

Editor's note: Few environmental management problems are more urgent or daunting than the need to balance the many competing uses of the Missouri River, including navigation, recreation, irrigation, habitat preservation and flood prevention. The following excerpts from an article by John E. Thorson, retired administrative law judge and immediate past chair of the MRRIC, describe the promising efforts of a Congressionally-authorized seventy-member public-private collaborative committee to devise a process for deliberation and then achieve consensus on substantive recommendations for river management. Judge Thorson's original article is at http://apps.americanbar.org/environ/committees/waterresources/newsletter/sept10/WaterRes_Sept10.pdf.

CASE STUDY OF A PUBLIC - PRIVATE COLLABORATION: THE MISSOURI RIVER RECOVERY IMPLEMENTATION COMMITTEE

John E. Thorson

The Missouri River is synonymous with western history. From its mouth near Saint Louis to its headwaters west of Bozeman, Montana, America's longest river evokes the legends of Lewis and Clark, Sacagawea, steamboats, epic floods, and monumental dams. Congressional passage of the 1944 Pick-Sloan Plan initiated decades of dam construction, flood control, and navigation improvements on the river. The flood control features have been especially tested during Spring 2011. June was the highest month of runoff in the basin since 1898, resulting in the inundation of land and communities along the river and its tributaries.

The Missouri has also been the venue for waves of litigation and conflict—somewhat ironic given the generally plentiful river. For example, the U.S. Army Corps of Engineer's (USACE's) revision of the Master Water Control Manual for operating mainstem reservoirs on the river, commenced in 1989, took 15 years to complete in the face of controversy and extensive litigation over how the many users of the river would be affected.

In the aftermath of this conflict, a committee oddly known as MRRIC, is pioneering new approaches for resolving conflicts involving large river systems. The Missouri River Recovery Implementation Committee—MRRIC—is a 70-member assembly of sovereign and stakeholder representatives who are working collaboratively on pressing river issues.

River of Controversy

For all its force and bounty, the Missouri faces a suite of problems challenging decisionmakers. The USACE is increasingly challenged in managing six mainstem dams, constructed in the 1930s and following decades, in our contemporary era of environmental consciousness and changed economics. Water levels can rapidly fluctuate both in the upper basin reservoirs and the lower river, complicating water intakes and other commercial uses as well as bird nesting patterns. Scientists and others are concerned about how dams and navigation channels have changed the sedimentation patterns in the river. The list goes on and on.

During the master manual revision (1989-2004), all sides criticized the USACE. The requirements of Biological Opinions issued in 2000 and 2003 by the U.S. Fish and Wildlife Service (USFWS) to protect the listed species limited the USACE's range of options, and the agency was challenged to find the right mix of flows and storage to satisfy all interests. During Summer 2003, the USACE was defendant in six lawsuits filed in different federal courts. When the agency was able to issue its master manual in 2004, it committed to a different approach to future decisionmaking. In signing the record of decision, Brigadier General William T. Grisoli pledged that river restoration actions "will be identified, reviewed, modified, and implemented through coordination with a Missouri River Recovery Implementation Committee, which will include stakeholder representation"

Advent of MRRIC

To advance the MRRIC concept, the U.S. Institute for Environmental Conflict Resolution (an impartial federal entity located in Tucson, Ariz., providing conflict resolution services; <http://www.ecr.gov/>) worked with the USACE and other federal agencies (which continue to work together as a Federal Working Group) and stakeholders to commission a situation assessment performed by CDR Associates of Boulder, Colo. In its 2006 report, CDR provided a detailed concept of how MRRIC might be created and what it might accomplish (<http://projects.ecr.gov/moriver/pdf/FINAL-SARTR.pdf>).

The USACE and other federal agencies active in the Missouri River basin asked the Institute to convene a Planning Group of sovereign and stakeholder representatives to draft a proposed charter for MRRIC. The Planning Group consisted of a Drafting Team that met ten times during 2007-2008 to develop charter language and a Review Team that critiqued the drafts. During this period, Congress passed the Water Resources Development Act of 2007 (WRDA 2007); Section 5018 of the legislation authorized the establishment of MRRIC. On July 1, 2008, the Drafting Team presented John P. Woodley, Jr., Assistant Secretary of the Army (Civil Works) with a proposed Charter, (<http://projects.ecr.gov/moriver/pdf/MRRICCharterFINAL1Jul2008.pdf>), which he approved that day.

