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**THE DEVILS LAKE DISPUTE
BETWEEN CANADA AND THE
UNITED STATES**

LESSONS FOR CANADIAN GOVERNMENT OFFICIALS

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INTRODUCTION

Devils Lake is an isolated water body in North Dakota that has no natural outlets. Rising water levels in the lake caused flooding in local communities from the early 1990s onwards. To reduce the danger of further flooding, the State of North Dakota constructed an “emergency outlet” from the lake in 2005 in order to transfer some Devils Lake water through a series of canals to the nearby Sheyenne River, which flows into the Red River and eventually into Canada and Lake Winnipeg (see the maps in Appendix 1).

The governments of Canada and Manitoba had long opposed construction of this outlet, on the grounds that transferring Devils Lake water might introduce harmful invasive species and chemical contaminants into the surrounding watershed, which might in turn cause environmental and economic damage downstream in Canada. When construction of the outlet neared completion in early 2005, the Government of Canada launched a comprehensive diplomatic effort to prevent North Dakota from opening the outlet without first taking all reasonable and necessary steps to address Canada’s concerns.

One of Canada’s principal goals, apart from minimizing environmental and economic harm, was to uphold the spirit and letter of the Boundary Waters Treaty (BWT), which stipulates that “waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other” (Article IV). This treaty is the key bilateral legal instrument governing the management of boundary waters between Canada and the US.

As a result of Canada’s diplomatic efforts, North Dakota constructed a gravel filter at the Devils Lake outlet to reduce the danger of biota transfer through the outlet, and the US Government agreed help to design and construct a more advanced water treatment system that would eventually replace the gravel filter. However, the US did not agree to refer the matter to the International Joint Commission for resolution, as Canada had requested, nor did the US take action to prevent North Dakota from opening the outlet pending further study of risks. North Dakota opened the outlet in early August 2005. Small amounts of water have moved through the canal since then. Meanwhile, discussions on the design and financing of the more advanced treatment system continue.

Devils Lake is a story of a long-simmering local issue escalating into a bilateral dispute. It illustrates the complexity of the US political system, including the power of state and local interests, and the difficulties facing Canadian officials seeking to navigate that system.

BACKGROUND: DECADES OF DISPUTE

North Dakota straddles two major drainage basins – the Missouri River basin and the Hudson Bay basin – which are separated by a continental divide. Most of the state’s freshwater lies within the Missouri River basin, west of the continental divide (see Appendix 1). The eastern part of North Dakota has faced shortages of surface and ground water for agricultural, industrial and municipal use. For this reason, the State of North Dakota has long sought to divert surplus water from the Missouri River basin to the Hudson Bay basin.

A major dam on the Missouri River – the Garrison Dam – was constructed in 1954 to create an immense water reservoir that would, it was hoped, provide excess water to drier parts of the state, including eastern North Dakota. However, plans to construct a series of pumps and pipelines that would move water over the continental divide into eastern North Dakota have been delayed for decades because of local, state and federal regulatory politics and litigation, and because of Canadian concerns about the potential danger of accidentally transferring harmful biota or substances from the Missouri River Basin into the Hudson Bay basin.

Water management has thus been a point of contention between North Dakota and Manitoba (and, by extension, between the two national governments) for many years. In 1975, Canada and the US referred the Garrison diversion project to the International Joint Commission for further study (see text box). The IJC convened a study board of Canadian and American scientists to examine Canada’s concerns.

Reporting in 1977, the board concluded that the diversion project “would cause injury to health and property in Canada as a result of adverse impacts on the water quality and biological resources of Manitoba,” thereby violating the BWT. The Board also recommended against constructing any portion of the project affecting “waters flowing into Canada” unless and until these concerns had been addressed.

The US Government immediately ceased its support of the project. However, the US did not concede that the diversion would have violated the BWT. For its part, North Dakota believed that the IJC did not adequately consider the state’s pressing water problems, and state officials came to view the IJC as an obstacle to achieving their goals. Since then, North Dakota has continued to argue strenuously for the diversion project to proceed. This history (including North Dakota’s ongoing efforts to build the Garrison diversion) is important to understanding the politics of the Devils Lake dispute.

The International Joint Commission (IJC)

The IJC is the bilateral institution established in 1911 under the Boundary Waters Treaty with the mandate to oversee the management of trans-boundary waters and to assist in dispute resolution.

Either country can refer an issue to the IJC for study or settlement, but in practice all referrals have been jointly made by both countries.

THE DEVILS LAKE OUTLET PROJECT

Devils Lake is a closed sub-basin within the Hudson Bay basin. It has been separated from the surrounding Hudson Bay basin for approximately 1,000 years. The water level of Devils Lake has fluctuated greatly in recorded history. Most recently, since 1993, the lake has risen over eight metres, flooding homes, roads, farmlands, utilities and railways. This flooding led some to call for the construction of an emergency water outlet from the lake into the Sheyenne River.

As early as 1996, the US Army Corps of Engineers began examining the possibility of constructing such an outlet. By 1999, the Governor of North Dakota had become frustrated at how long the Corps was taking and announced that the state would build its own outlet if the Corps did not act. While the Corps continued its analysis on the federal outlet project, North Dakota began its own planning process for a *state* outlet project, inviting Manitoba to participate in an environmental review. Premier Doer of Manitoba declined to participate in this review, arguing that any review would need to follow US federal procedures and would need to comply with the BWT. “Any Devils Lake outlet,” wrote Doer, echoing the IJC’s 1977 Garrison project report, “represents a diversion of water between unconnected drainage basins and therefore has the potential to harm Canadian waters.”

North Dakota criticized Doer’s characterization of the Devils Lake outlet as an inter-basin transfer because Devils Lake was located within the Hudson Bay basin. Nevertheless, Manitoba insisted that the 1,000-year isolation of Devils Lake, combined with the lack of scientific data on the lake’s animal and plant life, raised a real concern that alien invasive species might be present in the lake and that without adequate precautions an outlet could convey these species into the broader Hudson Bay basin, ultimately causing environmental harm and economic damage to downstream communities and fisheries in Canada.

Scientific advisors to the Governments of Canada, Manitoba and North Dakota were involved in analyzing and providing information on water science that supported their respective governments’ positions. Although these scientists communicated with each other in multi-jurisdictional bodies as the International Red River Board, they rarely discussed the Devils Lake outlet issue *per se* in their meetings. Disagreements on the environmental implications of the outlet reflected a lack of data on the animal and plant life of Devils Lake itself, which made it possible for some scientists (those supporting the Canadian position) to support the “precautionary approach” of delaying any opening of the outlet until more data could be collected, while others (those supporting North Dakota) took the position that risks were minimal.

