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Activities of the Eagle River Assembly

Douglas Kemper

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ACTIVITIES OF THE EAGLE RIVER ASSEMBLY

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Water and Growth in the West

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**NATURAL RESOURCES LAW CENTER
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ACTIVITIES OF THE EAGLE RIVER ASSEMBLY

by Douglas Kemper

As the 1980's came to a close, the water community was in search of new answers. The major regional cooperative effort, Two Forks, after years of work through the Governor Lamm's Water Roundtable was vetoed under Section 404 of Clean Water Act. More limited partnerships such as Homestake II between Aurora and Colorado Springs failed to receive the 1041 Land Use Permit from Eagle County. Individual approaches to export water from the Gunnison Basin were hopelessly mired in transbasin conflict. Concepts without a clear end user were being routed in both the South Platte and Rio Grande Basins.

It was clear that the traditional approach of water supply development was no longer going to work. Basin of origin discussions seemed to come up in the legislature every year, but there was no real change in the statutes. The courts reaffirmed local power to protect local interests. Counties of origin in the Gunnison and Rio Grande Basins overwhelmingly passed measures to tax themselves to fund legal battles to protect their water while at the same time soundly defeating tax increases for schools.

Four species of prehistoric-looking fish threatened not just to stop future West Slope projects, but existing ones as well. Fish that were considered too bony to eat and too carp-like to love. Twenty years earlier, popular support was to actively exterminate them. It may now cost over \$150 million just to stabilize them.

The search for liquid gold appeared to be tapped out. But strong growth pressures had subsided by the mid-1980's and Colorado's major municipalities could coast on existing supplies to serve new demand for the next 15 to 20 years. Reservoirs throughout the State were routinely being topped off as the drought years of 1977, 78, and 81 all too rapidly faded from memory.

Perhaps it was the weather, maybe it was a change in the leadership of some key organizations, and it could have been that some were ready to try something new; but it was about this time that conversations in meetings began to take a different direction. Discussions transitioned away from the traditional organizational mission statements reflected in concepts of maximum development of available yield, mitigation must be clearly tied to direct project impacts; protect the yield of existing projects, and ensure optimum opportunity to develop future water supplies. In short, "What's mine is mine and what's yours is negotiable."

Comments that would have been received as heretical just a few years previous began to surface. At first, they were just tentative questions that started with "What if . . ." Such as "What if we all actually had the same data?" And suddenly there was talk of spending real money on new technology to share information and "decision support systems" were born.

And "What if we let go of outcome?" Well, that one was a little harder. Because what was really being asked is "What if we let go of control?" No small feat in the world of power politics and water. But nonetheless as we entered the 1990's, there was a strong movement to focus on process rather than outcome. In fact, it at times seemed that the world was full of processes just looking for problems to solve.

New success stories began to emerge with much hoopla. Clinton Gulch Agreement. Wolford Mountain. Colorado River Headwater Forum. The game had changed. Yes, there had been multi-purpose water projects completed in past decades and arguably the requirements to build compensatory storage for transmountain projects funded through water conservancy districts could be viewed as East/West Slope cooperation. But this was something different. To use the phrase coined by President Bush, people were thinking "kinder and gentler."

It was in this atmosphere that the Eagle River Assembly was created in 1993. Water interests (stakeholders, to use the new vernacular of the time) in the upper Eagle River

Valley met with the Colorado River Water Conservation District requesting their intervention in an ongoing conflict primarily centered on a water project proposed by the Cities of Aurora and Colorado Springs, known as Homestake II. This was an extension of a water project completed by the Cities mid-1960's.

There was pending litigation on Eagle County's denial of the Homestake II 1041 land use permit and one might expect a request for additional technical, financial, and/or political assistance. The Cities had initially won in District Court. But the request was to assist in seeking a more cost-effective and productive means for resolution of long-standing disputes on water resources issues in the Eagle Basin.

The River District agreed to help. Dick Gustafson, a board member and former Eagle County Commissioner, was to take the lead in convening the Eagle River Assembly's first meeting. The discussions were styled as negotiations. As such, only those holding major water rights in the Eagle Basin were invited.

At the outset there was a promise that this process would not result in an endless string of meetings and there would be work toward concrete solutions. There was also an agreement to exclude both attorneys and the media. And with obvious discomfort both of these consented.

