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York, and on the Canadian side of the river under licenses authorized by the Dominion of Canada and the Province of Ontario.

So long as this treaty shall remain in force, no diversion of the waters of the Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.

The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.

The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second.

The prohibitions of this article shall not apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for the purposes of navigation.

ARTICLE VI.

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

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

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

ARTICLE VII.

The high contracting parties agree to establish and maintain an International Joint Commission of the United States and Canada composed of six commissioners, three on the part of the United States appointed by the President thereof, and three on the part of the United Kingdom appointed by His Majesty on the recommendation of the Governor in Council of the Dominion of Canada.

ARTICLE VIII.

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval

of this commission is required, and in passing upon such cases the commission shall be governed by the following rules or principles, which are adopted by the high contracting parties for this purpose:

The high contracting parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

(1) Uses for domestic and sanitary purposes;

(2) Uses for navigation, including the service of canals for the purposes of navigation;

(3) Uses for power and for irrigation purposes.

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary. The requirements for an equal division may in the discretion of the commission be suspended in cases of temporary diversions along boundary waters at points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

The commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

The majority of the commissioners shall have power to render a decision. In case the commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the commissioners on each side to their own Government. The high contracting parties shall thereupon endeavor to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the commissioners, who shall take such

further proceedings as may be necessary to carry out such agreement.

ARTICLE IX.

The high contracting parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The commission shall make a joint report to both Governments in all cases in which all or a majority of the commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the commissioners on each side to their own Government.

ARTICLE X.

Any questions or matters of difference arising between the high contracting parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor General in Council. In each case so referred, the said commission is authorized to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as

may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

A majority of the said commission shall have power to render a decision or finding upon any of the questions or matters so referred.

If the said commission is equally divided or otherwise unable to render a decision or finding as to any questions or matters so referred, it shall be the duty of the commissioners to make a joint report to both Governments, or separate reports to their respective Governments, showing the different conclusions arrived at with regard to the matters or questions so referred, which questions or matters shall thereupon be referred for decision by the high contracting parties to an umpire chosen in accordance with the procedure prescribed in the fourth, fifth, and sixth paragraphs of Article XLV of The Hague convention for the pacific settlement of international disputes, dated October 18, 1907. Such umpire shall have power to render a final decision with respect to those matters and questions so referred on which the commission failed to agree.

ARTICLE XI.

A duplicate original of all decisions rendered and joint reports made by the commission shall be transmitted to and filed with the Secretary of State of the United States and the Governor General of the Dominion of Canada, and to them shall be addressed all communications of the commission.

ARTICLE XII.

The International Joint Commission shall meet and organize at Washington promptly after the members thereof are appointed, and when organized the commission may fix such times and places for its meetings as may be necessary, subject at all times to special call or direction by the two Governments. Each commissioner, upon the first joint meeting of the commission after his appointment shall, before proceeding with the work of the commission, make and subscribe a solemn declaration, in writing, that he will faithfully and impartially perform the duties imposed upon him under this treaty, and such declaration shall be entered on the records of the proceedings of the commission.

The United States and Canadian sections of the commission may each appoint a secretary, and these shall act as joint secretaries of the commission at its joint sessions, and the commission may employ engineers and clerical assistants from time to time as it may deem advisable. The salaries and personal expenses of the commission and of the secretaries shall be paid by their respective Governments,

and all reasonable and necessary joint expenses of the commission, incurred by it, shall be paid in equal moieties by the high contracting parties.

The commission shall have power to administer oaths to witnesses and to take evidence on oath whenever deemed necessary in any proceeding, or inquiry, or matter within its jurisdiction under this treaty, and all parties interested therein shall be given convenient opportunity to be heard, and the high contracting parties agree to adopt such legislation as may be appropriate and necessary to give the commission the powers above mentioned on each side of the boundary, and to provide for the issue of subpoenas and for compelling the attendance of witnesses in proceedings before the commission. The commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person and through agents or employees as may be deemed advisable.

ARTICLE XIII.

In all cases where special agreements between the high contracting parties hereto are referred to in the foregoing articles such agreements are understood and intended to include not only direct agreements between the high contracting parties, but also any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion.

ARTICLE XIV.

The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible and the treaty shall take effect on the date of the exchange of its ratifications. It shall remain in force for five years, dating from the day of exchange of ratifications, and thereafter until terminated by twelve months' written notice given by either high contracting party to the other.