In February 2002, the Army Corps of Engineers issued a draft report provisionally recommending the construction of a federal outlet that would cost almost \$200 million to build and would be subject to a US federal environmental review process. Shortly after, the US Government invited Canada to make a joint reference to the IJC to consider the provisional project’s compliance with the BWT. The Government of Canada formally declined on the grounds that the Corps’s report was still in draft form and no final recommendation had been made on the project, and that any IJC reference should also include North Dakota’s renewed plans for Garrison diversion projects.

Meanwhile, North Dakota was proceeding with its own plan to build a simpler and cheaper (\$28 million) state outlet which, because it would be financed by the state alone, would not be subject to federal environmental review and could therefore be built faster. In August 2002, the North Dakota Department of Health issued a permit permitting the state to discharge water from Devils Lake into the Sheyenne River (specifying limits for the amounts of water that could be discharged in order to maintain water quality in the Sheyenne River) and the state immediately began to build its state own outlet infrastructure.

Two Outlet Projects

The US Army Corps of Engineers proposed a **federal outlet** costing approximately \$200 million and subject to federal environmental review.

North Dakota proceeded with its own **state outlet** costing \$28 million and not subject to federal environmental review.

In January 2004, US Secretary of State Colin Powell wrote to the Army Corps of Engineers indicating that he had some concerns about the federal outlet project, which was still in the planning stage. There was, he said, “some possibility of the introduction of biota of concern and additional mercury load into transboundary waters.” However, Powell took no stand on the *state* outlet project.

In April, now facing the prospect of North Dakota building its own outlet, the Government of Canada invited the US to make a joint reference on the state outlet project to the IJC. The US Government did not respond to this request.

Manitoba took action as well, joining a local North Dakotan interest group in filing a legal suit in a North Dakota county court, seeking to overturn the state outlet permit on the grounds that it did not meet the state’s environmental law. At the same time, Manitoba threatened to stop cooperating with the state on all water issues (including flood management along the Canada-US border) if North Dakota did not stop constructing the outlet.

By May 2004, Devils Lake had escalated into a significant bilateral issue. In a meeting with Secretary of State Powell, Minister of Foreign Affairs Bill Graham urged Powell to agree on an IJC referral on the state outlet project. The US continued to offer no formal response to this request. Privately, Secretary Powell told Minister Graham that Canada had missed its opportunity to pursue a joint IJC reference on the federal outlet proposals in 2002.

Having failed to slow construction of the state outlet, Premier Doer publicly pressed Prime Minister Paul Martin in late 2004 and early 2005 to raise the issue directly with President Bush. The outlet appeared to be scheduled for completion by summer 2005.

Prime Minister Martin met with President Bush and Mexican President Fox in Waco, Texas in March 2005 to discuss trilateral issues. Martin used the opportunity to raise Devils Lake with President Bush in their private session. Soon after, the Government of Canada began organizing a multi-pronged diplomatic and advocacy campaign, aimed primarily at securing US agreement for an IJC reference.

CANADA'S CHALLENGE: MOVING THE US POLITICAL SYSTEM

Canada faced the difficult challenge of moving the US political system, in which power is very diffuse and local actors and interests have considerable sway, in a direction favourable to the Canadian position. It did so by coordinating Canadian advocacy efforts, drawing upon the resources of actors across the Government of Canada and beyond, and engaging a broad range of US allies and adversaries.

US Senators have considerable power within the US federal government, and both Senators from North Dakota – Kent Conrad and Byron Dorgan – were determined to see the state outlet project completed. Conrad was the Democratic minority leader (“Ranking Member”) of the Senate’s powerful budget committee, which the Administration needed to cultivate in order to advance its spending priorities. Further, even though some officials in the State Department were reportedly sympathetic to Canada’s request for an IJC reference on the state outlet project, Conrad threatened to hold up Senate confirmation hearings for diplomatic appointments if the State Department impeded the construction of the state outlet, according to former Canadian ambassadors to the US, Michael Kergin and Frank McKenna. This may help to explain why the State Department never formally replied to Canada’s 2004 request for a joint reference to the IJC.

Initially, the White House had little interest in Devils Lake, apparently viewing it as a minor and mainly local issue. Moreover, Bush Administration officials were reluctant to cross swords with North Dakota Governor John Hoeven, a popular Republican who was reportedly positioning himself to run for the US Senate in 2006. Both of the state’s Senate seats were held by Democrats (Conrad and Dorgan) and the conventional wisdom in Washington was that Governor Hoeven might be able to win one of those Senate seats for the Republicans. This was a matter of great interest to the Bush White House in 2005 because maintaining Republican control of a narrowly-divided US Senate would help the president advance his domestic and foreign policy agenda during the final two years of his presidency. The Administration thus had little interest in pressuring Hoeven into suspending construction of the Devils Lake outlet – an outcome that would have damaged the governor’s political standing and possibly his future electoral prospects in North Dakota, where most people strongly supported the state outlet project.

Canada did, however, have some strong allies at the beginning of its concerted advocacy campaign. Premier Doer had developed a close relationship with the Governor of Minnesota, Tim Pawlenty, who was also troubled by the Devils Lake outlet because its effluent would flow into the Red River, which defines the border between Minnesota and North Dakota as it flows northwards to Manitoba. Pawlenty shared Manitoba’s and Canada’s concern that North Dakota’s opening of the outlet could weaken the Boundary Waters Treaty (which Minnesota had an interest in upholding given its own water-filled boundary with Ontario).

Both Minnesota and Manitoba were also worried that North Dakota’s unilateral action on Devils Lake could create an undesirable precedent leading to more unilateral action on the larger Garrison diversion project, whose potential environmental effects were more serious. The State of Missouri also shared this concern, but for slightly different reasons: any Garrison

diversion would lower water levels in the Missouri River, making navigation more difficult for commercial barges.

There was also some potential to make common cause with other US actors, including non-governmental environmental organizations in North Dakota and elsewhere, as well as local, state and federal officials from the Great Lakes states and elsewhere, who recognized the importance of maintaining a good working relationship with Canada on transboundary water issues.

DIPLOMATIC AND ADVOCACY CAMPAIGN: APRIL-AUGUST 2005

Several Government of Canada actors had been working on the Devils Lake file in the period leading up to April 2005. They included:

- Foreign Affairs Canada, including both the North America bureau and the legal branch;
- Canada's Embassy in Washington, which managed Congressional outreach and advocacy; and
- Environment Canada, which had a division responsible for international environmental policy and other divisions dealing with the scientific aspects of water issues.

The decision to intensify Canada's advocacy efforts in April 2005 led to two immediate changes in the management of the Devils Lake file.