Dick's summarized that first meeting as

"our thinking was that there would be no reason to proceed in any forum if all parties did not agree to the proposed premise that we must find a better, more constructive means of conflict resolution. I believe the group endorsed just that at our first meeting. The other consensus reached at that meeting was a desire to approach the issue from a technical perspective, similar to the Clinton and Wolford negotiations."

But immediately the first of several potential conflicts emerged. Ironically, it came from competition from another group that was also pursuing water conflict resolution strategies. And again quoting from Dick's summary

"Concurrently with the organization of the Eagle River Assembly, Amax approached the Colorado River Headwater Forum requesting it assist Amax in gathering technical and public input on Amax's proposal to reclaim and supply fresh water from a current tailings pond (Pond 4). The Forum established an Eagle Park Reservoir (Pond 4) Committee with the following proposed mission:

Define environmental, social, and economic issues associated with the various Eagle Park Reservoir development scenarios. Use data modeling and collaborative science to aid in the analyses of the various impacts on the region. Enhance the public decision making process by involving stakeholders, including the interested public, in the technical analysis.

I understand the larger Headwater Forum group recently requested this committee to broaden the scope of its mission to include consideration of other alternatives to meeting water needs of the Eagle Basin. From my perspective, both efforts have significant value in seeking constructive solutions to historically competing positions – and both should proceed in good faith."

And indeed they both did. In fact, there was a brief merging of some joint tasks for public comment and the Eagle River Public Information Group (ERPIG) was created.

The Headwater Forum also decided to use a new company, TERRA Laboratories, for its technical analysis. A procedure was developed that still seems difficult to comprehend and ultimately became mired. Eagle Park Reservoir was subsequently sold to Vail area interests and the need for this committee of the Headwater Forum vanished.

But the ERA continued to work through its own technical group on precisely defined tasks such as this one from its first meeting:

Pull together information and data for potential projects under consideration by major water rights holders in the Eagle River Basin to present to policy level personnel at the next ERA meeting in July, 1993.

In the first year, the ERA met five times with a technical work group meeting in between. Although the attorneys and media were excluded from the meetings, there certainly was the expectation that everyone at the table would keep their individual counsel informed as to progress. Also the process allowed for public input prior to any development and selection of site specific alternatives.

At this time, Denver Water was very involved in their own Integrated Resources Planning process including developing a state-of-the art computer model and GIS technology. Their primary projects in Eagle Basin, Eagle-Colorado and Eagle-Piney, were much further down their timeline. Their clear focus was on Wolford.

As a result, the discussions became sharply focussed on Homestake and local basin needs. About a year into the process, the Phase I report giving an overview of Eagle River Basin Issues was completed. Conceptual strategies were identified for enhancing critical flow shortages in the Eagle River Basin and meeting the needs of Aurora and Colorado Springs. The executive summary was published essentially verbatim in the local media. Two public meetings were held and the reaction was to keep proceeding.

But suddenly another threat surfaced. Two months after completion of the study, the Colorado Court of Appeals overturned a District Court decision. It was a complete victory for Eagle County and denial of the Homestake II permit was upheld. Attempts to have the decision set aside at both the Colorado and U.S. Supreme Courts were also to fail.

Some of the Eagle Basin entities' incentive to work on collaborative processes was removed. Would they walk away from this process? No. Litigation was clearly on another track and that train passed by almost without notice.

In 1995, the Cities filed on water rights for several storage sites and diversion points with enough breadth to cover most of the alternatives that were under consideration. This occurred with little or no notice to the local basin partners. The intent was not to exclude them, but to ensure the options would be preserved in the light of a pending filing by the Colorado Water Conservation Board on essentially the entire flow of the Colorado River at the State line for the recovery of the endangered fishes. Several entities were clearly upset on not receiving notice. An explanation and apology were answered with acceptance and the commitment to continue to work in good faith.

In 1996, the Cities sponsored legislation aimed at "reforming" the 1041 permitting process. Senate Bill 96-48 was ultimately withdrawn by the sponsor in the face of furious opposition from the West Slope and Colorado Counties. Anger could easily have derailed the Eagle River Assembly process. But a vent was provided as the Colorado River Headwater Forum took up the issue. There has been no serious talk of changes to 1041 legislation since then.

In 1997, the Cities, local interests, and the River District negotiated an MOU that provided for a permanent trade of 500 acre-feet to be released from Homestake Reservoir, settlement of competing water rights claims, continuing study of five alternatives for a joint project or projects, and perhaps most importantly a cap on future diversions from the Eagle River Basin. This can be viewed as a pie with one-third of the available water already developed under the original Homestake Project, one-third reserved to be developed under a joint project, and one-third would not be developed by the Cities now or in the future. Of the one-third of the water that would be developed – one third of this third would go to Aurora, one-third to Colorado Springs and one-third for local use in the Eagle River Basin.