MRRIC does not make management decisions for the Missouri River. The Charter specifies that MRRIC's purposes are primarily to provide *guidance and recommendations* to the USACE and other federal agencies on (a) the ongoing Missouri River mitigation and recovery plan (with annual expenditures of between \$50 and \$85 million), and (b) the long-term (50-year) Missouri River Ecosystem Restoration Plan (MRERP). MRRIC members are encouraged to articulate their perspectives and flag when policies might negatively impact their interests.

The MRRIC Charter establishes a committee with state, tribal, federal and stakeholder representation. The eight mainstem states may appoint members and all have done so. All 28 basin tribes are authorized to appoint representatives and 18 have done so. The USACE and USFWS are standing Lead Federal Agencies and 13 other federal agencies are represented as Participating Federal Agencies. Federal agencies are not counted for quorums or consensus determinations.

Sixteen stakeholder categories (*e.g.*, navigation, irrigation, environmental/ conservation) are identified in the Charter and a total of 28 MRRIC members are selected from these categories. State, tribal and federal agencies appoint their own representatives and alternates. Stakeholder representatives are appointed by the Commander, USACE Northwestern Division, based on applications and demonstrated support from stakeholder organizations. MRRIC selects its Chair and Vice-Chair (Michael Mac, retired U.S. Geological Survey official, was selected in May as MRRIC's second Chair). A talented team from RESOLVE, a nonprofit firm dedicated to the use of consensus building in public decisionmaking, facilitates meetings and conference calls. The U.S. Institute continues to provide overall assistance.

MRRIC's most distinctive feature is the consensus requirement. For a substantive recommendation to be adopted, state, tribal and stakeholder representatives must support or "be able to live with" the recommendation.

While MRRIC decisionmaking can be tedious, the committee was able to reach consensus on many important subjects in its first three years. They include:

- Adopting internal Operating Procedures and Ground Rules and establishing a series of specialized work groups allowing MRRIC to work efficiently;
- Selecting committee leadership and a facilitation team;
- Developing multifaceted ways to engage with federal agencies on a wide range of concerns including a partnered independent science program, the ongoing recovery program, and the USACE's long-term restoration plan (MRERP);
- Developed a comprehensive set of social, economic, cultural and tribal values associated with the river, articulated by individual members, that should be considered by the USACE in its long-term planning;
- Approving recommendations to federal agencies addressing the endangered pallid sturgeon, bird habitat, annual recovery program expenditures, and the purpose and need for the MRERP study; and
- Commissioning a newly formed Independent Science Advisory Panel to study the scientific efficacy of the controversial "spring rise," the release of water (under certain conditions) to mimic spring natural flows with anticipated benefits for the listed species. Other issues will be referred to the Panel in future years.

Recent Work & Challenges

MRRIC met six times during 2009, its first full year of operations, and four times during 2010. Two meetings have been held in 2011 (plus a video telephone conference) but MRRIC's July meeting has been cancelled due to flooding conditions. The Committee will meet again in Denver on October 18-20.

A typical MRRIC meeting is preceded with optional field trips or other educational activities on the Monday preceding the meeting. Official MRRIC meetings usually run from Tuesday morning to Thursday noon and the agenda consists of information sessions, business sessions, and work group meetings. Work groups, whose members also participate in two or three conference calls (each call usually lasting 90 minutes) between each MRRIC meeting, conduct much of the committee's work. Work groups have been formed on the ongoing

recovery program, MRERP, integrated science, communications, procedures, and agenda development. A Special Subcommittee on Tribal Participation has been established to emphasize tribal issues and explore ways to increase tribal involvement in MRRIC.

Insights for Multiparty Facilitation

With its large and diverse membership and complex mission, MRRIC provides an important, ongoing opportunity to assess what works or does not work in multiparty facilitation. The following are some preliminary insights:

Consensus is a difficult decision rule—MRRIC’s Charter requires that members in attendance reach consensus at two consecutive meetings on substantive recommendations to the USACE and other federal agencies. The consensus requirement provides opportunities for members to vet pending recommendations with constituents, prevents a tyranny of the majority, and ensures broad support for approved measures.