- First, the Washington Embassy was designated as the lead for Canada's advocacy and communications efforts. This decision reflected the fact that the Embassy was closest to the relevant US actors and that it had a mandate to serve clients throughout the Government of Canada.
- Second, the Privy Council Office chaired regular teleconferences on Devils Lake, aimed not only to coordinate efforts across federal government actors but also to draw on all the expertise and resources of the Government of Canada. Participants included officials from Foreign Affairs Canada, the Washington Embassy and Environment Canada as well as representatives from the Department of Justice (to address legal aspects of the file) and PCO Communications (including the regional officer based in Winnipeg). Between mid-April and early August 2005, these teleconferences took place once or twice per week, and sometimes more frequently.

Effective coordination with Manitoba was important to maximize Canadian leverage and ensure consistent messaging. For this reason, Manitoban officials were invited to participate in the federal government teleconferences. Typically, two Manitoban officials participated – one from the Premier's Office and one from the Department of Water Stewardship. However, on some occasions Manitoban officials were not invited to participate so that federal government officials could discuss matters of relevance only to the Government of Canada.

Canada's diplomatic resources were mobilized throughout the United States for the Devils Lake communications and advocacy campaign. The issue became a top priority for the Ambassador and political section of the Washington Embassy, and for all of Canada's regional missions in the US where there were nearby allies or adversaries to be engaged.

IDENTIFYING ADVOCACY TARGETS

The Embassy, as lead of the advocacy campaign, identified several categories of targets to be approached. They included:

- US Senators;
- US Representatives;
- State Governors and legislators;
- Major city mayors;
- Members of the US Administration; and
- Non-governmental organizations.

The Embassy also decided to focus its advocacy efforts on specific regions of the US which were most likely to be sympathetic to Canada's position, namely:

- Great Lakes states and other border states which had an interest in maintaining effective relations with Canada on transboundary water issues; and
- Midwestern states concerned about the possible effects of any future water diversions from the Missouri River (including the Garrison diversion project).

ADVOCACY CAMPAIGN

Canadian officials in the Embassy and in regional missions across the US worked in collaboration with the Government of Manitoba to secure the support of numerous US officials and interests for Canada's position on the Devils Lake outlet (see Appendix 3):

- In the two months between mid-April and mid-June, at least five US Senators (from Minnesota, Ohio, Indiana and Rhode Island) and eight US Representatives wrote letters to Secretary of State Condoleezza Rice calling for the US to refer the Devils Lake issue to the IJC.
- The Governors of Missouri, Ohio and Minnesota also wrote to Secretary Rice requesting an IJC referral on the Devils Lake outlet, as did several state legislators.
- The member states of the Great Lakes Commission (Illinois, Indiana, Michigan, New York, Ohio, Pennsylvania and Wisconsin) also wrote such a letter.
- The Great Lakes and St. Lawrence Cities Mayors group passed a resolution supporting and IJC reference, including strong support from Chicago Mayor Richard Daley.
- Aboriginal groups in Canada and the US – and industry and NGO groups such as the Lake Carriers' Association, the Great Lakes Research Consortium, and the Friends of the Earth – also wrote to Secretary Rice supporting an IJC reference.

- In addition, the Embassy's communications strategy began to generate US media attention on the Devils Lake issue. This attention intensified after Ambassador McKenna wrote an op-ed article for the *New York Times* on May 12, 2005 (see Appendix 4).

Throughout this period, the Embassy coordinated the activities of Canada's regional missions and maintained a detailed tracking record of all contacts between Canadian officials and US advocacy targets. This record included "next steps" for each target and identified responsible Canadian actors. It was kept evergreen, shared with all Government of Canada departments, and provided a basis for informing Ministers of the progress of the campaign.

The regular teleconferences also allowed officials to keep each other informed of their respective activities and share new information, to discuss the overall direction and priorities of the campaign, to coordinate the timing of different contacts to maximize their effectiveness, and to ensure consistent messaging.

Foreign Affairs and Environment Canada collaborated in preparing advocacy materials, including scientific fact sheets that the Canadian officials distributed when they called on US influencers (see Appendix 5). These fact sheets were detailed, informative and eye-catching.

MINISTERIAL ENGAGEMENT

Regular communication and discussion among Ministers on Devils Lake helped to maintain the momentum of the advocacy campaign and reinforced the importance of ongoing inter-departmental coordination among officials.

The Canada-US Cabinet Committee, which had responsibility over the Devils Lake issue, created an ad hoc group of Ministers in May 2005 to ensure continuous oversight of the file. This group included the:

- Minister of Foreign Affairs (Pierre Pettigrew);
- Minister of the Environment (Stéphane Dion);
- Minister of Justice (Irwin Cotler), to address the legal aspects; and
- President of the Treasury Board (Reg Alcock), in his capacity as Minister with special responsibility for Manitoba.

Canada's Ambassador to the US (Frank McKenna) was also asked by Ministers to participate in some of the discussions of the ad hoc group. The Privy Council Office served as the secretariat for the ad hoc group of Ministers.

Individually, Ministers communicated Canada's position on Devils Lake to their US Administration counterparts, and spoke to other key players including the Governor of North Dakota and Senator Conrad.

The existence of the ad hoc group of Ministers was also important in permitting timely adjustments of Canada's policy position on Devils Lake as circumstances shifted, including when it became clear that the US would not agree to a joint IJC reference (see below).

THE PERIOD OF NEGOTIATION

Canada's advocacy efforts were successful in gaining the attention of the White House on the Devils Lake file. President Bush instructed the chairman of the White House Council on Environmental Quality (CEQ), James Connaughton, to find a solution to the dispute. This was a setback for North Dakota, which had planned to proceed with the operation of the Devils Lake outlet and apparently did not expect the intervention of the Bush Administration.

The CEQ invited both Canada and North Dakota to make separate presentations in Washington. Canada's presentation (on June 1) was drafted by the same inter-departmental coordinating group that had been communicating regularly by teleconference, including input from Manitoba. It emphasized the potentially harmful effects of opening the Devils Lake outlet and called for an IJC reference.

As a result of these meetings, the CEQ arranged for a rapid bio-assessment to be conducted on Devils Lake in July in order to search for evidence of suspected invasive species. In the meantime, the State of North Dakota adjusted its outlet design and added a new gravel barrier that was intended to filter out larger organisms.

The preliminary results from the rapid bio-assessment showed no immediate danger of harmful biota transfer through the Devils Lake outlet. Canada sought further study before the outlet would be opened, because relatively little was still known about the biology of Devils Lake and because the gravel filter would not stop microorganisms from moving through the outlet.

By now, however, it was becoming clear that North Dakota was planning to proceed with testing the state outlet and that the US would not support an IJC reference. Thus, in late July, CEQ mediated negotiations on the terms of an agreement between Canada and the US on Devils Lake that could be supported by both of the national governments as well as Manitoba, North Dakota and Minnesota.