In 2000, all of the participants to the MOU entered into an agreement with Eagle County on permitting for the Eagle River alternatives. The provisions of this relatively simple agreement are to encourage an open dialogue of expectations and information flow prior to or in the early stages of a permitting

Conclusion

On both sides of the Continental Divide, the Eagle River Assembly is widely viewed as an example of a highly successful endeavor. Relatively little water has flowed as yet, but it is likely to in the future. There have been repeated legitimate opportunities for participants in the process to walk away. Each time the choice has been made to stay with the program. And with these choices comes the hope that the course will continue.

But the deeper question remains. What is the motivation for continuing? Efforts to find a cooperative project failed in the 1970's despite the Cities own engineering that showed such a path was the wisest from an economic standpoint. On a broader scale, entities throughout the State have repeatedly chosen conflict over consensus. And at least from the local perspective, this too has often been successful.

In early 1993, Aurora hired Larry Brown to conduct personal interviews as a means of gathering views, opinions, and perceptions regarding general attitudes toward the city, approaches to water projects, and the Homestake projects. Aurora was, in short, curious.

Interviews were conducted with a wide variety of individuals including county commissioners, shopkeepers, community activists, water experts, environmentalists, and ranchers. At conclusion, the 108 persons interviewed made a total of 513 specific recommendations.

Despite the controversy of the 1988 Eagle County Land Use Permit hearings, the negative response in the interviews, and Colorado's water history, an overwhelming number – 82% preferred cooperation and communication with Front Range entities over greater militancy or the status quo.

There was an 80% negative response when asked "When I say "Aurora – Colorado Springs – Homestake Water Project" what comes to your mind? But only 14% responded negatively when asked "Would you call your overall experience with Aurora positive or negative?" This would imply that there was a clear separation in people's minds from the past actions of Aurora and dealing with the present individuals of the organization.

There was also a strong individualism within the community, as reflected in the responses to the following question. "Is there a person, organization or government entity that you as an individual consider to be your water authority, an expert on water or one who looks after your water interests?"

No, No Longer, Hell No (23%)

Colorado River Water Conservation District (15%)

Eagle County (9%)

NWCOG (8%)

Vail Valley Consolidated Water District (7%)

State of Colorado (5%)

Other responses included Holy Cross Wilderness Defense Fund, Club 20, CU Natural Resources Law Center, and "My Lawyer"

Other insightful comments that ultimately guided much of the Cities actions are as follows:

"Staying the same has not gotten us anywhere, before we get to cooperation there must be more communication building and trust; sooner or later something (cooperatively) will have to be done; it is crazy to spend resources to litigate if it is not absolutely necessary; something's got to happen, this strife can't go on forever; for cooperation we must be equals, they must be fair; if it's not going to

improve – cooperation – might as well go head on; any kind of communication is good; taxpayers lose when governments go to war.”

“Mutual benefit. When Front Range water interests come to the mountains looking for water, should also become an advocate for that county’s water interests and the future.”

“Do not settle on a project, then tell us or impose it on us, because then we would have to say no.”

“Water is very important to every development here. Every drop taken is drop not here for uses.”

In the end, we all have choices. The choice for litigation over cooperation must ultimately depend on the individual circumstances. There is no one size fits all socket wrench in the conflict resolution tool box.

There are very legitimate reasons to proceed through more contentious approaches including litigation. In Douglas Amy’s book entitled The Politics of Environmental Mediation, he concludes:

The fundamental flaw underlying any attempt to rely on dispute resolution to resolve public policy conflicts is that such well-meaning efforts ultimately rest on a false understanding of what politics is all about. Politics is not simply about communication, it is also about power struggles. It is not only about common interests, but about conflicting interests as well. And it not only involves horse-trading, but competition between conflicting values and different moral visions. These are the elemental characteristics of politics in American society today. We need to realize that we are not yet at the dawn of a cooperative society, and that inescapable struggles over power and visions of the good society still lie at the center of the important political battles taking place in America.”

