

Example #3

**MINNESOTA DEPARTMENT OF NATURAL
RESOURCES
and
RED RIVER WATERSHED MANAGEMENT
BOARD:**

Phase I – Situation Assessment

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I. INTRODUCTION

The Red River of the North Basin today is the product of change wrought by powerful natural forces—glaciers, weather, flooding—acting over eons. The landscape shaped by these forces has profoundly influenced the lives of people who settled there. Human forces also have changed the landscape over the past 100 years, creating a productive agricultural economy and a system of manmade structures to address the regular threat of flooding. Change, geologic and human, is a constant force in the Basin, and that force is at the center of complex conflicts involving individuals and organizations over approaches to flood damage reduction. At one level these conflicts are about scientific, technical, and policy choices involving wetland, drainage, dikes, levees, and water retention. The conflicts reach deeper, however, to fundamental values around independence and self-reliance, natural resources, urban and rural lifestyles, and the roles of local, state, and federal government.

There is a strong sense among those involved in the current conflicts that the floods of 1997 created a unique opportunity to forge a new vision for flood damage reduction strategies in the Basin. Forging this vision will require individuals and organizations that have advocated tirelessly for their own approaches to consider a broader set of interests. Collaborative solutions around science, engineering, and policy will need to incorporate underlying values. They also will need to reflect the changes at work across the Basin. Finally, they will require key interest groups and individuals to forge new relationships as a foundation for making difficult choices.

The Legislature has asked the Minnesota Department of Natural Resources and the Red River Watershed Management Board to begin the process of building a vision around flood damage reduction for the Basin. Realizing that vision will require a broad-based effort to collaboratively address a complex set of interests around flooding in the Basin. This report offers an optimistic and realistic assessment of the prospects for that effort, along with a proposal for seizing the opportunity perceived by many people with a stake in the Basin's future.

II. CDR'S SITUATION ASSESSMENT PROCESS

This situation assessment is intended to assist the MDNR and RRWMB in carrying out the mandate of the Legislature for “a mediation process regarding flood damage reduction issues” in the Red River Basin. The MDNR and RRWMB decided on a two-phase approach to carrying out this mandate. As described in the RFP for mediation services, the objective for the first phase is to “assess the potential for mediation to be successful before the parties commit further time and funds to the process.” If the assessment phase reveals the potential for a productive outcome, then the MDNR and RRWMB will proceed with phase two, covering convening and facilitation of a process that includes “additional parties selected in an equal number by the [MDNR] and by the [RRWMB]”

To assist the MDNR and RRWMB, our broad goal as the mediators from CDR Associates selected to conduct Phase One was to develop answers to three key questions:

1. *Are there reasonable prospects for reaching sustainable and implementable agreements based on consensus?*
2. *Is there a set of parties who represent all significant interests and are ready and willing to negotiate?*
3. *Do the parties agree about which issues can and should be negotiated?*

We made multiple trips to the Basin and the Minneapolis-St. Paul area. One purpose was to conduct in-person interviews with people who might assist us in answering the questions described above. Another was to get a sense of the landscape at the heart of the conflicts so that we could better understand the interests of different groups and individuals. We also conducted telephone interviews, either to follow up on in-person conversations, to hear from interested groups located outside Minnesota, or to talk with individuals who were unavailable during our trips. We emphasized personal contacts over extensive documentary research, but also familiarized ourselves with key state statutes, news coverage of the 1997 floods and public statements of potential stakeholders about flood-related issues, and the 1996 Environmental Impact Study of Flood Control Impoundments in Northwest Minnesota (“1996 EIS”).

In broad terms, our interviews included:

- senior management of the MDNR, including the Deputy Commissioner
- MDNR staff in the Bemidji field office
- Minnesota Pollution Control Agency
- members of the RRWMB
- watershed district managers and engineers
- U.S. Army Corps of Engineers (“COE”), St. Paul District staff
- U.S. Fish & Wildlife Service (“USFWS”) field staff
- representatives of local and national environmental public interest organizations
- farmers in the Basin who are not watershed district officials

- local elected officials
- representatives of other organizations addressing Red River issues
- Board of Water and Soil Resources
- scientists affiliated with local colleges and universities
- other interested persons with knowledge of Red River Basin issues

We would be the first to acknowledge that we did not contact or meet with all persons who might have an interest in Basin water management issues. In particular, we did not meet with representatives of North Dakota or Canada. Nor did we meet with any member of the Minnesota Legislature. Our contacts with Native American tribes were limited to informal phone conversations. And we are aware of numerous individuals who also may have strong feelings or useful information. Our choices were defined by our own judgments about what was necessary for the situation assessment phase as well as schedule conflicts and resource limitations. We fully expect that any significant gaps or omissions regarding interviews or contacts would be addressed as part of a convening process, and made our decisions on this basis. We are confident that our interviews provide a firm foundation for this assessment and recommendations.

From the outset of this assessment we have been mindful of the need to protect the confidentiality promised to people who consented to share their views with us. Trust in the preservation of confidentiality provides the foundation upon which we do our work as neutrals. It also is our responsibility as neutrals to ensure that, as far as possible, our perspective and recommendations not have the effect of heightening conflict in the Red River Basin. Our approach reflects a balance of these concerns with our obligation to provide useful advice to the MDNR and RRWMB about prospects for a mediated dialog around flood damage reduction issues in the Basin.

III. ASSESSMENT OF PROSPECTS FOR A COLLABORATIVE DECISION- MAKING PROCESS

Our central conclusion is that there are reasonable prospects for a mediation around flood damage reduction issues in the Basin. The foundation for this conclusion is presented below, in the form of extended answers to the three questions that formed the framework for our inquiry.