To achieve consensus among all stakeholders and state-tribal representatives (federal representatives do not vote) is, to say the least, tough. The possibility of impasse always looms. MRRIC members are increasingly proficient in communicating their interests, listening, brainstorming alternatives, and agreeing on practical solutions. MRRIC’s work group processes help anticipate problems and allow time to achieve accommodations. When impasse has developed in plenary sessions, we’ve delayed final consideration to allow sidebars and further negotiations. Also, peer pressure is persuasive; it is very uncomfortable to be the only person saying “no” in a 70-member group.

Good facilitators are priceless—MRRIC has been fortunate to have some of the best, both from the Institute and Resolve. Bringing vast experience in multiparty facilitation, they have helped to give form to this new enterprise. They help to carefully plan, moderate, and document every meeting and call. Still, they struggle to continually assure members, in an even-handed manner, that their concerns and views are important.

Technology is indispensable—We have employed an array of technology to expedite our work, e.g., e-mail, conference calls, webinars, web conferencing (Adobe Connect), members-only website, and video telephone conferences. Prior to their MRRIC service, many members had little experience with these technologies, and we have provided necessary training. Generally, members have become comfortable with this new way of doing business.

Collaborators must often invent intermediate procedures—MRRIC’s Charter is a well-crafted document but, like a constitution, does not answer all the procedural issues that arise as MRRIC goes about its work. Because the Committee is new and different, no precedent exists to answer questions like, “What is the role of federal agency staff in the work groups?” or “Do we need unanimity or majority vote to move a proposal from a work group to MRRIC?” This “brave new world” of collaboration lacks the authoritative answers to such process questions as provided in the past by *Roberts Rules of Order*.

Collaboration, on this scale, is an expensive undertaking—Federal agencies annual spend about \$1.7 million in direct support of MRRIC plus a considerable amount more in staff time and travel.

The federal legislation establishing MRRIC (WRDA 2007) bars any compensation for non-federal members service—or even reimbursement of their travel expenses. This legislation, particularly the travel reimbursement ban, makes MRRIC participation costly for all members and is particularly burdensome during the recession. A 2009 survey estimated that non-federal members collectively spent more than 10,000 hours on committee activities (conservatively valued at \$253,000) during the first year of operations and incurred more than \$180,000 in travel expenses to meetings—a total of \$433,000.

If productive, MRRIC will continue at least during the preparation of the long-term MRERP—a planning exercise now scheduled for 2020-21 completion. By that time, American taxpayers and MRRIC members will have spent a vast amount on this new approach to problem solving in the Missouri River basin. MRRIC proponents believe the investment will be justified by improved decision making and the avoidance of even more expensive litigation.

Corps of Recovery

A MRRIC member, Randy Asbury, has noted, we are a “Corps of Recovery,” restoring both our personal relationships with one another and our relationship to the river. Yet, MRRIC’s crucial challenges are ahead—especially in meeting the needs of the pallid sturgeon, least tern and piping plover while minimizing disruptions to the multitude of economic and cultural uses now also dependent on the river. As the result of the 2011 floods, many basin residents will call for a fundamental reexamination of how the river is managed, and these efforts will make it more difficult for MRRIC to focus only on species recovery and ecosystem restoration.

MRRIC remains the foremost gathering of stakeholder and governmental representatives from all parts of the basin. The members are well informed on the issues and, as a result of meetings throughout the basin, have a better understanding of the range of interests and complexity of issues than do most governors or members of Congress. MRRIC members also have the experience of working through problems together and have developed more trust for one another. If the recent floods force the need to more fundamentally reexamine Missouri River management, MRRIC, which has already demonstrated its utility as a productive, collaborative forum, may be the right approach.

MRRIC’s website is www.mrric.org and the committee’s Charter and annual report may be found under the “MRRIC Documents” tab. More information on MRERP may be found at www.mrerp.org.

John Thorson, a retired judge and former Chair of the ABA Water Resources Committee, was Co-Chair of the MRRIC Charter Drafting Process (2007-08) and Chair of MRRIC (2009-

11). *The opinions expressed in this article are his and do not represent the view of MRRIC or necessarily of any member. © 2011. Permission granted by John E. Thorson.*

v.070611