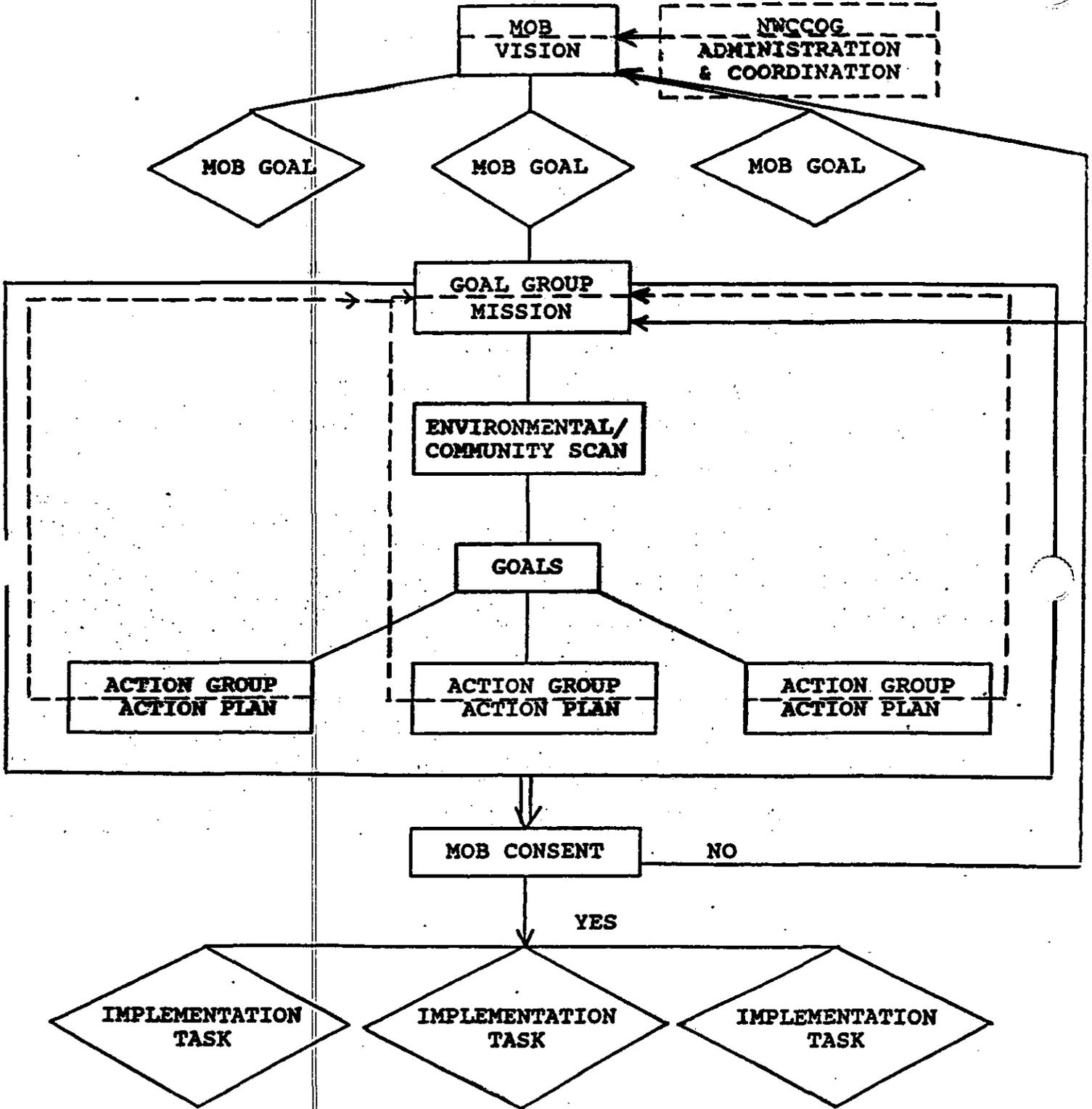
These battles, often urban versus rural at their heart, will likely continue for the foreseeable future. And many communities will have to decide on their own individual responses to environmental pressures.

Bill Ury in his book Getting to Peace works with the underlying question of whether we are humanly capable of living together without constantly falling into destructive conflict.