Question: Are there reasonable prospects for reaching sustainable and “implementable” agreements based on consensus?

Yes, along with significant challenges and unknowns.

We have heard a consistent message from people of diverse affiliations and interests: namely, that it is time to talk. There is a widely shared view that the flooding of 1997 created a unique opportunity to grapple with difficult issues and forge new relationships among individuals, agencies, and organizations. There appears to be a heightened awareness of fundamental connections that exist in the Basin: hydrologic, biological, political, and inter-personal, among others. We have heard frank acknowledgment that old ways of doing business are not effective. With that acknowledgment comes the message that, at this moment, alternatives to collaborative problem solving are unattractive due to expense, time, and uncertainty of outcome. While it may be a surprise to some, we consistently heard a message of flexibility on the range of potential options for flood damage reduction, and a willingness to listen to others if others will listen.

These messages are not enough to ensure a successful outcome for mediation, and should not blind anyone to the challenges that exist as a result of topography, politics, economics, history, personalities, and the forces of change. The success of a mediation will turn on choices to be made initially by MDNR and RRWMB, and later by other agencies, groups, and individuals. These choices will include allowing broad and balanced representation at the negotiating table, sharing control over the process with all stakeholders, and a good-faith commitment to seeking collaborative solutions in a transparent manner. We have no illusions about the difficulties that may accompany these choices for various individuals and organizations. We believe, however, that the positive messages noted above are significant and justify a guarded optimism.

We repeatedly heard the comment that “we have to find new ways of doing things.” This suggests that the dynamics of power in the Basin are shifting, and that the shift has exacerbated the conflicts over flooding. People point to the growth of urban populations along the Red River, shifts in representation in the state legislature, the emergence of public interest environmental groups, and basic policy changes by agencies such as the MDNR. While change is a constant in human affairs, significant change that disrupts familiar decision-making processes can be a factor in exacerbating conflicts by shifting power, creating uncertainty, and giving birth to new structures and processes. While change may indeed be contributing to conflict, it presents an opportunity to shape the future of the Basin.

We were struck by the absence of a habit of collaboration among some key stakeholders when dealing with flood damage reduction issues in the Basin. Federal and state agencies and organizations increasingly have found it difficult to work with each other or with the public on flood damage reduction. The 1996 EIS is the most frequently cited example of an inability to collaborate on technical, scientific, or policy issues. Yet we learned about initiatives on a small scale that provide some hope. Groups of people around the Basin have made quiet progress by working together to address issues like local flood emergency policies or wildlife refuges.

We acknowledge the strong values, deep disagreements, and feelings of disappointment, bitterness, and even animosity that have characterized many recent efforts to address flood damage reduction issues. Individuals and organizations have perceived strong stakes in virtually all decisions or outcomes on these issues, and have expended tremendous resources to prevail, often at a significant cost in personal and professional relationships. Flooding is an immediate experience for many Basin residents and resonates in a way that is difficult for others to understand. Without drawing too close a comparison, we believe the same kind of personal commitment is felt by scientists and others who devote their professional lives to protecting natural resources. Decisions about individual projects and overall policy often reflect deep personal values, and opposing viewpoints are perceived as a threat to those values. The result has been a significant deterioration in individual capacities to listen, to remain open-minded, to acknowledge interests, and to seek solutions that accommodate those interests. Despite all that has occurred, however, we do not feel that primary stakeholders are so deeply polarized or enmeshed in conflicting values that consensus is an unrealistic goal.

Along with our overall conclusion in support of mediation we have identified questions that should be pursued in convening, in order to obtain a clearer picture of the commitment of stakeholders to reaching consensus. These questions are addressed below.

Are stakeholders willing to refrain from litigation in order to maximize prospects for mediated agreements? Litigation can have multiple impacts on mediation. Lawsuits typically reduce the flexibility of parties in negotiations, particularly where positions have become public and the facts and law are fairly undeveloped. Litigation, or a threat of litigation, is one alternative open to parties who believe others will not address their needs through negotiation. We have raised the question of postponing litigation with different stakeholders but have not sought or received firm commitments.

What are the expectations of stakeholders around the processes (federal and state) for permitting specific projects during a mediation? This question is linked to the previous one on litigation. The issuance of permit decisions during a mediation will influence efforts to reach consensus. The different interests and options around this issue should be explored further.

Are some stakeholders committed to a legislative or political strategy to meet their needs? The Basin has been the focus of various legislative and political strategies over the years. We do not know whether any individual or group may prefer to rely principally on a change in political leadership, or a legislative bill, or both, to achieve their goals for the Basin. It will be extremely difficult to participate in a mediation in good faith if this is the case, which would undermine prospects for consensus.

Will stakeholders be able to agree on structures and procedures to create a credible base of technical and scientific information? And can stakeholders ever rely on professional opinion where data are inconclusive or unavailable? Data has lost its power to persuade among key stakeholders. It is regularly dismissed on the basis of its origin rather than its integrity. The same is true for those who offer professional opinions: they are guilty by association with interest groups. These are serious obstacles that must be overcome if a mediation is to succeed. We have developed a recommendation to address this challenge, which we present in the following section.

Question: Is there a set of parties who represent all significant interests and are ready and willing to negotiate?