Council on Environmental Quality (CEQ)

The CEQ is an office within the Executive Office of the President. It coordinates federal environmental efforts and works closely with agencies and other White House offices in the development of environmental policies and initiatives. The CEQ Chair, who is appointed by the President with the advice and consent of the Senate, serves as the principal environmental policy adviser to the President. In addition, the CEQ reports annually to the President on the state of the environment; oversees federal agency implementation of the environmental impact assessment process; and acts as a referee when agencies disagree over the adequacy of such assessments

JOINT DECLARATION ON DEVILS LAKE: AUGUST 5, 2005

The Joint Canada-US Declaration on the Devils Lake Diversion Project (see Appendix 6) was negotiated as North Dakota was proceeding to open the outlet for testing. It indicated that:

- All parties had "a higher level of confidence" that the outlet could be operated without causing harm.
- Canada and the US agreed to cooperate in the construction of a more advanced filtration or disinfection system at the outlet.

- Canada, the US, Manitoba, North Dakota and Minnesota also agreed to work with the International Red River Board (a scientific body of the International Joint Commission) to develop a shared risk management strategy for the entire Red River Basin.
- North Dakota had no “current intention” to divert Missouri River water *into* Devils Lake.

SINCE AUGUST 2005

Since the Joint Declaration was issued in August 2005:

- The Devils Lake outlet operated for 10 days in 2005. This limited operation was due to water quality restrictions set by North Dakota’s own state permit for the outlet. In 2006, North Dakota acted to reduce the restrictions in the permit, which allowed the outlet to operate for 38 days in 2007.
- Canada and the US continue to study the requirements for a more advanced filtration or disinfection system at the outlet.
- The International Red River Board has been examining the possible environment effects of the Devils Lake outlet on the Red River basin, building upon the work of the Devils Lake rapid bio-assessment.
- A coalition of NGO groups filed a submission to the North American Commission on Environmental Cooperation, asserting that Canada and the US had failed to enforce their obligations under the Boundary Waters Treaty to prevent possible harm from the Devils Lake Outlet. The Commission ruled that it lacked jurisdiction to reach a finding.
- North Dakota and the US Government are moving ahead with environmental assessments of a reformulated Garrison diversion project that would transfer Missouri River water across the continental divide by pipeline into the Sheyenne and Red Rivers to serve the water needs of communities in eastern North Dakota and western Minnesota.

CONCLUSION: A PARTIAL SUCCESS?

The Joint Declaration of August 2005 may have been the best outcome that Canada could have expected under the circumstances. But whether it was a “success” depends on one’s perspective.

On one hand:

- The US did not agree to an IJC reference on the state outlet project.
- The August 2005 statement was not legally binding, and Canada’s initial efforts to negotiate a legally binding text did not ultimately come to fruition.
- The prospect of building a more advanced filtration or disinfection system on the outlet remains uncertain.
- Canada and Manitoba continue to be concerned about other possible water diversion projects in North Dakota.

On the other hand:

- If it were not for Canada’s advocacy and communications campaign, North Dakota probably would have opened its outlet with no gravel filter, no agreement to construct a more advanced mitigation system, and no plan to strengthen environmental monitoring of the Red River basin.
- Even though the matter was not referred to the IJC, the negotiation of the August 2005 declaration did reflect the spirit of the Boundary Waters Treaty, including the principle that both countries should be consulted on transboundary water issues of mutual interest.
- The August 2005 declaration cooled tempers on both sides of the border and reduced the significance of Devils Lake as an irritant in the Canada-US relationship.

It could be that the Government of Canada waited too late to begin its concerted advocacy campaign – Canada did not fully mobilize its resources until the Devils Lake state outlet was nearing completion in early 2005. Further, Canada’s advocacy position in 2005 may have been weakened by its earlier 2002 decision to decline the US offer of jointly referring the Devils Lake issue to the IJC when a federal outlet was under consideration.

Nevertheless, Canada did achieve a partial success by reaching an agreement with the US that addressed some of Canada’s concerns – and it did so in spite of strong opposition from the North Dakota Congressional delegation and the US Administration’s initial unwillingness to intervene. Canada’s advocacy and communications campaign in April-August 2005 induced the White House to become involved in the dispute and to seek a compromise that would

address the concerns of North Dakota, Minnesota, Canada and Manitoba. Without Canada's efforts, it is very likely that there would have been no Joint Declaration and that North Dakota would have simply opened the outlet.

LESSONS FOR CANADIAN GOVERNMENT OFFICIALS

Several lessons can be drawn from the Devils Lake episode. Below are two sets of lesson – first relating to the US political system, and the second to Canada’s engagement and advocacy strategy.

A. LESSONS RELATING TO THE US POLITICAL SYSTEM

1. Complexity of the US Political System

It is impossible to fully understand US behaviour on the Devils Lake issue without considering the role of North Dakota state officials and the North Dakota Congressional delegation, the concerns of other US states and local officials, and the relationship between powerful actors in Congress and the US Administration, including the White House and State Department.

2. All Politics is Local

Domestic and local considerations were predominant, even for federal actors, including those in Congress and in the Administration. Concerns about maintaining good relations with Canada were secondary. To the extent that Canada succeeded in engaging the White House, the mobilization of US domestic interests in support of the Canadian position seems to have been important.

3. Importance of Electoral Politics and Timing

Among the domestic considerations in this case was the anticipation of Governor Hoeven’s possible bid for a US Senate seat from North Dakota and the Administration’s desire to solidify Republican control of the Senate.

4. Power of US Senators (and their links with State Governors)

The Devils Lake case also illustrates the power that US senators can exercise over the Administration by threatening to oppose the Administration’s efforts, including in areas not directly related to the issue at hand. Further, it also underlines the close relationship that sometimes exists between state governors and US senators (and the broader Congressional delegation from the state), even when they belong to different parties.

B. LESSONS RELATING TO CANADA’S ENGAGEMENT STRATEGY

Several features of Canada’s advocacy and communications campaign on Devils Lake contributed to its effectiveness:

1. Coordinated Strategy

By agreeing on a single Government of Canada strategy, all relevant departments pursued the same goals, synchronized their efforts, and maximized Canada’s leverage.

2. Whole of Government Involvement

All relevant federal government departments were involved in the process of planning and executing the strategy.

3. Effective Use of the Embassy and Missions in the US

The Embassy and the network of Canadian missions in the US were closest to the “targets” of Canada’s advocacy efforts and best placed to lead these efforts.

4. Regular Communication

Frequent teleconferences allowed all relevant Government of Canada actors to stay apprised of recent events and discuss next steps, and also to draw quickly on expertise from across the Government of Canada (e.g., scientific, legal, diplomatic).

