

AGREEMENT

Commented [F1]: Came into force on 26 October 1989

**BETWEEN
THE GOVERNMENT OF CANADA
AND
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
FOR WATER SUPPLY AND FLOOD CONTROL
IN THE SOURIS RIVER BASIN**

Commented [F2]: Text in: Canada Treaty Series, 1989,
No. 36

The Government of Canada and the Government of the United States of America, hereinafter referred to as “the Parties”

DESIRING to provide for development of the Souris River Basin to increase the general welfare of the people of the United States and Canada;

NOTING that significant benefits will accrue to the Parties by construction, operation, and maintenance of reservoir projects in the Souris River Basin in Canada for the purposes of flood control in the United States of America and water supply in Canada;

FURTHER NOTING that the Government of the United States of America and the Government of Canada are parties to the Treaty between the Government of the United States of America and the Government of the United Kingdom Concerning Boundary Waters and Questions Arising Along the Boundary between the United States of America and the Canada, signed on January 11, 1909, hereinafter referred to as the “Boundary Waters Treaty”, and to the Convention Between the Government of the United States of America and the Government of the United Kingdom for the Protection of Migratory Birds in the United States of America and Canada, signed on August 16, 1916, hereinafter referred to as the “Migratory Birds Convention”, and desire in connection with the development contemplated in the Agreement to fulfil their rights and obligations under these instruments, and any agreements or orders which implement them;

INTENDING that the Souris River Basin be developed for flood control benefits in the United States of America and water supply benefits in Canada in a manner that is consistent with the Boundary Waters Treaty and the Migratory Birds Convention;

NOW, THEREFORE, hereby agrees to the following plan for development of the Souris River Basin:

ARTICLE I

1. In this Agreement, the terms:
 - a. “Alameda Dam” means the dam which will be constructed on Moose Mountain Creek in the Province of Saskatchewan approximately four kilometres upstream from its confluence with the Souris River;
 - b. “Boundary Dam” means an existing dam located on Long Creek approximately seven kilometres in a southwesterly direction from the City of Estevan in the Province of Saskatchewan;

- c. “Boundary Diversion Channel” means a channel that will be constructed in the Province of Saskatchewan with a maximum capacity of 60 cubic meters per second (2,100 cubic feet per second) to allow the conveyance of water from the Boundary reservoir to the impoundment behind Rafferty Dam;
- d. “Boundary Reservoir” means the impoundment of water behind Boundary Dam;
- e. “construction costs” means expenditures made by Canada for construction of Rafferty Dam and Alameda Dam and reservoirs. Such costs shall include expenditures for engineering, design, construction, land acquisition, and operation and maintenance prior to completion of construction;
- f. “flood control storage” means the volume below the maximum allowable water level in a reservoir to store flood event runoff;
- g. “improvement” means a dam, reservoir or related facility to which this Agreement applies;
- h. “Lake Darling Dam” means an existing structure which is part of the Upper Souris National Wildlife Refuge located on the Souris River approximately 25 kilometres in a northwesterly direction from the city of Minot in the State of North Dakota;
- i. “maintenance curtailment” means an interruption or curtailment of operations under the Operating Plan which is necessary for purposes of repairs, replacements, installation of equipment, performance of other maintenance work, investigations, or inspections;
- j. “Operating Plan” means the plan of operation which is attached to this Agreement as Annex A and which is an integral part of this Agreement, for certain dams, reservoirs, and related works on the Souris River;
- k. “Rafferty Dam” means the dam which is under construction at a location on the Souris River approximately six kilometres upstream in a northwesterly direction from the city of Estevan in the Province of Saskatchewan;
- l. “Reservoir Regulation Manual” means a document which is used as a guide in the day-to-day operation of a reservoir by the agency responsible for the operation of the reservoir. The manual shall contain a description of the project and its history, and discuss watershed characteristics, data selection and communication networks, hydrologic forecasts, the water control plan, and water control management;
- m. “substantially destroyed” means when the cost of repairs or rehabilitation to an improvement to rectify damages to that improvement would exceed 50 percent of the replacement value of the improvement at the time the damage is sustained;
- n. “uncontrollable force” means any force or cause beyond the control of the party affected, including, but not limited to, war, riot, civil disturbance, sabotage, earthquake, catastrophic storm event, and restraint by court order, which by exercise of due care and foresight, such party could not reasonably have been expected to avoid;
- o. “useful life” means the time remaining until an improvement is permanently retired from service because it no longer effectively serves its intended purpose, as defined in this Agreement and the Operating Plan, notwithstanding good maintenance, or because it is substantially destroyed by uncontrollable force;
- p. “water quality monitoring” means the collection, analysis and interpretation of water quality conditions, whether obtained through systematic surveys or special studies;