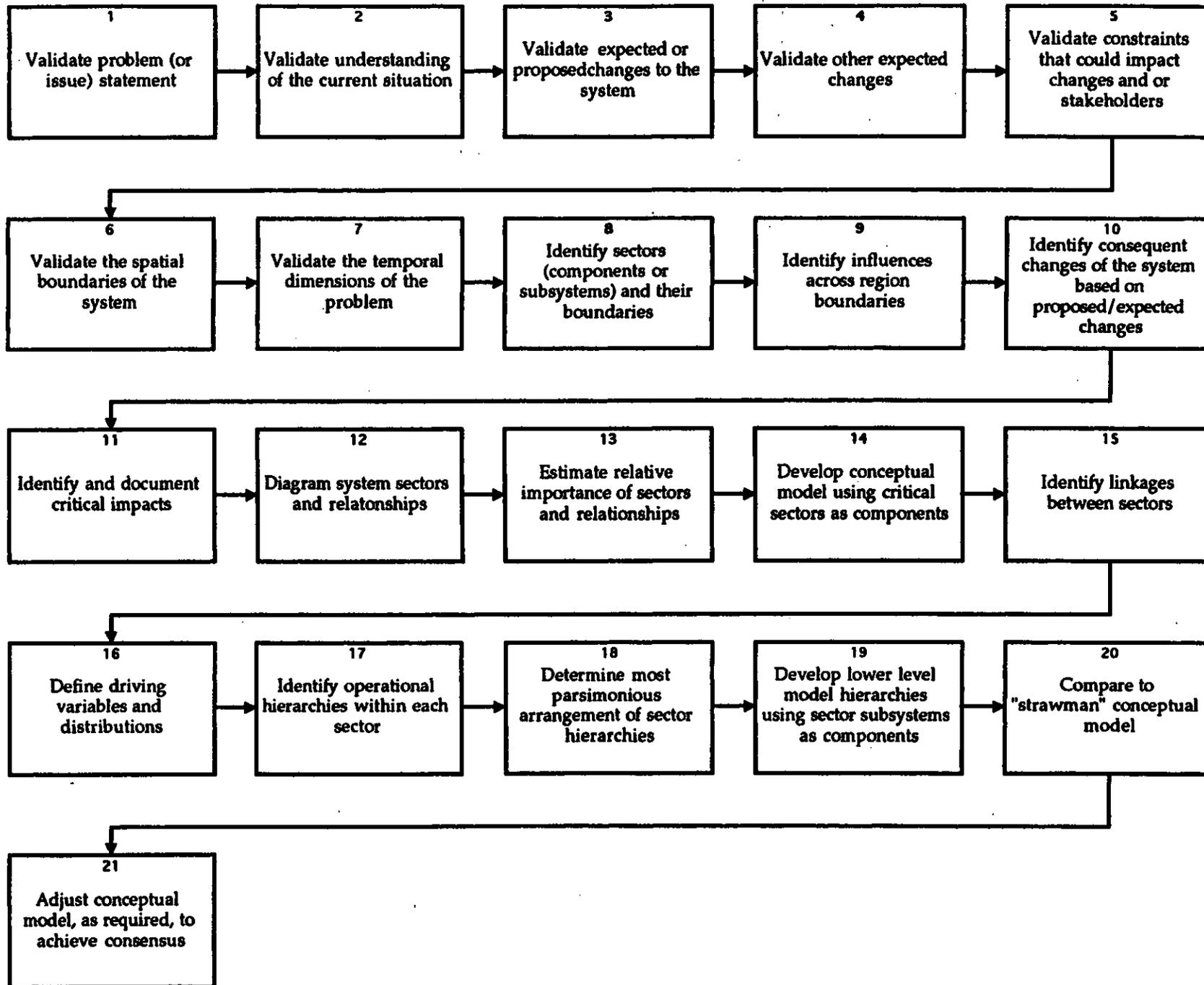
“Human behavior is extraordinarily flexible, as is reflected in the extreme variation in societal rates of violence . . . The variation derives, in great measure, from how people choose to deal with their differences. Violence is not an autonomous phenomenon, but one choice among many for handling disputes. People are constantly coping with conflicts, their own and those of others, making choices as to which procedures to use. Humans, in other words, are conflict managers.

Our common assumptions about human nature are mistaken. We are not by nature killer apes – one end of the continuum. This does not mean that we are naturally peaceful or harmonious either – the other end of the continuum. Rather, we are capable of both destructive and constructive responses to our differences. As a Semai elder once remarked to me, ‘Conflict is created by human beings and thus can be controlled by human beings.’ The answer to the assertion that ‘War is human nature!’ is ‘Yes and so is peace.’”

Colorado River Headwater Forum
COLLABORATIVE DECISION MAKING MODEL DIAGRAM



Define the conceptual system structure



TERRA Laboratories

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