5. Involvement of Manitoba

Inviting Manitoban officials to participate in regular teleconferences increased the amount of information available to all Canadian actors and facilitated greater coordination between the two governments. It may have also helped to moderate Manitoba’s position and avoid a detrimental escalation of the dispute with North Dakota.

6. Strategic Targeting of US Influencers

A wide range of US actors were targeted in the advocacy campaign (including federal, state and local leaders), focusing on parts of the US which were most likely to be sympathetic to Canada’s concerns and/or troubled by the implications of North Dakota’s water diversion.

7. Detailed, Real-Time Tracking

The Embassy’s detailed and up-to-date records of contacts with US influencers contributed to the effective management of the advocacy campaign. These records were shared with all Canadian actors and Manitoba, and also provided to Ministers.

8. Ministerial and Prime Ministerial Engagement

Creation of an ad hoc group of Ministers facilitated timely policy decisions on Canada’s strategy, including Canada’s negotiating positions when it became clear that the US would not agree to an IJC reference. Ministers were also able to coordinate their individual contacts with their US counterparts. (The ad hoc group of Ministers was supported by PCO on behalf of the inter-departmental coordinating group, which collectively drafted the briefing materials provided to Ministers).

The Prime Minister’s communication with President Bush was also crucial in mobilizing the support of the White House.

9. Selective Engagement with NGOs

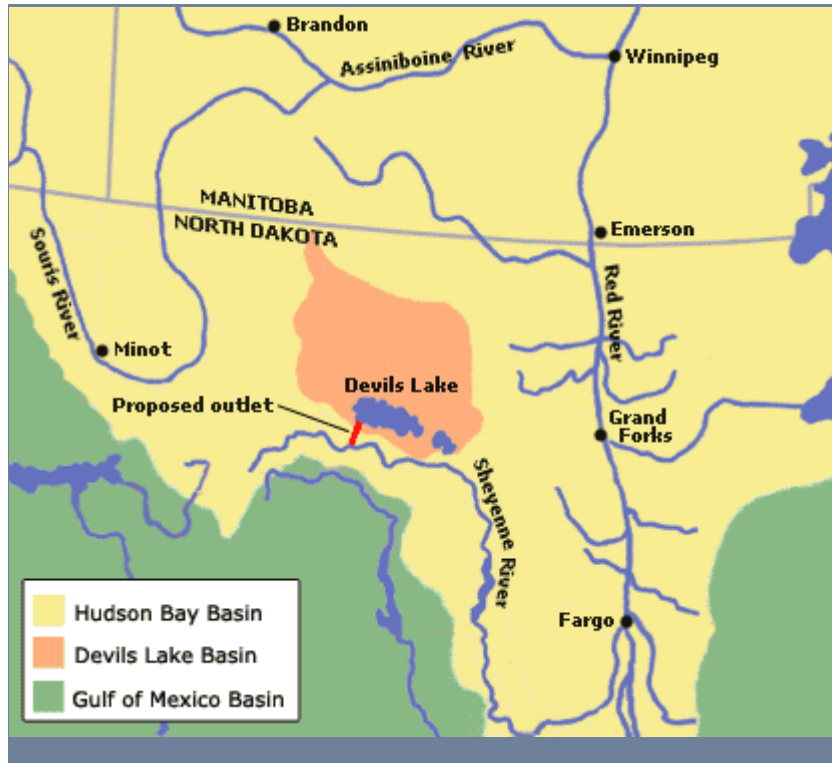
Canada and Manitoba communicated regularly with certain NGOs in Canada and the US on the Devils Lake issue. Information was provided to these NGOs for their own advocacy efforts.

10. Coordinated, Strategically Crafted Messaging

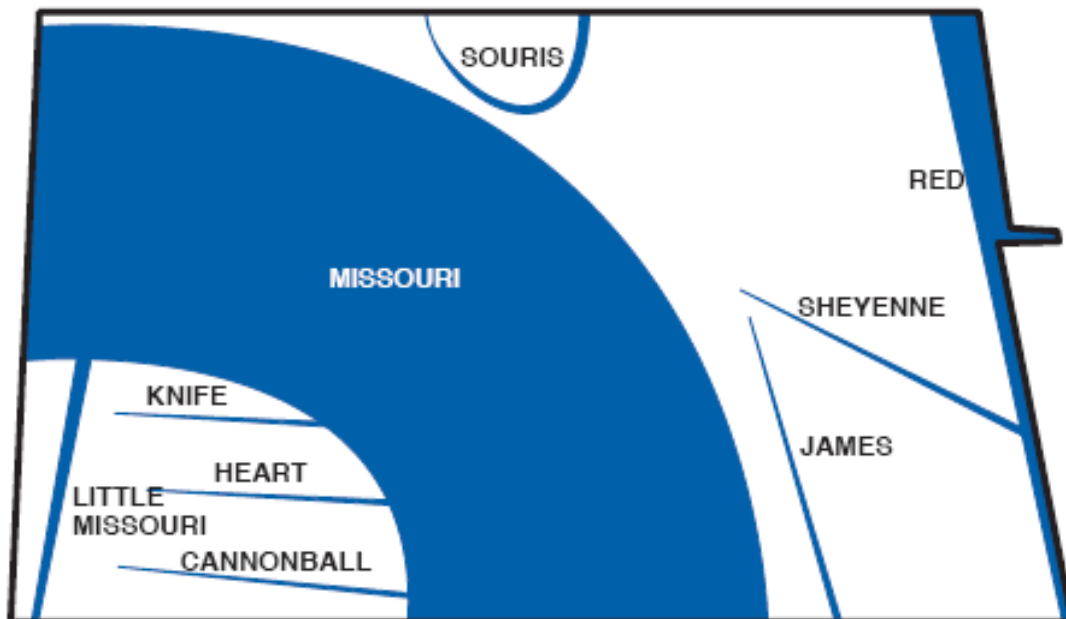
Key messages and speaking points were provided to all Canadian officials and Ministers who had contact with US influencers. These messages were drafted by the inter-departmental coordinating group and included input from Manitoba

Canada's negotiating positions and advocacy messages on Devils Lake emphasized the fact that the US and Canada benefit from the effective joint management of transboundary waters. These messages were intended to highlight US national, regional and local interests in cooperating with Canada on the Devils Lake issue.