- q. “water quality objective” means a concentration level, other measure, or narrative goal which is intended to support the designated uses of water at a specific site; and
 - r. “water supply in Canada” means the use of reservoir storage in Canada for the purposes of: cooling water for electric generating plants, irrigation, domestic use, municipal and industrial use, agricultural use recreation, conservation, flood protection in Canada, or such other uses as the Government of Canada shall designate.
2. Both the United States of America system of measurement and the Système international (metric system) are equally valid where used in this Agreement. The conservation table in the Operating Plan shall be used to convert values in one measurement system to values in the other measurement system.
 3. The terms defined in this Agreement shall have the same meaning when used in the Operating Plan.

ARTICLE II

1. The Government of Canada shall expeditiously provide the Government of the United States of America with a minimum of 466,000 cubic decametres (377,800 acre-feet) of flood storage by:
 - a. Completing construction of Rafferty Dam and including in that improvement a minimum of 327,100 cubic decametres (365,200 acre-feet) of flood control storage; and
 - b. Constructing Alameda Dam and including in that improvement a minimum of 138,900 cubic decametres (122, 600 acre-feet) of flood control storage.
2. The Government of Canada shall design and construct Rafferty Dam and Alameda Dam in accordance with accepted engineering standards, before the Government of the United States of America shall make any payment pursuant to Article IV of this Agreement, the Government of Canada shall ensure, to the satisfaction of the Government of the United States of America, that Rafferty Dam and Alameda Dam will be designed to have a 100-year project life, and will be capable of operation in accordance with the Operating Plan.

ARTICLE III

1. The Government of Canada shall operate and maintain Rafferty Dam and Alameda Dam at no cost to the Government of the United States of America, except for those costs referred to in Article IV of the Agreement, in accordance with the Operating Plan or in accordance with any subsequent mutually agreed upon change to the Operating Plan for the term of this Agreement. Operation and maintenance of Rafferty Dam and Alameda Dam in accordance with the Operating Plan shall commence immediately upon completion of construction of each dam.
2. The Government of Canada shall operate and maintain the Boundary Reservoir at no cost to the Government of the United States of America in accordance with the Operating Plan or in accordance with any subsequent mutually agreed upon change to the Operating Plan for the remainder of the useful life of the Boundary Reservoir.

Operation maintenance of the Boundary Reservoir in accordance with the Operating Plan shall commence immediately upon entry into force of this Agreement.

3. The Government of Canada shall operate the Boundary Diversion Channel and any future water resources development of flood control projects constructed after entry into force of this Agreement for the term of this Agreement at no cost to the Government of the United States of America in a manner which will not adversely affect the stream flow in the Souris River so as to reduce the flood control benefits provided by the Rafferty Dam and Alameda Dam and the Operating Plan.
4. The Government of the United States of America shall operate and maintain the improvements located in the United States for the remainder of their useful life at no cost to the Government of Canada and in accordance with the Operating Plan or any subsequent mutually agreed upon change to the Operating Plan.
5. The Parties shall notify one another of any maintenance curtailment that is proposed at any project addressed in the Operating Plan and the probable duration thereof, and take such action as is appropriate to minimise the effects of such maintenance curtailments on operations under the Operating Plan, to include providing one year's notice of such maintenance curtailments when possible.