In faith whereof the respective plenipotentiaries have signed this treaty in duplicate and have hereunto affixed their seals.

Done at Washington the 11th day of January, in the year of our Lord one thousand nine hundred and nine.

(Signed) Elihu Root (Seal)
(Signed) James Bryce (Seal)

APPENDIX II

DIVERSIONS AT NIAGARA

Article IX of the Agreement of 1941 contains certain provisions in respect to the diversion of water above the Falls from the Niagara River, which have been questioned as being in conflict with the Treaty of 1909, which would seem to limit all diversions of water from the Niagara River above the Falls, except as permitted in such treaty.

Article V of the Treaty of 1909 provides that the United States "may authorize and permit the diversion within the State of New York of the Waters of said river above the falls of Niagara for power purposes, not exceeding in the aggregate a daily diversion at the rate of 20,000 cubic feet of water per second.

The United Kingdom by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara for power purposes, not exceeding in the aggregate, a daily diversion at the rate of 36,000 cubic feet of water per second."

Article IX of the Agreement of 1941 recognizes the obligation to preserve and enhance the scenic beauty of Niagara Falls and River "as envisaged in the final report of the Special International Niagara Board," which well-known report contains a study and recommendations as to the use and diversions of Niagara Waters.

Subdivision (a), (b) and (c) of Article IX of the Agreement provides that the two governments: "May make arrangements by exchange of notes for the construction of such works in the Niagara River as they may agree upon, including provision for temporary diversions of the waters of the Niagara River for the purpose of facilitating construction of the works."

Subsection (c) provides that "upon completion of the works authorized in this Article, the Commission shall proceed immediately to test such works under a wide range of conditions and to report and certify to the governments, the effect of such works, and to make recommendations respecting the diversions of water from Lake Erie and the Niagara River," including a report as to the efficient utilization and equitable apportionment of such waters as may be available for power purposes.

"On the basis of the Commission's reports and recommendations," the governments thereafter may "by exchange of notes and concurrent resolution, determine the methods by which the purposes may be attained."

The provisions of subsection (a) and (c) of Article IX above referred to are clearly unobjectionable and cannot be attacked on any valid ground, and do not, in any way, conflict with the Treaty of 1909, for the diversions are of a temporary nature and for the purpose of testing the works. However, Subsection (b) of Article IX, if read separately might seem

to authorize the diversion of 5,000 cubic foot seconds on each side of the border in excess of the amount specified in Article V of the Boundary Waters Treaty of 1909.

Subsection (b) does not specifically state that such diversions are of a temporary nature as contemplated in subsections (a) and (c). As, however, the words "temporary diversions" are used in Subsection (a), it is fair to assume that it was the intention of the two governments that the diversions mentioned and permitted in Subparagraph (b) are the temporary diversions indicated in Section (a) and are for the purposes stated therein. Subsection (b) must be read with and as a part of Subsection (a) and it would have been better to combine (a) and (b) in a single subsection. However, the meaning and intention seem clear.

On the other hand, we have seen that the Treaty of 1909 recognizes and provides for the further development, use and diversion of boundary waters by special agreements between the two nations and that the agreement relates to improvement of navigation and commerce. It seems clear, therefore, that the two nations can, by special agreement, ratified by Congress as to the United States and by Parliament in behalf of Canada, provide for such additional and necessary uses and works as may be deemed advisable in order to improve navigation and for the benefit of commerce, and to include therein the production of power. I, therefore, conclude that the plan and proposals contained in Article IX of the Agreement

to authorize the diversion of 5,000 cubic foot seconds on each side of the border in excess of the amount specified in Article V of the Boundary Waters Treaty of 1909.

Subsection (b) does not specifically state that such diversions are of a temporary nature as contemplated in subsections (a) and (c). As, however, the words "temporary diversions" are used in Subsection (a), it is fair to assume that it was the intention of the two governments that the diversions mentioned and permitted in Subparagraph (b) are the temporary diversions indicated in Section (a) and are for the purposes stated therein. Subsection (b) must be read with and as a part of Subsection (a) and it would have been better to combine (a) and (b) in a single subsection. However, the meaning and intention seem clear.