Drainage Basins (including the Devils Lake sub-basin)



Relative Discharges of the Principal Rivers in North Dakota



APPENDIX 2

TIMELINE

October 2000	Manitoba Premier Gary Doer declines ND's offer to partner in ND's environmental review of the Devils Lake Temporary Emergency Outlet Project.
February 2002	Army Corps of Engineers issues draft report with preliminary recommendation to build emergency outlet
May 2002	Canada declines US Government's invitation to make joint reference to IJC on proposed DL outlet project.
February 2003	Army Corps of Engineers planning/environmental report recommends federal outlet project
August 2003	North Dakota state agency issues permit for smaller outlet project.
January 2004	Letter from Secretary of State Colin Powell to Army Corps of Engineers indicating concerns about the possibility of biota transfer through federal outlet.
April 2004	Canada invites US to make joint reference to IJC on Devils Lake. US does not reply.
April 2005	Interdepartmental working group established with regular teleconferences chaired by PCO and Embassy.
April-June 2005	Advocacy campaign led by Embassy and regional missions in the US.
June 1, 2005	Government of Canada presentation to the White House Council on Environmental Quality (CEQ).
July 2005	Rapid bio-assessment of Devils Lake.
August 4, 2005	ND begins testing Devils Lake outlet with limited water flow
August 5, 2005	Joint Canada-US Declaration on the Devils Lake Diversion Project
August 15, 2005	Devils Lake outlet begins limited operations.

APPENDIX 3

SELECTED CALLS FOR AN IJC REFERRAL

From Capitol Hill

- Senator Lincoln D. Chafee to U.S. Secretary of State Condoleezza Rice
- Senator Mark Dayton to U.S. Secretary of State Condoleezza Rice
- Rep. Gil Gutknecht to U.S. Secretary of State Condoleezza Rice
- Rep. Rahm Emanuel to U.S. Secretary of State Condoleezza Rice
- Rep. Raúl Grijalva to U.S. Secretary of State Condoleezza Rice
- Representative Louise Slaughter enters into the Congressional Record Ambassador Frank McKenna's Op-Ed in the *New York Times*
- Senator Richard G. Lugar to U.S. Secretary of State Condoleezza Rice
- Rep. Thomas E. Petri to U.S. Secretary of State Condoleezza Rice
- Rep. Jim McDermott to U.S. Secretary of State Condoleezza Rice
- Senator Mike DeWine to U.S. Secretary of State Condoleezza Rice
- Press Release- Kennedy Supports International Joint Commission
- Representative John Kline to U.S. Secretary of State Condoleezza Rice
- Senator George V. Voinovich to U.S. Secretary of State Condoleezza Rice
- Rep. Betty McCollum to U.S. Secretary of State Condoleezza Rice
- Representatives Oberstar and Slaughter to U.S. Secretary of State Condoleezza

From State and Local Governments

- Ohio Governor Bob Taft to U.S. Secretary of State Condoleezza Rice
- Resolution of the Great Lakes and St. Lawrence Cities Initiative
- Minnesota state Senator John Marty to Secretary of State Rice
- Great Lakes Commission to (former) Secretary of State Colin Powell
- Minnesota Governor Tim Pawlenty to (former) Secretary of State Powell
- Missouri Governor Bob Holden to (former) Secretary of State Colin Powell

From Canadian Officials

- Premier Jean Charest to Prime Minister Paul Martin
- Premier Dalton McGuinty to Prime Minister Paul Martin

From Aboriginal Groups

- Assembly of First Nations, National Chief Phil Fontaine to U.S. Secretary of State Condoleezza Rice
- White Earth Indian tribe's resolution regarding Devils Lake Waters, Outlet and Treaty Maps
- Red Lake Band of Chippewa Indians resolution regarding Devils Lake Waters, Outlet and Treaty Maps

From Non-Governmental Organizations

- Lake Carriers' Association to U.S. Secretary of State Condoleezza Rice
- Great Lakes Research Consortium to U.S. Secretary of State Condoleezza Rice
- Canadian Environmental Law Assn. to U.S. Secretary of State Condoleezza Rice
- Canadian Wildlife Federation to U.S. Secretary of State Condoleezza Rice

APPENDIX 4

AMBASSADOR MCKENNA'S OP-ED IN THE NEW YORK TIMES

HELL FROM HIGH WATER

By Ambassador Frank McKenna
New York Times
May 12 2005

A CRISIS looms on the United States border with Canada, and it could easily be averted with some research and a little patience.

The problem stems from a body of water in North Dakota known as Devils Lake. The lake has no natural drainage, and because North Dakota has drained surrounding wetlands, it has risen 26 feet since 1993, flooding nearby communities. In Canada, we are sympathetic to the plight of the lake's neighbors, but not to the solution their state has proposed.

In June, North Dakota plans to open an outlet that will let Devils Lake water travel into the Sheyenne River and on into the Red River, which flows north into Canada. From there the water will eventually stream into Lake Winnipeg and the Hudson Bay watershed.

Devils Lake, a remnant of a shallow glacial sea, is a closed ecological system that has been geographically separate from the surrounding Hudson Bay basin for more than a thousand years. Its salty waters have high concentrations of nitrogen, sulfates and phosphates - minerals that could cause severe digestive distress if consumed and could be lethal to aquatic life. Because of these contaminants, North Dakota does not allow Devils Lake waters to be used for irrigation.

Once the canal is opened, the pollutants will enter the water supply of downstream communities in North Dakota, Minnesota and Manitoba. Moreover, species of fish, plants, parasites and viruses previously confined in Devils Lake, in some cases for millenniums, will spill out into the Sheyenne and Red Rivers. There they could kill the native plants and fish of the larger ecosystem. The consequences for Lake Winnipeg, the largest freshwater fishery in North America, are particularly worrisome.

Despite concerns on both sides of the border about maintaining safe water sources, North Dakota has decided to pump out Devils Lake water without undertaking any environmental assessment or establishing ecological safeguards.

There is a solution to this impending crisis. Nearly 100 years ago, Canada and the United States established the Boundary Waters Treaty. Under that treaty the two governments set up an International Joint Commission to address differences of opinion involving boundary waters. So far, of the 53 issues the two countries have jointly referred to the commission, 51 have been resolved by mutual agreement.

For over a year, Canada has been requesting that North Dakota put off pumping water while the United States and Canada refer the issue to the commission for a time-limited, independent, scientific review. Both the Canadian and Manitoban governments have stated that they will support the commission's finding, whatever it may be. The governors of Minnesota and Missouri, as well as many other officials, have expressed support for the Canadian request in letters to the United States secretary of state.


At their March meeting in Waco, Tex., President Bush, Prime Minister Paul Martin of Canada and President Vicente Fox of Mexico pledged to enhance water quality "by working bilaterally, trilaterally and through existing regional bodies." Secretary of State Condoleezza Rice should demonstrate the strength of that commitment by joining Canada in referring the Devils Lake project to the joint commission.