ARTICLE IV

1. The Government of the United States of America shall pay the Government of Canada \$25,7 million (United States currency, based on October 1985 price levels) for the flood control storage provided at Rafferty Dam.
2. The Government of the United States of America shall pay the Government of Canada an additional \$14,4 million (United States currency, based on October 1985 price levels) for the flood control storage provided at Alameda Dam.
3. The amount of the contributions specified in paragraphs 1 and 2 were determined by an allocation of construction costs based on the proportionate use of the Rafferty Dam and Alameda Dam for flood control in the United States of America and water supply in Canada. Such contributions shall be subject to adjustment for cost changes by the United States of America pursuant to Section 902 (2) of Public Law 99-662 and shall fluctuate to reflect changes in the rate of exchange for currency between the United States of America and Canada that occurred between October 1985 and the time such contributions are made.
4. At the end of each calendar month, the Government of Canada shall issue a progress billing to the Government of the United States of America for its share of project construction costs, which shall be determined by an allocation of joint construction costs to flood control and water supply purposes. The Government of the United States of America shall review such billing and, if not disputed, make payment of the amount billed within thirty days of receipt of the bill for the amount due. If the Government of the United States of America disputes any billing or portion of such billing, it shall specify its reasons for disputing the billing and pay any undisputed amount. Disputed billings or disputed portions of billings shall be discussed by the Parties. Disputes concerning amounts billed that are not resolved by discussion may be settled in accordance with Article XII.

5. Records shall be established and maintained to permit identification of the exact nature and amount of costs of the Rafferty Dam and Alameda Dam. The records established and maintained pursuant to this paragraph shall be subject to audit at the request of the Government of the United States of America at any reasonable time during the construction of the dams and for five years thereafter, following reasonable notice to the Government of Canada.
6. The Government of Canada shall furnish quarterly status reports to the Government of the United States of America on the progress of construction on the Rafferty Dam and Alameda Dam, the total amount of funds expended on the dams at the time of the report, and the anticipated costs to be billed to the United States for the remainder of the United States of America Government fiscal year, which ends on September 30, and for each following the United States of America Government fiscal year.

ARTICLE V

1. The Parties shall cooperate and consult on the matters addressed in this Agreement. The Parties shall exchange information as is appropriate to ensure timely and beneficial fulfilment of obligations under this Agreement.
2. The Parties shall prepare the Reservoir Regulation Manuals required by the Operating Plan. In preparing such Manuals, the Parties shall consult with interested states and provinces.
3. The Parties shall jointly review the Operating Plan at five-year interval, or as mutually agreed, in an effort to maximise the provision of flood control and water supply benefits that can be provided consistent with the terms of this Agreement. The Parties shall cooperate and consult, as necessary, with interested states, provinces, and agencies on the review of the Operating Plan and recommended changes in the Operating Plan.
4. Subject to the consent of the Government of Canada, officials of the Government of the United States of America may enter on lands in Saskatchewan acquired for construction of Rafferty, Alameda, and Boundary Dams for the purpose of inspection to ensure that such improvements are being constructed, operated, and maintained in accordance with the terms of this Agreement.
5. The Parties shall consult with interested states and provinces upon request, as appropriate, and so far as is practicable, concerning the supply of water throughout the Souris River Basin.

ARTICLE VI

1. The Parties shall ensure that all activities pursued under the terms of this Agreement are consistent with applicable provisions of the Boundary Waters Treaty, particularly those of Article IV, paragraph two.
2. The Parties shall establish a Joint Water Quality Monitoring Program (“the program”) in the in the relevant portions of the Souris River Basin.
3. The Parties shall establish, within six months of the entry into force of this Agreement, a Bilateral Water Quality Monitoring Group (“the Group”). The Group shall be

composed of six members, three appointed by each Party, and be co-chaired by a Canadian and a United States of America member. Each Party may also identify advisors to the Group to assist its respective members.