On the other hand, we have seen that the Treaty of 1909 recognizes and provides for the further development, use and diversion of boundary waters by special agreements between the two nations and that the agreement relates to improvement of navigation and commerce. It seems clear, therefore, that the two nations can, by special agreement, ratified by Congress as to the United States and by Parliament in behalf of Canada, provide for such additional and necessary uses and works as may be deemed advisable in order to improve navigation and for the benefit of commerce, and to include therein the production of power. I, therefore, conclude that the plan and proposals contained in Article IX of the Agreement

can be constitutionally carried into effect by and through the Agreement of 1941, when ratified by concurrent resolutions of Congress and by Parliament. As expressed in Article IX the two countries intend to restudy Niagara and to make future adjustments and agreements concerning the allocation and diversion of water, from the Niagara River, having also in mind the preservation of the scenic beauty of the Falls.

In construing any Congressional act, treaty or international agreement, it is always wise and proper to study the purposes thereof and the reports of committees appointed to make recommendations and suggest provisions to be placed therein. On the question of permitted diversions of water from the Niagara River above the Falls, it is well to consider the known facts in respect to the present use of water from the Niagara River above and at the Falls, and the probable reason for placing in Article IX of the agreement, a provision which would permit an additional temporary or permanent diversion on each side of the boundary of at least 5,000 cubic foot seconds in addition to the diversions permitted in the Treaty of 1909.

Canada has brought into the watershed by the Ogoki and Long Lac Rivers diversions into Lake Superior, 5000 cubic foot seconds which, pursuant to understandings between the two governments would entitle Canada to the use of such additional water by diversion at Niagara Falls, for hydroelectric development.

APPENDIX II (CONTINUED)

On the American side, we have seen that a diversion of only 20,000 cubic foot seconds is allowed as against 36,000 on the Canadian side.

Diversions from Lake Michigan at Chicago have been limited by a decision of the United States Supreme Court to 1500 cubic foot seconds in addition to approximately 1900 cubic foot seconds originally allowed for municipal water supply. Prior to the Treaty of 1909, Chicago was claiming the right to divert at least 10,000 cubic foot seconds for the purpose of sewage disposal which water would outlet through the Illinois River into the Mississippi. Chicago even claimed that a large increase of population might even require 20,000 cubic foot seconds for all purposes. Much of this water when so used and diverted would develop large quantities of hydroelectric power, but through inefficient plants with a low head, not comparable with Niagara or the St.Lawrence developments. The proposed Chicago Diversion resulted in litigation. Objection was made to the dumping of sewage and additional water into the Illinois River and thence into the Mississippi where floods were already a menace. The Great Lakes States and New York also objected on the ground that the lake levels would be lowered and water unlawfully taken from the watershed. The Supreme Court, therefore, wisely determined the rights of Chicago, and limited such diversion as we have already seen. That the limitation was just and equitable was later demonstrated when the works

were completed.

A letter written by General E. M. Markham, Chief of Army Engineers, bearing date January 31, 1934, to Honorable Key Pittman, is most interesting. This letter appears as Appendix #. At this time it is probable that about 1900 cubic foot seconds is being diverted at Chicago for drinking and domestic uses in addition to the 1500 cubic foot seconds permitted by the decision of the United States Supreme Court for sewage purposes, making an aggregate of 3400 cubic foot seconds.

On March 19, 1906, the report of the American Members of the International Waterways Commission was filed, which made recommendations as to the necessity of a treaty to control diversions at Niagara, and for other purposes. The Commission made recommendations that diversions from Niagara River above the Falls, should be consistent with the then use of such waters, and mentioned the fact that 10,000 cubic foot seconds was contemplated from Lake Michigan for uses at Chicago. One cannot read this report and the subsequent treaty of 1910, and the final report of the Special International Board, without being impressed with the fact that at least 6,700 cubic foot seconds should be allocated to the New York State Side of the International Boundary and be diverted from the Niagara River above the Falls, without further delay.

Such facts, including the Ogoki and Long Lac Rivers diversion by Canada, all well known to those negotiating the agreement

of 1941, undoubtedly influenced the decision to include in such agreement the provisions contained in Article IX.