If instead the Devils Lake project goes forward without a review, it will damage not only the region's environment and economy, but also North America's most important bilateral water management arrangement. There is a better solution

APPENDIX 5

FACT SHEETS DISTRIBUTED BY CANADA'S EMBASSY AND MISSIONS

Devils Lake Outlet



Science Overview

General


- The State of North Dakota is completing construction of an outlet to drain Devils Lake.
- This outlet will connect Devils Lake to the broader Hudson Bay drainage system that includes the Sheyenne River, the Red River basin and Lake Winnipeg.
- This outlet has high potential to affect water quality and plant and aquatic life downstream.

Biota and invasive species

- With no natural outlet, the Devils Lake basin has not been connected to the Hudson Bay drainage system for approximately 1000 years, when it last overflowed. This long period of isolation, and the fact that much of the larger aquatic life in Devils Lake was introduced by humans after the lake was essentially dry in the 1940s, suggests that biota (microbial, plant and animal life) in Devils Lake may have developed somewhat differently from biota downstream.
- The United States Army Corps of Engineers has reviewed the scientific literature on Devils Lake biota and recommends a number of biota of concern for baseline monitoring: striped bass, zebra mussels, the spiny water flea, rusty crayfish, Chinese mystery snails, Eurasian water milfoil, curly leaf pondweed, and flowering-rush. The Corps also says not enough is known about what is in Devils Lake.

Water quality

- The discharge of Devils Lake water into the Sheyenne River will increase the number of times that International Joint Commission water quality objectives are exceeded, and will violate the *Boundary Waters Treaty*.
- Devils Lake contains high concentrations of total dissolved solids (TDS) and sulphates that will degrade water quality downstream should the outlet become operational.
- High TDS concentrations are often lethal to aquatic life and can make water unsuitable as a drinking water source.
- Sulphates in drinking water can have a laxative effect on people that can lead to dehydration, especially in infants.
- The International Joint Commission's water quality objective for sulphates is 250 mg/L.
- The U.S. Geological Survey reports that sulphate concentrations in Devils Lake in 2000 ranged from 480 mg/L in West Devils Lake to 2,780 mg/L in East Devils Lake.
- The U.S. Army Corps of Engineers also indicates there would be increased loads of phosphorus and nitrogen in Lake Winnipeg from Devils Lake waters at a time when eutrophication is a recognized problem in the Manitoba Lake.
- The Governments of Canada and Manitoba have repeatedly pointed out that analysis of Devils Lake has not considered potential threats from organic mercury, dissolved organic carbon, arsenic and boron.



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Downstream Effects of the Devils Lake Outlet



Alien Biota a concern to Canada

The State of North Dakota is completing construction of an outlet to drain Devils Lake. This outlet will connect Devils Lake to the broader Hudson Bay drainage system that includes the Sheyenne River, the Red River basin and Lake Winnipeg. The environmental impacts of this drainage are a concern to the Governments of Canada and Manitoba.

One of the environmental impacts will be the introduction of alien invasive species (non-native plants, fish, invertebrates and possibly pathogens) from Devils Lake to the broader drainage system.

Species in the Devils Lake basin have been isolated for a number of reasons. The Devils Lake basin has no natural outlet. It has not been connected to the Hudson Bay drainage system for approximately 1000 years, when it last overflowed. Much of the larger aquatic life in Devils Lake was introduced by humans after the lake was essentially dry in the 1940s. These conditions suggest that biota (microbial, plant and animal life) in Devils Lake may have developed somewhat differently from plant and animal life downstream.

Biota is a threat

- The United States Army Corps of Engineers has reviewed the scientific literature on Devils Lake and recommends a number of biota of concern for baseline monitoring: striped bass, zebra mussels, the spiny water flea, rusty crayfish, Chinese mystery snails, Eurasian water milfoil, curly leaf pondweed, and flowering-rush.
- The problem is that we don't know enough. According to Corps: "unfortunately, existing data gaps lead to uncertainty as to the presence of non-indigenous species within both Devils Lake and the remaining Red River basin."

What can invasive species do?

- Introducing this biota to downstream rivers and lakes poses a serious environmental and economic risk by allowing alien invasive species from Devils Lake to establish themselves downstream. These species can take over and degrade their new environments by displacing or harming native biota.
- In the nearby Great Lakes, invasive species such as zebra mussels have caused millions of dollars in damage and are killing native molluscs. Eurasian water milfoil has displaced existing native plants, and is possibly affecting fish populations by interfering with spawning. The invasion of the sea lamprey into the Great Lakes was devastating to the commercial fisheries, and the Lake Winnipeg fishery could be at similar risk from Devils Lake waters.
- The multi-million dollar commercial, recreational, and aboriginal fishery on Lake Winnipeg is threatened by invasive alien species originating in Devils Lake.

The Precautionary Principle

- Not enough is understood about the full range of threats from Devils Lake, both in terms of invasive alien species and water chemistry. However, there is clearly sufficient cause for concern. The precautionary principle, endorsed by countries around the world (including the United States) in the 1992 Rio Declaration, must be used in a case such as this. The precautionary principle means we must be prudent in the face of uncertainty.
- The Governments of Canada and Manitoba have made repeated requests to the U.S. Government that the state outlet not proceed until the International Joint Commission - the international organization created specifically to prevent and resolve water disputes between Canada and the United States - can review the project at Devils Lake, and make recommendations to mitigate the risks it poses.
- The Governments of Canada and Manitoba support an expedited IJC review process that could take less than a year.



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Downstream Effects of the Devils Lake Outlet

Lake chemistry a concern to Canada



The State of North Dakota is completing construction of an outlet to drain Devils Lake water into the nearby Sheyenne River. As the Sheyenne River flows into the Red River, and north into Canada where it empties into Lake Winnipeg, the impact of draining Devils Lake is a concern for Canada.

The International Joint Commission (IJC) (the bi-national body created by the *Boundary Waters Treaty* to prevent and resolve disputes between Canada and the United States) has established a set of Red River water quality objectives for each country to meet. These objectives are based on science, and agreed to by both governments.

The discharge of Devils Lake water into the Sheyenne River will increase the number of times that IJC water quality objectives are exceeded, and will violate the *Boundary Waters Treaty*.

- Total dissolved solids (TDS) and sulphates in Devils Lakes are higher than IJC's water quality objectives. Water quality in the Sheyenne, River, Red River and Lake Winnipeg will be degraded should the outlet become operational.
- The governments of Canada and Manitoba have repeatedly pointed out that analysis of Devils Lake has not considered potential threats from organic mercury, dissolved organic carbon, arsenic and boron.
- The U.S. Army Corps of Engineers also indicates there would be increased loads of phosphorus and nitrogen in Lake Winnipeg from Devils Lake waters at a time when eutrophication is a recognized problem.