4. The initial United States of America members of the Group shall include a representative of each of the United States Environmental Protection Agency, the North Dakota Department of Health and Consolidated Laboratories, and the United States Geological Survey. A representative of the United States Fish and Wildlife Service, the United States Department of Army, and the North Dakota State Engineer shall serve as the initial advisors to the United States of America members of the Group.
5. The initial Canadian members of the Group shall include a representative of each of the Government of Canada, the Government of Saskatchewan, and the Government of Manitoba.
6. The Group shall:
 - a. develop recommendations for the Parties on the Program and on water quality objectives;
 - b. on a regular basis, exchange data provided by the Program;
 - c. collate, interpret, and analyse the data provided by the Program;
 - d. review the Program and the water quality objectives at least every five years and recommend to the Parties, as appropriate, any modifications to improve the Program and the water quality objectives; and
 - e. prepare an annual report to be submitted to the Parties containing:
 - i. a summary of the principal activities of the Group during the year;
 - ii. a summary of the principal activities affecting water quality in the Souris River Basin during the year;
 - iii. a summary of the collated, interpreted, and analysed data provided by the Program;
 - iv. a summary of the water quality on the Souris River at the two locations at which it crosses the International Boundary Between Canada and the United States;
 - v. a section summarising any definitive changes in the monitored parameters and the possible causes of such changes;
 - vi. a section discussing whether the water quality objectives as established pursuant to Paragraph 7 have been attained;
 - vii. a section summarising other significant water quality changes and the possible causes of such changes; and
 - viii. recommendations on new water quality objectives or on how existing water quality objectives can be met, including suggestions on water quality as it relates to water quantity during periods of low flow, in the event that the annual report indicates that the water quality objectives have not been attained as a result of activities pursued under this Agreement.

7. The Parties shall, by April 1, 1991, establish water quality objectives for the Souris River at the Saskatchewan/North Dakota boundary and at the North Dakota/Manitoba boundary.
8. The Parties shall make reasonable efforts, consistent with the existing legal authorities, to implement the recommendations of the Group and, where reasonably practicable, to improve water quality in the Souris River Basin.
9. If the annual report of the Group indicates that the water quality objectives are not being attained, the Parties shall commence consultations to determine how the water quality objectives can be met, revised or otherwise addressed. Such consultations shall include participation by interested states, provinces, and agencies.

ARTICLE VII

The Parties agree that paragraph 1 of the 1959 Interim Measures, which were approved by the Government of the United States of America and the Government of Canada, shall be modified as shown in Annex B attached hereto.

ARTICLE VIII

1. Should operation of any improvement result in flood damages in either the United States of America or Canada in excess of the flood damages that would have occurred had the improvement not been in operation, the Parties shall, upon the request of either Party, commence consultations on how such flood damages can be avoided in the future and what mitigation and compensatory measures may be appropriate, including possible changes to the Operating Plan. Such consultations shall include participation by interested states, provinces and agencies.
2. Notwithstanding Article XI, paragraph 2 nothing in this Article shall preclude either Party from asserting any rights in may have against the other Party for flood damages resulting from the actions of the other Party.

ARTICLE IX

All obligations of the Government of the United States of America to be carried out under the terms of this Agreement shall be subject to the laws and regulations of the United States of America. All obligations of the Government of Canada to be carried out under the terms of this Agreement shall be subject to the laws and regulations of Canada.

ARTICLE X

1. The Government of Canada designates the Government of Saskatchewan as the Canadian entity responsible for the construction, operation, and maintenance of the improvements mentioned in this Agreement and located in Canada. Such entity shall issue the progress billings and receive the payments referred to in Article IV.

2. The Government of the United States of America designates the Department of the Army as the entity responsible for receiving billings and making the payments for flood control storage referred to in Article IV and for operating the improvements mentioned in this Agreement and located in the United States of America in accordance with the Operating Plan during periods of flood. The Government of the United States of America designates the Department of the Interior as the entity responsible for operating the improvements mentioned in this Agreement and located in the United States of America in accordance with the Operating Plan during non-flood periods.