Yes, there is a set of parties who represent all significant interests we were able to identify. We are confident that our interviews have provided a reasonably complete picture of the significant interests associated with flood damage reduction in the Basin and the parties associated with those interests. Our interviews have yielded a consistent picture of the *primary* stakeholders, i.e., individuals, groups or organizations that will be directly affected by the outcome of the negotiation and have power to influence the outcome or its implementation, as well as *secondary* stakeholders, i.e., individuals, groups, or organizations that may be directly or indirectly affected by the outcome but are not integral to the resolution of issues. The identification of individuals who will represent stakeholder interests will occur as part of the next phase if the MDNR and RRWMB decide to proceed with mediation.

Yes, all primary stakeholders have expressed, at some level, a willingness to participate in a mediation. We were able to interview representatives of all primary stakeholders, and all expressed support for a mediation process. We were struck by the frequency with which people expressed their own desire to participate, but expressed doubts about the willingness of others to do the same. Our conversations revealed several factors that appear necessary for productive discussions to take place. These factors would require further attention during a convening process, and are presented below.

Internal MDNR issues. Many people expressed a range of concerns about the ability of the MDNR to persuade others that it can carry through, at all staff levels, on commitments made at the negotiating table. We believe enough is known publicly about the difficult policy choices facing the Department, and the internal conflicts generated by those choices, that our sharing these concerns will not breach any confidence or make future negotiations more difficult. In the event a decision is made to proceed with mediation, MDNR must persuade other stakeholders of its ability to make and keep commitments.

Level of agency participation. We were unable to interview the primary decision makers in some state and federal government agencies that would be primary stakeholders. While we did hear support, in varying degrees, for mediation, we believe it would be helpful to seek clarification of those agencies' views at the highest level as part of convening.

Native American tribes. We had only informal telephone contact with members of one tribe familiar with environmental issues, and no contact with another tribe. We heard suggestions that a mediation is not likely to directly affect the interests of either tribe, but do not believe it is appropriate to draw any conclusions on this basis. We strongly recommend a formal effort to clarify the interests of each tribe as part of convening.

Red River Watershed Management Board. The RRWMB and its nine watershed districts are a complex part of this assessment. Through interviews with some Board members, some watershed district members, unaffiliated farmers and others we began to appreciate the many points of difference and agreement that exist on issues of flood damage reduction. As one example, the topography of the Basin means that upland and bottomland farmers have different interests around flood damage reduction strategies, yet share similar values around agriculture and rural communities. The location of watershed districts (upstream, mid-stream, or downstream) and their constituents may mean differences with other districts or a majority of the Board. Reflecting this diversity of interests and perspectives will be a challenge for the Board in selecting representatives to a mediation.

North Dakota and Canada. We heard many viewpoints on whether it makes sense to limit a mediation to Minnesota given the obvious interests of North Dakota and Canada in the Red River. There are strong arguments for inclusion, such as addressing flood-related issues from a holistic perspective, coordinating with other initiatives and studies, and building a pattern of cooperative policymaking. There are organizations approaching Red River issues on this basis, such as the International Joint Commission (“IJC”), Red River Basin Board, and The International Coalition. As an example, the IJC has released an interim report that contains some 40 short-term measures to assist in preventing or minimizing damages from future floods and reportedly plans to hold public meetings in the Basin in the months ahead, including one each in Moorhead (Feb. 9th) and Grand Forks (Feb. 10th).

We also heard that it is important for Minnesota interests to find ways of working with each other before they can hope to work collaboratively outside the state. This point is significant. We believe such collaboration is potentially attainable in a relatively small group. Such a group could establish and pursue its own goals with the benefit of knowledge about other initiatives, and could make informed choices about coordination. We concluded that at this time it makes sense to focus on Minnesota parties, but to specifically invite North Dakota, Canada, and others to a mediation as special observers whose input would be solicited at key points throughout the process. The best structure for this aspect of the mediation should be addressed in convening.

Question: Do the parties agree about which issues can and should be negotiated?

There is sufficient agreement about issues to convene a process based on the approach recommended in this report.

Different people inevitably see the same problem from different perspectives, and we heard many views on what is most important and how to approach problemsolving. Anyone familiar with the Basin could readily come up with his or her own list, which likely would include some or all of the following: wetlands, ditching, drainage laws, sustainable development, impoundments and water retention, and permitting and Tier 2 review. Rather than compile an exhaustive list, we focused on identifying broad questions that stakeholders could agree to address. Our expectation is that the following would be acceptable to all primary stakeholders, though perhaps with different wording:

1. What are the criteria or principles around which flood damage reduction decisions for the Basin should be made?
2. What are the elements of a scientifically and technically sound, politically feasible program of flood damage reduction in the Basin?
3. What will be required in order to apply such a program to specific projects?
4. What are the appropriate roles of federal and state agencies and other organizations in a program of flood damage reduction?
5. What technical and scientific information is appropriate for consideration as part of the permitting process for flood damage reduction projects? This goes to subject matter, e.g., cost/benefit, hydrologic impacts, environmental impacts, to scope or level of detail, e.g., the appropriate area of influence (distance up/downstream), and to analytical tools, e.g., how to evaluate wetlands impacts.

Perhaps the most important message we heard is an openness to a wide range of approaches to flood damage reduction. No one flatly ruled out any particular strategy, e.g., diking, moving dikes, wetlands, or impoundments.

There are clear differences of opinion around the scope of a process. Among key individuals, some see advantages to a broad approach that looks at the entire basin and seeks to develop basin-wide goals; others prefer focusing on specific projects; and still other suggest focusing on a specific watershed or sub-basin. We also heard support for addressing a specific problem such as permitting. There are advantages and shortcomings in each of these approaches. We believe that the combined approach recommended in the next section offers the best prospects for obtaining commitments from all primary stakeholders to proceed. We also note that a few people expressed doubts that any approach could be successful, but they do not appear to represent the views of primary stakeholders.