It is the intention of the two governments, as clearly stated in the agreement of 1941, to make further investigations and studies before finally determining and agreeing upon the amount of water which can be properly diverted for power purposes from the Niagara River above the Falls and the allocation and use of the same on each side of the boundary. That this is also the view of Canada is disclosed in Paragraph (c) of Article VII as contained in an agreement entered into between the Government of Canada and the Province of Ontario, which is also dated March 19th, 1941, and which is an accord between Canada and Ontario in respect to the use of diverted water for the production of hydroelectric power by Ontario resulting from the 1941 agreement. Paragraph (c) reads as follows:

> "Upon completion of the remedial works authorized under Article IX of the Canada-United States Agreement, Canada, without delay, will authorize such diversions of water above the Falls, for power purposes, in addition to the amounts specified in Article 5 of the Boundary Waters Treaty of 1909, as Canada is from time to time enabled to authorize under Article IX of the Canada-United States Agreement and Canada will promptly take steps that may be necessary under the Canada-United States Agreement to enable Canada to authorize at all times the maximum permissible diversion of water for power."

The arrangement between the United States and Canada clearly indicates that Canada, having diverted the waters of the Ogoki and Long Lac Rivers into Lake Superior, is entitled ~~it~~

to divert an equal amount of water and to use the same on the Canadian side of the border, and such arrangement does not seem to be in conflict with the spirit or intention of the treaty of 1909, or the recognized right of either country to make use of water which it actually supplies through and by means of its own works and improvements so long as such works do not change water levels adversely to the other country.

The arrangement in connection with the Ogoki Diversion is one of the factors which entered into the proposal contained in Article IX of the agreement of 1941, to make a new study of the whole situation at Niagara and for the temporary diversions indicated in such article. A reasonably clear statement of such intention is expressed in a letter from Honorable W. L. McKenzie King to Mr. Pierrpont Moffat, Minister to Canada, dated March 5th, 1941. The following is a quotation from such letter:

> "We are also duly appreciative of the agreement recently reached between our respective governments, whereby the Province of Ontario has obtained the right to the immediate use of additional power at Niagara, and the diversion of the waters of the Ogoki and Long Lac Rivers into Lake Superior, in consideration of which, authority was given for the immediate investigation by United States Engineers of the project in the international section of the St.Lawrence River in Ontario, in order to enable work of future development to proceed with the least possible delay, once an agreement between the two governments respecting the St.Lawrence development was concluded."

The conclusions which I reach are:

1. That under Article IX of the Agreement of 1941,

there is to be no permanent diversion of any water from the Niagara River in excess of the amount specified in the Treaty of 1909, without a further study and future understandings and agreements between the two countries.

2. That, having in mind all the provisions contained in the Treaty of 1909, and the purpose of such treaty, and the powers of each government to regulate commerce and navigation and to appropriate funds therefor, an agreement between the United States and Canada for immediate and permanent diversions of additional water from Niagara River above the falls, is permissible and appropriate procedure, and that when such agreement, or any other similar agreement, is ratified by concurrent legislation of Congress and ~~by~~ Parliament, ~~such action is in every respect constitutional.~~ it becomes the law of the land.

3. The Constitution does not forbid the modification or amendment of the Treaty of 1909 by concurrent legislation of Congress and Parliament.

# APPENDIX III.

THE FOLLOWING ARE A FEW OF THE MANY EXECUTIVE AGREEMENTS AND CONCURRENT ACTS OF CONGRESS RELATING TO INTERNATIONAL COMPACTS:

1792 (Feb. 20) Act of Congress authorizing subsequent executive agreements with Canada in respect to postal service.

1799 (Washington Administration) Settlement of the Wilmington Packet controversy with The Netherlands by an exchange of notes.

1845 Texas annexed by joint resolution of Congress, accepted by the Government and people of Texas. A treaty of annexation had previously been defeated in the Senate. In instructions relating to the resolutions Secretary Calhoun said, "It is now admitted that what was sought to be effected by the Treaty submitted to the Senate, may be secured by a joint resolution of the two houses of Congress incorporating all its provisions. This mode of effecting it will have the advantage of requiring only a majority of the two houses." (Held valid. Texas v. White. 74 U.S. 700).

1850 Secretary of State Daniel Webster acquired Horse Shoe Reef in Buffalo Harbor and Congress appropriated the purchase price. (See Malloy, Treaties and Conventions, Vol. 1, P. 663).

1890 McKinley Tariff Act, followed by executive agreements

1892 Executive agreement with Germany protecting authors, artists, musicians and photographers by reciprocal stipulations relating to copyrights.

