



## Devils L. Landowners' Lawsuit Dismissed

In May 1999, approximately 100 individuals who own land around Devils Lake sued the State of North Dakota, the North Dakota State Water Commission, the State Engineer, and nine water resource districts (collectively referred to as 'defendants'). They alleged that water projects in the upper Devils Lake basin - designed, constructed, funded, and/or maintained by the defendants, caused Devils Lake to flood their property. The landowners sought monetary damages in excess of \$10 million, an injunction, and an order directing the defendants to initiate condemnation proceedings.

On Oct. 25, the court concluded that the plaintiffs failed to establish that any of the alleged projects were the cause for the harm and damages incurred by the plaintiffs to their properties. As a result, the court issued its decision in favor of the defendants.

The court also concluded that the dramatic shift in the climatic conditions of the Devils Lake basin region over the decades, and especially in the 1990s, was the sole proximate cause for the increased water elevations experienced by Devils Lake, which in turn, caused damages and harm to the properties of the landowners.

Starting in 1993, the Devils Lake basin began experiencing huge runoff events. The estimated average annual inflow to Devils Lake for 1950-1992 is 60,100 acre-feet. The estimated average annual inflow for

1993-1999 is 328,200 acre-feet, and inflow for this 7-year period accounts for 47 percent of all inflow to Devils Lake for 1950-1999. Between 1993 and 2004, the volume of Devils Lake expanded from 827,278 acre-feet to 2,704,967 acre-feet.

As mentioned above, Devils Lake's expansion was the impetus for the landowners' lawsuit against the defendants. Unlike the numerous previous lawsuits over projects in the basin and around Devils Lake itself, the specific allegations were that the defendants were responsible for private drainage, and all of the water management activities in the upper Devils Lake basin, including:

- Hurricane Lake outlet channel and control structure
- Iverson Dam removal
- Lake Ibsen control structure
- Mauvais Coulee improvements above Lake Alice
- Mauvais Coulee improvements below Lake Irvine
- Lake Irvine control structure
- Channel improvements between Mikes Lake and Chain Lake
- Calio Coulee channel improvements above Chain Lake
- Grand Harbor drain and pump station
- Starkweather channel improvements
- Channel improvements between Morrison and Cavanaugh Lakes
- Channel improvements between Cavanaugh and Dry Lakes
- Dry Lake outlet channel (Channel A)
- Ring channel on the north and east sides of Devils Lake
- Creel Bay dike

The landowners asserted several theories of relief, alleging that the projects were negligently designed, maintained, and operated; the projects resulted in a nuisance; the projects caused an unconstitutional taking of the landowners' property; the projects violated water permit requirements; the reasonable use rule was violated; and there was a trespass.

In Nov. 1999, the Court, in response to motions filed by the defendants, issued an order dismissing a majority of the landowners' claims against the state, but primarily leaving the inverse condemnation claim. In April 2000, the landowners filed a motion for class certification but the court denied the request in Sept. 2000.

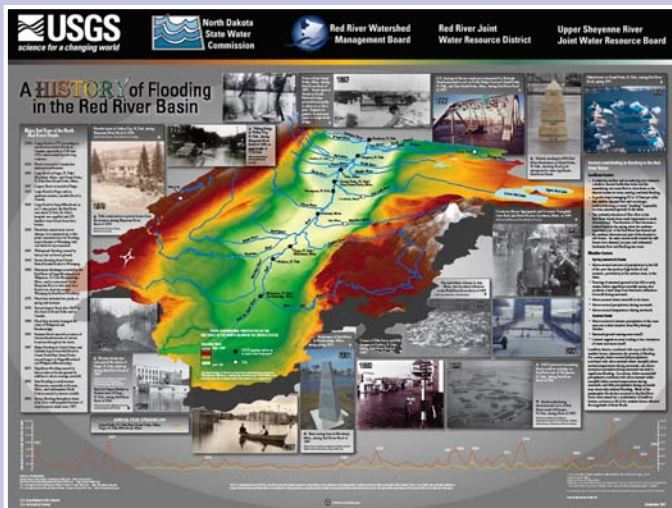
During the following six years, the parties engaged in extensive discovery, exchanging thousands of documents, and over 50 depositions were taken. Multiple pre-trial motions were also filed with the court during this time period. The sole legal issue remaining to be decided at trial after pre-trial discovery and summary judgment motions was whether the plaintiffs suffered damages or unconstitutional taking of their property because of the defendants' acts. The trial began in Devils Lake on July 31, 2006, and proceeded through Aug. 18, 2006. It was later completed with additional trial dates on Sept. 14 and 15, 2006.

During trial, the court admitted over 1,000 exhibits, and heard testimony from numerous experts on statistics, computer models, geology, hydrology, Devils Lake, the Devils Lake basin, and climatology.

Ultimately, after eight years of litigation, and 17 days of trial, the court ordered that the claims be dismissed with Prejudice—meaning the plaintiffs cannot sue on the same grounds in the future.

*This article was developed in cooperation with Assistant Attorney General, Matthew A. Sagsveen.*

# History of Flooding in the Red River Basin Poster Now Available



The U.S. Geological Survey, the State Water Commission, the Red River Watershed Management Board, the Red River Joint Water Resource District, and the Upper Sheyenne River Joint Water Resource Board, are proud to announce the completion of a new educational poster entitled, "A History of Flooding in the Red River Basin." The poster is designed to increase awareness about the history of flooding in the Red River Basin, and the factors that contribute to flooding in that region.