IV. RECOMMENDATIONS

A mediation around flood damage reduction will involve complex and emotional issues and, as noted already, difficult choices. Stakeholders will need a stable foundation upon which to base collaborative decisions. That foundation does not exist at this time, although we perceive many of its essential elements in the positive messages just noted. In this situation, a mediation process should provide an opportunity for parties, along with the mediator, to locate the essential elements of a foundation and assemble them, with deliberation, care, and pragmatism, in conjunction with efforts to resolve substantive issues.

It would be unwise, in the present circumstances, to convene a stakeholder group and present it with a blank sheet of paper. We recommend that the MDNR and RRWMB invite primary stakeholders and others to participate in a mediation process whose general approach and structure are defined in advance, but one that also offers flexibility to the group about its direction once a foundation has been established. A proposed approach, built around a Flood Damage Reduction Work Group, is outlined below. We further recommend that the mediation proceed on a step-by-step basis, with clearly identified decision points for joint evaluation, process or schedule changes, or even termination, to mark the Work Group's progress.

We have developed a detailed proposal for your consideration. The proposal includes:

- an overall process,
- a broadly designed negotiating table, and
- criteria for selecting individual representatives to that table.

This proposal is intended to stimulate thinking and discussion about next steps. Our task is not to prescribe, but to offer something concrete for your consideration and reaction. At a minimum we expect that your discussions will generate important questions, and we would not be surprised to see modifications and improvements to this proposal in the event a decision is made to proceed with mediation.

Overall Process

We outline below the different components of a process built around stakeholders whom we have named the Flood Damage Reduction Work Group.

Scope: A Combined Approach

We received extensive input during our interviews on the scope of a mediation. From this input we identified four basic approaches: basin-wide; individual watershed or sub-basin; specific project(s); and discrete problem, such as permitting. Our interviews revealed potential strengths and shortcomings for each approach which are summarized in Table 1.

Table 1

BASIC APPROACH	STRENGTHS	SHORTCOMINGS
Basin-wide	<ul style="list-style-type: none"> • Recognizes and build on connections and awareness from flooding • Brings multiple perspectives to table that reflect changes in Basin • Seeks agreements on basic goals and principles • Provides foundation for future negotiations over specific strategies and/or projects • Shifts focus from specific project controversies 	<ul style="list-style-type: none"> • Concern that agreements will be too broad or general for future use to resolve specific problems • Doesn't immediately address desire to move forward with project decisions • Limitations on resources • Potentially supports stalling
Watershed or sub-basin, e.g., Roseau, Buffalo-Red River, Wild Rice, Bois de Sioux	<ul style="list-style-type: none"> • Encourages focus on specific problems rather than theory • Encourages a mix of strategies • Maximizes potential options • Broader than any single project 	<ul style="list-style-type: none"> • Variations among watersheds and sub-basins may limit application of lessons and agreements about strategies • Some watersheds have been the focus of controversy that may be reactivated • Data requirements may limit choices • Likely to require technical and scientific expertise
Project-specific, e.g., Marsh Creek #6	<ul style="list-style-type: none"> • Even more focused than watershed • Requires specific choices • Potentially significant precedent if successful with controversial project 	<ul style="list-style-type: none"> • Project differences may limit applicability of lessons and strategy agreements • Pending or threatened litigation may limit flexibility • High risk of re-stimulating negative reactions to EIS process • Likely to require technical and scientific expertise

		<ul style="list-style-type: none"> • Available data may limit choices
Problem-specific, e.g., permitting process	<ul style="list-style-type: none"> • Narrowest possible focus • Agreements likely to be practical • Potentially limited group of stakeholders 	<ul style="list-style-type: none"> • Issues might have narrow appeal • Issues may have significant implications outside Basin and require different set of stakeholders, e.g., permitting process might apply throughout Minnesota • Does not address flood damage reduction strategies

Our recommendation is that stakeholders be asked to commit to a scope that begins broadly and then gradually narrows, with the potential for incorporating each of these four approaches along the way. We believe this scope offers the best chance of building a stable foundation for collaborative decision making and potentially meets a range of concerns about achieving concrete, transferable outcomes.

This approach begins with a look at the Basin as a whole and seeks consensus around broad goals for a program of flood damage reduction. The first step is for stakeholders to look forward as well as backward and develop a joint vision. We expect this will reduce the incentives for stakeholders to immediately open familiar debates over specific projects. There will be opportunities to identify broad points of agreement and shared concerns that may have been missed in the smoke of past disagreements. This approach provides an important test of the group's willingness to build consensus. And the initial product, a set of broad goals supported by the entire group, will provide a key point of reference for future discussions.

We feel strongly that attempting to immediately take up a specific project or watershed will re-stimulate many of the negative aspects of past processes and relationships and undermine prospects for reaching agreements. We recognize that stakeholders may have limited resources and feel impatient to tackle specific watersheds or projects. Under the circumstances, we believe a more pragmatic approach is to aim for, but postpone temporarily, such specific discussions, and build a foundation that will support negotiations around specific watersheds, sub-basins, and projects.

After education around flood damage reduction strategies and identification of criteria for evaluating those strategies, the stakeholders can narrow the scope of their negotiations in order to test broad goals and criteria in a specific context. Using consensus, they can select from among the remaining approaches from Table 1. They may choose to adopt more than one approach, such as focusing on a specific sub-basin and also creating a committee to deal with permitting issues. We make no recommendation at this time about what approach may make sense, believing it will emerge from the mediation process.