1898 Hawaii annexed by joint resolution of Congress after two treaties had been submitted and ignored. These resolutions were approved by President McKinley, July 7, 1898.

1900 Samoan Islands annexed by release of Great Britain and Germany and consent of native chiefs. (President Theodore Roosevelt made the agreement.)

1903 Two executive agreements with Cuba (Congress making appropriations) relative to coaling stations for the Navy, customs and navigation duties.

1905 President Theodore Roosevelt refused to sanction a change made by the Senate in the terms of a "special agreement" made pursuant to a treaty with Great Britain respecting arbitration of international disputes. The only change made was the insertion of the word "Treaty" instead of "Agreement".

APPENDIX III (CONTINUED)

1905 Theodore Roosevelt entered into an executive agreement with the Dominican Republic (in lieu of a treaty) providing for a receiver of revenues from custom houses.

1911 (January 21) President Taft sought avoidance of Senate two-thirds rule by making use of an executive agreement with Canada for tariff reciprocity. This was accomplished by an exchange of notes which frankly stated "that the desired tariff changes shall not take the formal shape of a treaty, but that the Governments of the two countries will use their utmost efforts to bring about such changes by concurrent legislation at Washington and Ottawa."

1921 (July 2) Joint resolution of Congress, declaring war with Germany at an end.

1923 (October 18) Executive agreement with Brazil under Tariff Act of 1922, executed by Secretary Hughes with approval of President, relating to principles of commercial equality.

1934 Act of Congress authorizing the President to enter into foreign trade agreements with foreign governments.

1940 (August 18) The Roosevelt-Mackenzie King agreement between United States and Canada providing for a Permanent Joint Board of Defense for North half of the Western Hemisphere.

1940 (September 2) The Hull-Lothian Agreement between the United States and Great Britain relating to the defense of the Western Hemisphere, and granting to the United States Naval and Air bases on Newfoundland and elsewhere and transferring in exchange fifty destroyers. (See opinion of Attorney General Jackson dated August 17, 1940, to the effect that this agreement is constitutionally valid.)

1941 (March 11) Lend-Lease Act, the basis of the present mutual aid agreements.

1798 to date Biparte agreements authorized by acts of Congress relating to international mail service. (Particular reference is made to the Act of 1872.)

APPENDIX IV.

January 31, 1934.

Honorable Key Pittman,
United States Senate,
Washington, D.C.

Dear Senator Pittman:

In accordance with your request, I take pleasure in advising you on the asserted need for a diversion of water from Lake Michigan to provide for the present and future improvement of the Mississippi River for navigation.

A decree of our Supreme Court and the provisions of the St. Lawrence Deep Waterway treaty limit the diversion from the Great Lakes through the Chicago Drainage Canal into the Illinois River after the year 1938 to an annual average of 1,500 cubic feet per second, in addition to the amount drawn for the municipal water supply for the city of Chicago and discharged into the canal as sewage. The decree contemplates that this sewage shall be purified before its discharge into the drainage canal. The reliable flow through the Illinois Waterway and into the head of the Illinois River, as augmented by the water drawn for municipal purposes, will therefore be not 1,500 cubic feet per second, but will be 2,400 cubic feet per second. The annual average flow will be at least 3,200 cubic feet per second. The maximum annual average diversion through the Chicago Drainage Canal, including the sewage discharge from the city, has been 9,965 cubic feet per second. The decree will therefore decrease the diversion by a maximum of 6,765 cubic feet per second.

It has never been the view of this Department that the diversion of water from the Great Lakes into the Chicago Drainage Canal is an essential factor in the present and future development of the interior waterways system formed by the Mississippi River and its tributaries. The initial action to restrict the diversion was taken by this Department in 1907 because of the injury to navigation on the Great Lakes resulting from the lowering of their levels by reason of the diversion. Subsequently certain States of the Union brought action in the Supreme Court to restrain the diversion to prevent injury to their citizens, and the present decree is a result of the latter action. I need

not point out to you that even were the present treaty not ratified, a due regard for the interests and rights of these States will impel a proper restriction of the diversion. The interests of our own citizens, aside from any consideration of the treaty, will presumably always limit the diversion of water from the Great Lakes into the Mississippi River system to that essential to the public need.

