ORDERING THE ELEPHANTS TO DANCE: CONSENT DECREES AND ORGANIZATIONAL BEHAVIOR*

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I. INTRODUCTION

Courts cannot foresee every consequence of their action upon initial intervention in a dispute. Often the actual effect of the court's solution differs from the intended result. For example, in theory, a consent decree should influence the behavior of targeted organizations to abide by the law or carry out a proposed reform.[1] In practice, however, the consent decree does not always influence group and organizational behavior in the positive manner advocated by students, scholars, and public interest groups. This Article analyzes some of the organizational factors associated with the positive influence that consent decrees assert. This Article also acknowledges those organizational factors that inhibit the attainment of the consent decree's intended goals. This discussion relies on a consent decree case involving a con-

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1. A consent decree is an agreement drafted by the parties, subject to judicial scrutiny and serves to resolve a dispute. *See infra* notes 14-19 and accompanying text for a further description of the nature of consent decrees.

troversy over a major urban freeway in California, the Century Freeway or I-105.[2]

Planning for the Century Freeway began in 1959 when the state legislature added the route to the state's Freeway and Expressway System. Engineering studies and right of way acquisition followed.[3] By 1972, the state possessed fifty-five percent of the needed right of way. In February 1972 a lawsuit enjoined work on the freeway. Parties to the litigation settled their dispute in 1979 and entered into a consent decree,[4] which established institutions and procedures governing virtually every aspect of this mammoth public works project.[5] The parties amended this decree in 1981.[6]

The story of the Century Freeway reflects a complex public policy mechanism that is not well understood. The questions raised in the literature, the state houses, and in the courts concerning the value of consent decrees generally suggest why the Century Freeway consent decree created significant controversy and proved difficult to implement.

This Article first describes the consent decree as a tool for promoting the implementation of public policy. Second, it summarizes the consent decree's advantages and disadvantages as recognized in the literature. Third, it presents a brief summary of a case that illustrates a highly ambitious legal mandate to a complex environment of new and existing organizations. Next, the Article analyzes the treatment of one set of factors that influences the successful implementation of a decree — organizational and interorganizational dynamics. Finally, the Article concludes by offering some public policy implications, based on or-

2. Joseph DiMento, Court Intervention, the Consent Decree and the Century Freeway II-11 (Sept. 13, 1991) [hereinafter Final Report] (on file with the *Washington University Journal of Urban and Contemporary Law*). At the request of the State of California Department of Transportation (Caltrans), the author researched the history of the Century Freeway and analyzed the impact of litigation on its construction. Sources of data include interviews with key participants in the project, as well as other public and institutional records.

3. *Id.* at II-11, II-12.

4. Consent Decree, Keith v. Volpe, 352 F. Supp. 1324 (C.D. Cal. 1980) (No. 72-355-HP) [hereinafter Final Consent Decree]. An amended decree, containing Appendices A, B, C and D, was entered on September 21, 1981. Amended Consent Decree, Keith v. Volpe, 352 F. Supp. 1324 (C.D. Cal. 1981) (No. 72-355-HP) [hereinafter Amended Consent Decree]. *See infra* note 74 for a description of the four appendices.

5. *Id.* at (i). Upon completion in 1993, the Century Freeway will extend 17.2 miles through portions of southern Los Angeles County. *Id.*

6. Amended Consent Decree, *supra* note 4.

ganizational theory, for the use of the decree. Public officials, public interest law groups, and commentators continue to advocate employment of the consent decree in resolution of challenging problems that derive from multi-organizational disputes. Their evaluation of the decree, among other strategies, should be enhanced by additional application of organizational theory.

II. THE CONSENT DECREE IN THEORY

A great deal of legal and public policy literature exists concerning the consent decree. Consent decrees are used to address some of the following public policy problems: desegregating school systems;[7] providing more humane prison environments;[8] improving conditions for the institutionalized and deinstitutionalized retarded;[9] and redressing employment discrimination.[10] Consent decrees are very common, but the exact number is difficult to determine. Judith Resnik, a professor of law at the University of Southern California Law Center, reports that in 1985, approximately five percent of the dispositions filed in federal court were consent judgments, and approximately one-half were dismissals, including several dismissed upon the consent of the parties.[11] An overwhelming majority of civil environmental enforcement cases are settled by consent decree.[12] Indeed, the government uses the

7. *See, e.g.*, United States v. Board of Educ., 88 F.R.D. 679 (N.D. Ill. 1981) (school board and federal government entered consent decree with intent to expedite desegregation of city schools, and precluded civil rights organization from intervening as party plaintiff).

8. *See, e.g.*, Watson v. Ray, 90 F.R.D. 143 (S.D. Iowa 1981) (despite objection from prison inmates, court accepted a proposed consent order regarding conditions of confinement as satisfactory to meet constitutional obligations).

9. *See, e.g.*, New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983) (finding that trial court erred in not modifying consent decree in light of evidence that the proposed solution was inadequate).