Steps and Tasks

We propose a step-by-step approach that has discrete tasks, key decision points, and a negotiated schedule. Our proposal reflects early direction from the MDNR and RRWMB for the Work Group, with subsequent opportunities for choice and adjustment. The proposal is complete: it starts with convening and goes through negotiation of implementation steps. We have made no assumptions about how far the Work Group will progress beyond a recommendation that, as part of convening, stakeholders be asked to commit through the steps of (1) defining broad goals for the Basin, and (2) education around flood damage reduction strategies. We believe success could come in many different forms at various points along the way.

There are seven process steps:

- Convening Work Group
- Organizing Work Group
- Reaching Consensus on Broad Goals for Flood Damage Reduction in the Basin
- Sharing Perspectives/Mutual Education Around Potential Flood Damage Reduction Strategies
- Reaching Consensus on Criteria for Applying Flood Damage Reduction Strategies
- Testing Goals and Criteria
- Reaching Consensus on Procedures, Structures, and Approaches to Implement Agreed-on Goals and Strategies

We have identified throughout this document some of the open questions that should be addressed during convening. One other task is drafting of an operating agreement that would be adopted by the Work Group at its initial meeting. Elements of an operating agreement include: roles of mediators, stakeholders, support staff, and others; process for decision making, i.e., defining consensus; a meeting schedule; guidelines for representation and attendance; guidelines for discussions; and media guidelines. We included a sample operating agreement in our August 29th proposal, at Appendix B. Other convening tasks are listed in Figure 1 below.

Following convening there would be a period of education, *but not negotiation or decision making*, about the potential range of flood damage reduction strategies. Agreements about processes to establish a common pool of credible data would be important accomplishments.

Stakeholders would next seek to build consensus around a set of criteria for making decisions about flood damage reduction strategies. We recommend this approach as a way to refine a potential framework for future decision making around strategies. Without suggesting the outcome or revealing any confidences, possible criteria could address the role and/or significance of costs; priorities for protection against flooding; respect for key values; practicability; and short- versus long-term needs.

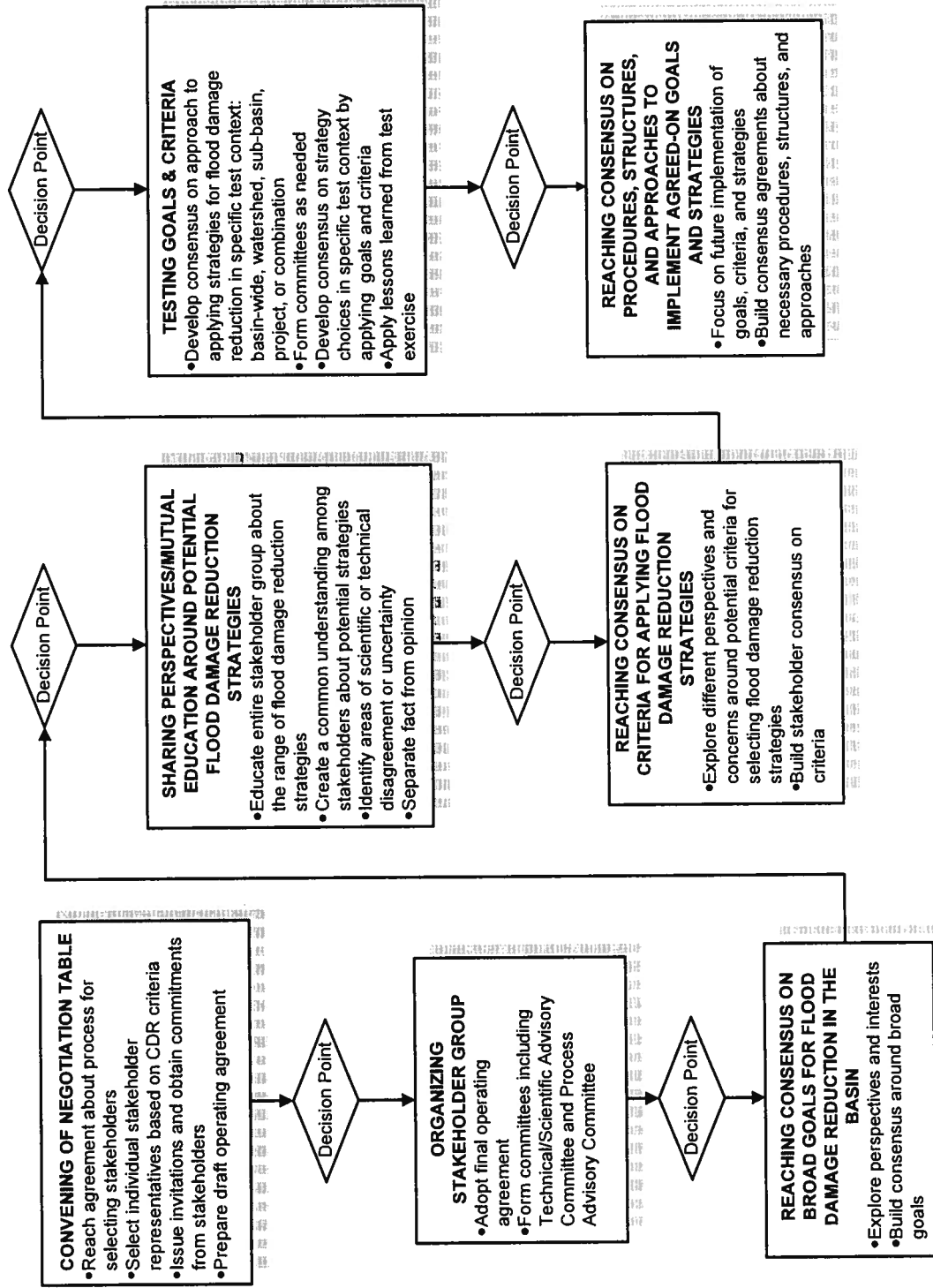
The next step would be a test of those criteria along with Basin-wide goals. The test would be to select a set of strategies for a watershed, sub-basin, or project(s) by using the goals and criteria already negotiated. We expect the stakeholder group to decide by consensus about how to test the criteria. While the range of possibilities appears wide at this time, we anticipate that it will narrow as education and consensus-building proceed, and that the best approach will emerge from the process. The purpose is to move to specifics, exploring how the goals and criteria can or