Total Dissolved Solids

- Total dissolved solids are dissolved inorganic matter in water, typically mineral salts. The higher the TDS concentration (measured in milligrams per litre) the more salty the water will become. Water with TDS concentrations below 1000 mg/L is considered fresh, and becomes salty at concentrations between 1,001 and 10,000 mg/L.
- The IJC's water quality objective for TDS concentration is 500 mg/L.
- The U.S. Geological Survey shows that in 2000, Devils Lake TDS was 1,140 mg/L in the west part of the lake and 5,450 mg/L in the east part of the lake.
- TDS concentrations at the Canada-U.S. border ranged in 2000 from 310 mg/L to 470 mg/L. Only once were they above the IJC objective during this time.
- High TDS concentrations are often lethal to aquatic life and can limit the suitability of that water as drinking water source.

Sulphates

- Sulphates are a particular type of dissolved solid - a combination of sulphur and oxygen that may be leached from some soil and rock formations. Sulphate minerals dissolve over time and are released into groundwater.
- Sulphates in drinking water can have a laxative effect on people that can lead to dehydration, especially in infants.
- The International Joint Commission's water quality objective for sulphates is 250 mg/L.
- The U.S. Geological Survey reports that sulphate concentrations in Devils Lake in 2000 ranged from 480 mg/L in West Devils Lake to 2,780 mg/L in East Devils Lake.
- An outlet at Devils Lake will cause an increase in sulphate levels in the Sheyenne River, the Red River and Lake Winnipeg.



APPENDIX 6

TEXT OF THE JOINT DECLARATION ON DEVILS LAKE



Government
of Canada

Gouvernement
du Canada

Canada

August 5, 2005 (11:45 p.m. EDT)

No. 142

JOINT CANADA-U.S. DECLARATION ON THE DEVILS LAKE DIVERSION PROJECT

Today, the Government of Canada and the Government of the United States of America issued the attached statement on the Devils Lake Diversion Project.

JOINT PRESS STATEMENT ON DEVILS LAKE FLOODING AND ECOLOGICAL PROTECTION BY THE UNITED STATES AND CANADA, NORTH DAKOTA, MINNESOTA AND MANITOBA

The United States and Canada today announced that important progress has been made toward addressing flooding in Devils Lake while protecting aquatic resources throughout the Red River Basin. Consistent with the history of cooperation under the Canada-U.S. Boundary Waters Treaty, the mutually accepted approach is the product of extensive cross-border consultation and cooperation by North Dakota, Minnesota and Manitoba over several months.

The proposed approach provides for a layered system of environmental safeguards at the Devils Lake outlet and a cooperative approach to monitoring throughout the Red River Basin.

Since 1993, Devils Lake has rapidly risen, growing from 70 square miles to more than 200 square miles and flooding communities, schools and farms. To help control flooding, North Dakota will soon complete construction of an outlet to carry some of this water from Devils Lake to the Sheyenne River.

In response to concerns raised by Canada, Manitoba and Minnesota about the potential for deterioration of water quality and other environmental effects, government experts consulted extensively and worked in close cooperation over the last several months to:

- evaluate water quality safeguards and the permit limits for the project;
- share and review prior scientific work studying the potential for “aquatic nuisance

- species,” such as invasive fish or plants, and parasites;
- jointly conduct a rapid bio-assessment of the Lake by 20 biologists from the U.S. and Canada to enhance our collective understanding of Lake organisms; and
 - develop shared strategies to protect the broader Red River Basin from future risk of aquatic nuisance species that might pose a significant risk to the Basin.

Based on this review and the arrangements outlined below, the participants have a higher level of confidence that the outlet can be operated in a manner that will not pose an unreasonable risk to the other parts of the Basin.

To protect against the ongoing risks of any aquatic nuisance species entering the Basin through Devils Lake or through other parts of the watershed, the participants have agreed upon the following layered approach involving both mitigation measures and joint monitoring. Specifically:

- North Dakota will put in place a rock and gravel intermediate filter before opening the outlet, to prevent the release of macroscopic aquatic nuisance species from Devils Lake;
- the United States and Canada will cooperate in the design and construction of a more advanced filtration and/or disinfection system for the Devils Lake outlet, taking into account the results of ongoing monitoring and risk assessment;
- the participants will work with the International Red River Board, of the International Joint Commission, to develop and implement a shared risk management strategy for the greater Red River Basin, involving an early detection and monitoring system for water quality and aquatic nuisance species throughout the Basin;
- the participants will take immediate measures to prevent the spread of any aquatic nuisance species that pose significant risk to the Basin, should any be identified;
- the Province of Manitoba will complete tasks associated with mitigating the impacts of the Pembina Border Dike no later than August 31, 2005; and
- to address concerns raised by Canada, Manitoba and Minnesota with respect to an inlet being built from the Missouri River to Devils Lake to help stabilize lake levels, North Dakota affirms it does not have such a current intention, plan or prospective proposal to construct such an inlet; and the US federal government affirms that it is prohibited by federal law from expending funds towards the construction of such an inlet.

“This arrangement both reaffirms our mutual cooperation under the Boundary Waters Treaty and deals with our environmental concerns,” said Foreign Affairs Minister Pierre Pettigrew. “I

am particularly pleased that we were able to work in close cooperation with the Government of Manitoba to address the concerns of Manitobans.”

U.S. Ambassador David Wilkins also expressed his support for the cooperative approach. “This is a triumph for diplomacy. It is a wonderful example of how our two countries can work together for the benefit of our shared environment and our shared resources.”

“The layered system of safeguards will provide a level of protection that is essential,” said Environment Minister Stéphane Dion. “The approach also reaffirms our mutual interest to work together to address our shared environmental interests.”

“This approach represents an important and positive achievement for all the parties,” said North Dakota Governor John Hoeven. “The outlet will be an important step forward in providing relief for the thousands of North Dakotans who have faced hardship due to the historic flooding levels of Devils Lake.”

“This is positive,” said Manitoba Premier Gary Doer. “We are pleased our two countries could come to a common approach to take mitigation measures to protect Manitoba’s resources.

“The benefit of this approach is that we will be working together to manage the entire Red River Basin,” Minnesota Governor Tim Pawlenty. “We will all benefit from this increased level of protection for our aquatic resources.”

“This arrangement demonstrates that with collaboration of all levels of government in both Canada and the United States, we can reach a consensus,” said Reg Alcock, Federal Minister responsible for Manitoba. “We are protecting Manitoba’s waterways while providing flood relief to our neighbours in North Dakota.”

As the parties work to conclude the analysis of the rapid bio-assessment testing, a number of intermediate measures are being put in place, including a mesh screen and a rock and gravel filter. These measures, combined with the rapid bio-assessment testing, provide a higher level of confidence that the necessary precautions have been put in place. The parties are working to finalize this arrangement prior to the completion of the testing phase of the operation.



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