ARTICLE XI

1. The Parties shall be liable to each other and, shall make appropriate compensation to each other with respect to any act, failure to act, omission or delay amounting to a breach of this Agreement. For the purposes of this Agreement, any act, failure to act, omission or delay occurring by reason of uncontrollable force shall not constitute a breach of this Agreement.
2. The Parties do not intend to create in this Agreement any private right of Action. Except as provided by Paragraph 1 of the Article, neither Party shall be liable to the other or to any person in respect of any injury, damage, or loss occurring in the territory of the other caused by and act, failure to act, omission or delay under this Agreement whether the injury, damage, or loss results from negligence or otherwise.
3. Neither Party shall have any obligation under this Agreement to rebuild or further operate or maintain any improvement to be constructed under this Agreement that is destroyed by uncontrollable force.
4. Neither Party shall have any obligation under this Agreement to take any act to extend the life of any improvement mentioned in this Agreement beyond its normal useful life.

ARTICLE XII

1. The Parties shall seek to resolve any dispute concerning the interpretation or application of this Agreement through consultation undertaken in good faith. As part of this consultation process, the Parties may refer any dispute concerning the implementation or application of this Agreement to the International Joint Commission for advice and recommendations if mutually agreed. In making such a referral, the Parties shall request that the International Joint Commission provide its advice and recommendations within [90] days of the referral.
2. Any dispute concerning the interpretation or application of this Agreement which cannot be resolved through good faith consultations shall, upon the request of either Party, be referred to a neutral tribunal for review and examination and issuance of advice and recommendations. The tribunal shall consist of two members appointed by the Government of Canada, two members appointed by the Government of the United States of America, and a member jointly appointed by the Parties, who shall be chairman of the tribunal.

3. The Parties shall give prompt and sympathetic consideration to the advice and recommendations of the International Joint Commission and the tribunal.
4. The expenses of the International Joint Commission and the tribunal shall be shared equally by the Parties.
5. These procedures may be supplemented or modified by mutual agreement of the Parties.

ARTICLE XIII

1. This Agreement shall enter into force upon signature.
2. This Agreement may be amended by mutual agreement of the Parties.
3. This Agreement shall remain in force for a period of one hundred years or until the Parties agree that the useful life of the Rafferty and Alameda Dams has ended, whichever is first to occur.
4. If either Party fails to receive appropriations or other revenues in amounts sufficient to meet anticipated obligations under this Agreement, that Party shall so notify the other Party. Ninety calendar days after providing such notice, either Party may elect to terminate this Agreement or to defer future performance under this Agreement. Termination or deferral of future performance shall not affect existing obligations of the Parties under this Agreement or relieve the Parties of liability for any obligation previously incurred. In the event that either Party terminates or suspends future performance under this Agreement. Termination or deferral of future performance shall not effect existing obligations of the Parties under this Agreement or relieve the Parties of liability for any obligation previously incurred. In the event that either Party terminates or suspends future performance under this Agreement pursuant to this provision, the Government of Canada shall make appropriate adjustments in the Operating Plan to maximise the flood control and water supply benefits that can be obtained in the United States of America and Canada from the construction accomplished at the time of termination or suspension.

IN WITNESS WHEREOF the undersigned, duly authorised by their respective Government, have signed this Agreement.

DONE at Washington DC in duplicate, this 24th day of [*illegible*] 1989 in the English and French languages, each text being equally authentic.

For Canada:

MICHAEL XERGIN

For the United States of America:

JOHN DOYLE

CANADA/SASKATCHEWAN AGREEMENT

The Government of Canada, hereinafter referred to as Canada, and the Government of Saskatchewan, hereinafter referred to as Saskatchewan,

Have agreed as follows:

1. Saskatchewan shall be designated by Canada as the responsible Canadian entity for the purposes set out in Article X (I) of the Agreement between the United States of America and Canada for Water Supply and Flood Control in the Souris River Basin, to be signed at Washington, D. C., on October 26, 1989, hereinafter referred to as "the Agreement", and shall honour all the terms of the Agreement.
2. Saskatchewan shall indemnify and save harmless Canada from and in respect to any liability of Canada to the United States of America arising under the Agreement.

Signed at Regina and Ottawa this 23rd day of October 1989, and this 15th day of November 1989, in two copies,

For the Government of Canada
JOE CLARK

For the Government of Saskatchewan
GRANT DEVINE