cannot be used, and also how they might need to be modified. There are a variety of possible outcomes from this step: stakeholders might focus on revising the criteria; they might reach a consensus on specific strategies for a project or watershed; they might draw lessons from the specific exercise for application in other watersheds; or they might abandon the use of criteria altogether in favor of another approach.

The final step involves reaching consensus agreements around implementation. These could involve procedures for future decision making around watershed planning or project permitting. They also could cover structures, whether formal or informal, to support processes. And they could address new approaches, such as partnerships within and outside Minnesota.

Figure 1 identifies each of these steps, along with related tasks.

FIGURE I PROCESS STEPS AND TASKS



Key Decision Points

After each process step we have identified a key decision point. These decision points are intended to serve multiple purposes. Stakeholders would jointly evaluate progress on tasks and prospects for reaching consensus agreements according to the Work Group's schedule. Stakeholders could raise concerns about the process or schedule and provide the Work Group an opportunity to make adjustments. Negotiators could report back to their constituencies on progress and future prospects. After the process was underway, stakeholders also would have the option of terminating their participation in accordance with the operating agreement. This approach allows stakeholders to make discrete commitments, and ensures that basic questions will be raised: "Where are we?" and "How are we doing?" and "Do we agree to continue?"

Schedule

It is important to link steps and key decision points with a schedule that encourages good faith participation, addresses reasonable needs of individual stakeholders and is open to revision by the Work Group. We recommend establishing a deadline or end date for the process. Our experience is that this encourages focus by participants, and addresses the concern that one or more stakeholders will be killing time in order to carry out an alternative strategy. We also recommend establishing intermediate target dates to mark progress and support evaluation.

□What a Negotiating Table Might Look Like

In this section we present a broadly conceived Flood Damage Reduction Work Group and support structure for your consideration. We have identified primary stakeholders and proposed a numerical distribution of representatives to stimulate your thinking about some of the key choices that must be made in convening a mediation process. This mix of stakeholders and chairs represents only one approach to applying our criteria. We believe other mixes also could meet these criteria, and suggest this be addressed during convening. We have not identified individual representatives as we believe these decisions should be made in the context of convening.

The Flood Damage Reduction Work Group is the product, in part, of our effort to answer the following questions:

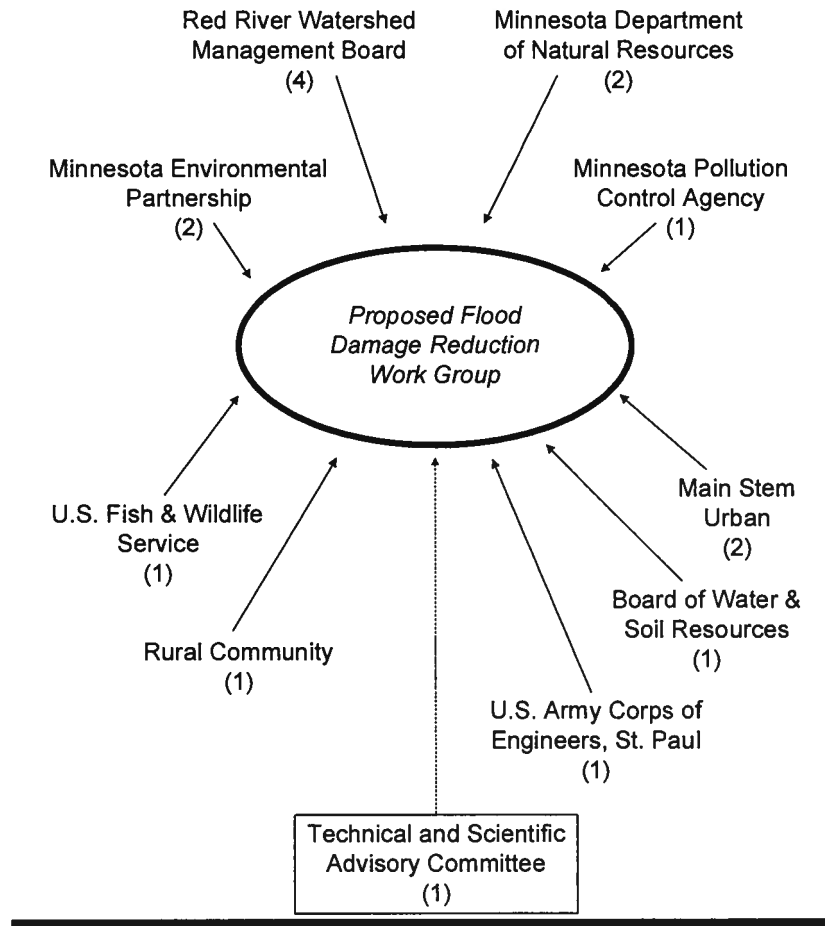
- *Who has a significant stake in the outcome of negotiations over strategies for flood damage reduction?*
- *Who has had past involvement in decision making and will continue to be involved?*
- *Who has institutional authority or responsibility?*
- *Who has necessary standing to mount a legal challenge to agreements made in a negotiation?*
- *Who has the power to mandate or block implementation of agreements?*
- *Who has sufficient political or public influence to draw elected or appointed officials into the conflict or mount considerable opposition to or support for the mediation process itself or its outcomes?*
- *What is the potential for groups to have shared interests?*
- *Who are potential "bridge" groups?*