The poster can be downloaded from either the USGS website at <http://pubs.usgs.gov/gip/2007/55/> or the Water Commission website at <http://www.swc.nd.gov>. Or, paper copies of the 30-inch by 40-inch map can be requested by calling the Water Commission at 701-328-4989, or by sending an e-mail request to [dschock@nd.gov](mailto:dschock@nd.gov).



## COMMISSION MEETING MINUTES

The North Dakota State Water Commission (Commission) held a meeting in the basement conference room of the State Office Building on Oct. 24. The Commission acted on several items of business and heard reports on various water management happenings across the state. In action items, the Commission:

- Approved cost-share in the amount of \$19,799 for the North Dakota Natural Resources Trust for fiscal year 2007. The Commission has contributed to the Trust since 1993, along with the Game and Fish Department and Garrison Diversion Conservancy District.
- Approved a cost-share request from the International Water Institute in the amount of \$400,000 for their Red River Basin Mapping Initiative. The purpose of the project is to collect and publicly disseminate high-resolution elevation data for the entire U.S. portion of the Red River basin. Other partners in the project include the federal govern-

ment, through the U.S. Geological Survey and the Natural Resources Conservation Service, local partners from North Dakota and Minnesota, several cities, and the State of Minnesota. The Commission's funding will be contingent upon the availability of funds from the other sources.

- Approved a \$200,000 cost-share request to participate in the Non-point Source Pollution Program, administered by the North Dakota Health Department. The Commission's funding will be used to fund livestock manure management projects, which ultimately help to attain pollution reduction goals for various water-bodies.
- Approved a cost-share request in the amount of \$36,000 from the Red River Joint Water Resource Board to assist with funding a Red River Basin Flood Control Coordinator position. The funding will cover the state's share of the position for two years – including salary and expenses.
- Approved a cost-share request from the McKenzie County Weed Board for \$33,732 to help with noxious weed control on sovereign

land during the 2007-2009 biennium. The funding will be used to control salt cedar, leafy spurge, and knapweeds that are growing below the ordinary high water mark along the Yellowstone River.

- Approved two cost-share requests from the Southeast Cass County Water Resource District (WRD) in the amounts of \$65,000 and \$47,500 for snagging and clearing along the Sheyenne and Wild Rice Rivers.
- Conditionally approved a cost-share request from the Southeast Cass WRD in the amount of \$94,197 for a Cass County Drain No. 27 improvement and reconstruction project.
- Conditionally approved a cost-share request in the amount of \$125,550 from the Maple River WRD to participate in a Cass County Drain No. 62 construction project.
- Approved funding in the amount of \$100,000 to conduct Ordinary High Water Mark delineations along various navigable water bodies across the state. Areas below the ordinary high water mark on

navigable lakes and streams are sovereign, and are held in trust by the state for the people of North Dakota. In some instances, questions about ownership between the state and private landowners require the state to delineate where the line between public and private property occurs.

- Approved \$10.3 million in funding for the Southwest Pipeline Project. Of that amount, \$8.38 million will be allocated for Medora-Beach Phase III and the Oliver, Mercer, North Dunn regional service area.

- Approved \$5 million for the Northwest Area Water Supply project. Of that amount, \$4.6 million will be allocated toward new construction, and the balance for salaries, easements, and legal fees, which are ineligible for MR&I program funding.

In addition to the aforementioned action items that were addressed at the Commission meeting, the Commission also heard updates on several projects and water management efforts across the state, such as: Southwest Pipeline Project, Northwest Area Water Supply, Devils Lake flooding and the emergency outlet, Red River Valley Water Supply Project, Missouri River management, and the water history book entitled, "North Dakota Water: A History of Challenge."

The official meeting minutes can be downloaded from the Water Commission's website at [www.swc.nd.gov](http://www.swc.nd.gov), then click on "About the SWC."



The Sheyenne Dam, in Eddy County.

## Sheyenne Dam Restoration to Begin

By Michael Noone

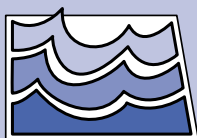
In 2004, the restoration of Sheyenne Dam, on the Sheyenne River in Eddy County, began with the Upper Sheyenne River Joint Board (Joint Board) working to identify basin water retention structures in need of repair.

Early in the process, Eddy County was interested in repairing the structure, and was willing to commit funds for that purpose. However, the cost of the project represented a substantial financial commitment. In response, the Joint Board worked closely with Eddy County and the State Water Commission during the design phase to acquire additional cost-share partners. Because a fish passage was included in the final design, the North Dakota Game and Fish Department and U.S. Fish and Wildlife Service agreed to provide cost-share.

The Joint Board's hard work has paid off. As of November, commitments for cost-share have been received from eight separate entities, including the Water Commission for 33 percent, Game and Fish for approximately \$26,000, Eddy County Water Board for \$15,000, Fish and Wildlife for \$13,000, Southeast Cass Watershed District for \$10,000, Aggregate Industries for \$6,000, the Joint Board for \$1,500, and the Devils Lake Basin Joint Water Resource Board for 1 percent.

With the funding secured and the project design complete, construction is set to begin in the coming months, (weather permitting) with rock for the fish passage being staged at the construction site, and potentially placed this year. It is anticipated that construction will be completed during the 2008 construction season.

Projects such as this are a fine example of the benefits of being a member of a joint board, with the costs for a relatively expensive project being borne by several partners. It is hoped that this process will continue in the future with other dams on the Sheyenne River.



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