Our inland waterway system is not dependent on the Great Lakes for its water supply. The flow of our great interior rivers, with such conservation as may be necessary, is ample to provide for their maximum development for navigation. The major tributaries of the river, the Ohio and the Missouri, as well as the Mississippi itself above the mouth of the Illinois, have been or are being developed for modern barge navigation with their own water resources. The portion of the main stem of the Mississippi, below the mouth of the Illinois, and the link with the Great Lakes formed by the Illinois River itself, are alone affected by the diversion.

Under the direction of Congress this Department has made a thorough study of the amount of water that will be required to meet the needs of a commercially useful waterway on the Illinois River and its connection with the Great Lakes, and on December 6, 1933, submitted a report setting forth its conclusions. This report was reviewed by the Board of Engineers for Rivers and Harbors as provided by law. The report finds that by constructing two modern locks and dams on the Illinois River which will supersede two old and inadequate structures now impeding navigation on the river, and with the completion of a lock and dam at Alton on the Mississippi River below the mouth of the Illinois, the flow provided under the decree of the Supreme Court and the provisions of the treaty will be ample for the fullest development of navigation on the Illinois. The conclusions in this report apply not only to the present 9-foot barge navigation but also to any future increase in depth that may be found advisable. No public need of navigation therefore exists for a larger diversion so far as navigation on the Illinois is concerned.

Even with the present diversion, the extreme low water flow of the Mississippi in the short reach of 23 miles between the mouth of the Illinois and the confluence of the Missouri has proved insufficient to afford a reliable 9-foot channel suitable for modern barge navigation. With funds

provided under the Public Works program, work will soon be begun on a lock and dam at Alton, a short distance above the mouth of the Missouri, which will make navigation independent of shortages of water supply. This dam is part of the comprehensive development of the Upper Mississippi River, now in active prosecution, to afford modern 9-foot barge navigation to Minneapolis and St. Paul.

There remains therefore only the consideration of the need for a diversion from the Great Lakes to afford the fullest development of navigation on the Mississippi below the mouth of the Missouri. The present low water flow of the Mississippi at St. Louis, immediately below the confluence of the Missouri, is 42,000 cubic feet per second, of which 35,000 cubic feet per second is contributed by the natural flow of the Missouri and the upper Mississippi, and the balance of about 7,000 or less cubic feet per second by the diversion from the Great Lakes into the Illinois River. This minimum flow is not adequate to provide a reliable channel of the full 9-foot depth. Under the Public Works program, however, construction has been begun on a great storage reservoir at Fort Peck at the headwaters of the Missouri, which through the conservation of flood waters will add at least 20,000 cubic feet per second to the low water flow of the mouth of the Missouri. It is at once apparent that this measure of water conservation will add three times as much water to the low flow of the Mississippi as is involved in the decreed reduction of the Chicago diversion.

Looking into the future, the demand must be foreseen for deeper and more commodious channels in our interior waterways, but these channels can be provided without the diversion of water from the Great Lakes. A comprehensive report made by a special board of engineers in 1909 found that it would be possible to provide a 14-foot channel in the Mississippi River from St. Louis to the mouth by dredging and constructing works to confine and regularize the low water channel, but that the great cost of these works was not justified by the benefits. Subsequent experience in the improvement of the river does not controvert this conclusion. Should it be found advisable at some future time to provide in channels of the Mississippi River and its tributaries a greater depth than 9 feet, to provide which effort is now being directed, a deeper channel in the Mississippi River below St. Louis can be provided by the further development of the works to confine and regularize

the low water channel. After these works have been developed to the maximum limit practicable and advisable, it may well be found appropriate to further augment the low water flow of the river. The Fort Peck Dam is however, but a beginning in the possibilities in the conservation of the water resources of the Mississippi. The available water supply with proper conservation is ample for any future needs of navigation without drawing upon the Great Lakes.

This Department has committed itself fully and wholeheartedly to the improvement of our great interior waterways system, and it would be its duty to present fully to Congress the need for augmenting the water supply of the Mississippi River by Diversion from the Great Lakes if this supply were necessary to the present and future development of the Mississippi River system. It does not regard a diversion greater than that provided in the Supreme Court Decree as necessary for that purpose, and is cognizant of the injury to navigation and related interests on the Great Lakes that would result from any excessive diversion of water through the Chicago Drainage Canal.

Sincerely yours,

E. M. Markham,
Major General,
Chief of Engineers.