- *What is reality, i.e., the structural situation?*

The Flood Damage Reduction Work Group

We focus initially on the Flood Damage Reduction Work Group. This group will be the principal forum for building consensus and reaching agreements. The proposed structure of the Work Group and other participants is based on the mediation approach outlined above: first seeking consensus on broad goals for the Basin, then educating around possible strategies, identifying criteria, testing the goals and criteria, and finally building consensus on implementation. Taking a different approach likely would result in a different structure. Figure II presents the proposed Work Group structure in graphic form. A discussion of key issues and questions follows.

FIGURE II



Minnesota Department of Natural Resources (2): The MDNR is an obvious choice as a primary stakeholder (apart from the Legislature's designation). The Department plays a central role in managing natural resources in the state, and is the permitting authority for certain categories of flood damage reduction projects. As noted earlier, MDNR also has experienced public conflicts over policy choices that directly affect the Basin. These conflicts have raised serious questions in the minds of other potential stakeholders about whether commitments made at the negotiating table will have meaning within the Department. These questions do not extend personally to the Deputy Commissioner, Ron Nargang, who has been designated to represent MDNR in a mediation. This choice appears to have broad support. The challenge is for Deputy Commissioner Nargang, Commissioner Sando, and department management and staff to persuade other stakeholders that MDNR can and will deliver on agreements reached through negotiation. The structure of MDNR suggested a different numerical approach from other stakeholders. While we propose two seats at the table, we also believe it will be important for senior managers to attend negotiating sessions in support of the negotiators. We encourage the Department to include staff from the Bemidji field office in its negotiation support team.

Red River Watershed Management Board (4): The Board also is an obvious choice as a primary stakeholder given its past and present role in the Basin, legal authority, resources, and makeup. The challenge is to ensure balanced representation of the key interests associated with the Board and its nine member watershed districts. A formula requiring representation of each district would place nine or more people at the table and have the effect of significantly enlarging the total number of stakeholders. Moreover, our assessment revealed different interests within each district based on topography, geology, resources, and myriad other factors. We recommend that representation from the Board reflect these key interests: upland farming, bottomland farming, and location upstream, mid-stream, and downstream on the main stem of the Red River. This is the reason we assigned four seats at the table.

Minnesota Environmental Partnership (2): We have no doubt that public interest environmental organizations are a primary stakeholder around flood damage reduction in the Basin. These groups have demonstrated a willingness to use legal action to affect the permitting process, and have been active in advocating certain approaches to flood damage reduction. We believe these groups are essential to reaching sustainable, implementable collaborative solutions. The challenge associated with public interest representation is ensuring that all key interests and views are included. Stakeholders must believe that any agreements reached at the table will be acceptable to other public interest groups. While we have had discussions with a number of these organizations, our proposal is that the MEP, which consists of some 50 national and local environmental organizations, be the forum for settling on environmental representation. Our expectation is that organizations with a strong demonstrated interest in Basin issues, including the National Audubon Society, Minnesota Center for Environmental Advocacy, Sierra Club, and Nature Conservancy, would play prominent roles. Under this structure it would be the task of the two negotiators to bring the interests and concerns of other MEP members to the Work Group.

U.S. Army Corps of Engineers, St. Paul (1): The COE is another primary stakeholder in light of its jurisdiction over permitting under '404 of the federal Clean Water Act and well as other statutory authority. The COE has extensive engineering and scientific expertise that it can bring to the negotiating table. The absence of the COE from a mediation would seriously limit the

range of agreements that could be reached. Given the Corps' structure we believe a single seat is appropriate, and fully expect that technical and policy staff will provide support at meetings. We expect other stakeholders will pay close attention to the authority of the COE's representative within that organization. We would encourage participation at the highest possible level.

Minnesota Pollution Control Agency (1): Our interviews indicate that water quality issues are playing an increasingly important role in policy decisions within the state, and that water quality is linked to decisions about flood damage reduction strategies. The MPCA plays a role in the permitting process by providing (or withholding) certification pursuant to '401 of the Clean Water Act. For this reason, we believe MPCA is a primary stakeholder and should have a seat.

U.S. Fish & Wildlife Service (1): We see the USFWS as having an important perspective and set of interests. The Service has worked with different watershed districts to establish refuges, and also has worked with individual landowners to address wetlands issues. A Service negotiator potentially could play an important bridge role. Its staff have extensive experience with habitat in the Basin, and many also are longtime residents. We also recognize the potential for USFWS jurisdiction under the federal Endangered Species Act, although this was not a primary issue during our interviews. The Service would have several important choices in considering a representative, including background (refuges or ecological services), location, and relationships within the Basin.

Main Stem Urban (2): One of the more significant changes identified in our interviews is the increased significance of urban concerns along the main stem of the Red River. The floods of 1997 had the effect of heightening public awareness and interest in connections between activities carried out in different watersheds and potential impacts on cities like Breckenridge, Moorhead, and East Grand Forks. Without advocating in any way for a particular approach to flood damage reduction, we believe the urban perspective should be represented in a mediation with two seats. These representatives may share perspectives of others at the table, e.g., they may come from farming families, or may have scientific or technical backgrounds. But they should be recognized as representing broad concerns of urban dwellers related to flood damage reduction issues. We believe the mechanism for nominating these representatives should be addressed during convening.

Rural Community (1): There are powerful values associated with rural communities in the Basin. These communities face a range of challenges in order to survive, and some of those are directly related to flooding. We recommend that these values and perspectives be represented at a negotiating table. They will be particularly relevant to reaching a consensus around broad goals and criteria for flood damage reduction in the Basin. We recognize that many watershed district officers are part of small rural communities, but propose a representative having a different set of interests.

Board of Water & Soil Resources (1): We see BWSR as another potential bridge in a mediation and propose that it have a seat. BWSR is directly involved in some wetlands programs pursuant to state law, and regularly interacts with counties and local governments in delivering those programs. Several people likely to play a role in negotiations have served on the Board, and its current leadership regularly interacts with other key stakeholders.

Technical and Scientific Advisory Committee

In the recent history of the Basin, data have come to be perceived as a tool for advancing specific solutions related to flood damage reduction and natural resource protection. While there is extensive expertise in the Basin, that expertise frequently engenders suspicion, and professional opinion tends to be dismissed as advocacy rather than accepted as good engineering or science. In addition, there is a disparity in the resources historically devoted by different interest groups to studying technical and scientific aspects of flood damage reduction in the Basin. This disparity has contributed to a range of perceptions that hinder open dialog. In these circumstances, special attention must be given to creating a process for managing technical and scientific data. Stakeholders must be able to rely on a common base of information that is accessible, understandable, and above all credible. Stakeholders must be able to consult experts free from the damaging shadow of advocacy. Where data gaps require them to rely on professional opinion, those opinions must be credible. And all stakeholders must be willing to acknowledge the differences between scientific and technical facts on the one hand, and opinion on the other.

For these reasons we recommend creation of a Technical and Scientific Advisory Committee. This committee will have multiple tasks. It would respond to specific needs of the Work Group, e.g., provide briefings in response to specific requests. It would review all scientific and technical data proposed for consideration by the Work Group in its decisionmaking. And it would provide a credible, neutral voice at the negotiating table through its representative. We recommend that the formal TSAC representative at Work Group meetings rotate frequently to ensure diversity of perspectives, and that the TSAC chair not be part of consensus. The role is to be purely advisory. Our suggestion is that the Work Group negotiate the makeup of the TSAC as one of its initial tasks. We strongly recommend that there be at least two members of the TSAC who are widely respected in their fields and have no association with Basin issues. The TSAC should do its work away from the Work Group's negotiations, and all meetings of the TSAC should include the mediator(s).

Special Invited Observers

The location of the Red River and the facts of hydrology and politics mean that other states, countries, governments, and organizations have interests associated with flood damage reduction. We recommend limiting stakeholders in the Work Group as discussed above, but believe it is important to invite others to participate in the process. Particular consideration should be given to Canada, the State of North Dakota, Native American tribes in Minnesota, the Red River Basin Board, and the U.S. Army Corps of Engineers Omaha District, which has federal jurisdiction over flood control in North Dakota. We note that the IJC might also be considered in light of its current activities in the Basin. Special invited observers would have unique status throughout the mediation. While they would not sit at the negotiating table, they could submit written comments to the Work Group, provide informal input during meeting breaks, and comment formally to the full Work Group at specific points in the process.

Staff to the Working Group

We fully expect that stakeholders will be supported at Work Group meetings by staff members, and believe this will be helpful. Stakeholders can negotiate the appropriate role of staff as one of their initial tasks.

□ *Criteria for Nomination of Stakeholder Representatives*

In the preceding section we presented one scenario for a negotiating table and identified criteria that were significant in making decisions about what organizations or agencies should be part of a mediation. In this section we present general criteria for nominating individual negotiators. Many of the criteria are broadly applicable to all consensus decisionmaking, while some reflect our specific understanding of challenges in the Basin. We believe that a Work Group made up of negotiators who reflect these criteria will have the greatest chance of building consensus.

- * *Credible representation, both in the eyes of a constituency and of other stakeholders*
- * *The ability and willingness to negotiate in a collaborative manner*
- * *Genuine openness to different perspectives*
- * *An ability to listen to others despite differences*
- * *Ability to treat other stakeholders with respect even when disagreeing*
- * *A willingness to speak up at the negotiating table: to seek information, express agreement or disagreement, and acknowledge differences*
- * *Substantive knowledge about flood damage reduction issues*
- * *Time to commit to building consensus*
- * *For representatives of agencies and organizations, authority to make commitments at the negotiating table or ability and commitment to obtain prompt decisions*

V. CONCLUSION

Conducting the situation assessment has been a challenging and enjoyable professional experience. We have gained a strong respect for the many individuals who care deeply about the Basin, as well as a fuller appreciation of the many issues associated with flood damage reduction. Without predicting the future, we reiterate that there is a solid opportunity at this moment to begin the task of working toward collaborative solutions. Hopefully, this report will assist the MDNR and RRWMB in making key decisions about that opportunity.