10. *See, e.g.*, Local 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 506-12 (1986) (utilizing consent decree to remedy race-based discrimination in the hiring, assigning and promoting of firefighters in violation of Title III).

11. Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43. A notice of dismissal is filed following mutual agreement to terminate a suit. These dismissals fall into one of two categories: (1) a withdrawal without obtaining relief; or (2) a dismissal resulting from an agreement (a consent decree) negotiated by the two parties.

12. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part II*, 14 ENVTL. L. REP. 10063, 10080 (1984). From 1985 to 1990 the Environmental Protection Agency experienced a three-fold increase in the number of consent decrees

consent decree mechanism to resolve a wide variety of disputes.[13]

Most simply, a consent decree is an agreement formalized by the judiciary to settle a lawsuit according to principles agreed to by the parties. The consent decree is a hybrid containing both contract and judicial elements.[14] A consent judgment is a "contract" when it represents an agreement of the parties in the settlement of litigation. Commentators differ regarding whether its source of authority comes from the implementing statute[15] or from the parties' agreement.[16] The consent decree also embodies a judicial (injunctive) act because the settlement is subject to judicial approval and enforcement.[17]

Courts and legal scholars differ on the exact definition of consent decree. One federal circuit, for example, distinguished between a "true consent judgment" and a "settlement judgment."[18] In the former, the parties must approve of the relief provided by the judgment. In the latter, the parties agree on components of a judgment, but the judge

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subject to monitoring. *See* EPA OFFICE OF ENFORCEMENT, FY1990 ENFORCEMENT ACCOMPLISHMENTS REPORT 3-1 (EPA Pub. 21E-2002, 1991).

13. *See* Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements, and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 335. Amendments to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601-9657 (1988), reflect the government's approval of the use of consent decrees as a solution to many conflicts. The implications of such amendments are explored in Frank P. Grad, *Alternative Dispute Resolution in Environmental Law*, 14 COLUM. J. ENVTL. L. 157, 169-72 (1989).

14. Some argue that the hybrid model fails to explain the functioning of consent decrees or the means to evaluate these decrees. *See* Thomas M. Mengler, *Consent Decree Paradigms: Models without Meaning*, 29 B.C. L. REV. 291, 292 (1988) (arguing that the hybrid model fails to provide a clear understanding of a court's proper role in evaluating consent decrees); Julie K. Rademaker, Note, Alliance to End Repression v. City of Chicago: *Judicial Abandonment of Consent Decree Principles*, 80 NW. U. L. REV. 1675 (1986) (noting that the hybrid model leads to an ambiguous judicial response to consent decrees).

15. Percival, *supra* note 13, at 334.

16. Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 20.

17. *See* Mengler, *supra* note 14, at 292; Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 726. A consent decree might implicate either equitable or legal powers. Professor Resnik wrote:

> [T]hose litigants who have terminated their lawsuit by a consent decree have a contract that is something more (how much more is not clear) than a "private contract." A judge has signed the contract, and that contract can be enforced as a continuation of the original lawsuit and, in other jurisdictions, as a judgment.

Resnick, *supra* note 11, at 47.

18. Resnick, *supra* note 11, at 45 n.4.

determines the detailed terms of the relief and the form of the decree.[19]

Consent decrees may contain formal devices to monitor compliance. They vary in effectiveness and in intrusiveness into the defendant's actions. The monitoring devices range from the court's retention of jurisdiction to the full time appointment of a special master to oversee decree implementation.[20] These "structural injunctions" may require the defendants, often governmental bodies, to reorganize themselves in order to comply with the standard the judicial decree specifies.[21] Professor Horowitz, a professor of law at Duke University School of Law, points out that these structural reform decrees provide extensive, affirmative requirements. They also assume an administrative character, using the courts as the "manager" of a public agency.[22] In addition, structural reform decrees are legislative in nature because they require a fundamental alteration of policy and an augmentation of financial resources.[23] Moreover, they necessitate continuing judicial involvement in their implementation and modification.[24] Finally, they are often resistant to appellate review.[25] In short, the decrees involve courts in ongoing attempts to direct organizational behavior.

ADVANTAGES AND DISADVANTAGES

Defining what is an advantage and what is a disadvantage of the use of the consent decree depends on one's perspective as a plaintiff or a defendant. Because the agreement between the parties requires final approval by the court, it is entered as a judgment in many cases. The doctrine of *res judicata* precludes further litigation of the claims addressed in the settlement. The consent decree is presumed valid and is rarely overturned. This rigidity disadvantages an agency official who inherits the requirements of a decree without an opportunity to negotiate its provisions. In contrast, this rigidity may benefit a plaintiff con-

19. *Id.*

20. Vincent M. Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL. L. REV. 419, 420-21 (1979). Special masters occupy various rules throughout the formulation of the decree. *Id.* at 421.

21. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L. J. 1265, 1267.

22. *Id.*

23. *Id.*

24. *Id.* at 1268.

25. Horowitz, *supra* note 21, at 1268.

cerned that the administrative agency's commitment to the consent decree goals will diminish as agency personnel change over time.

The generally recognized advantages of settlement through consent decrees, as opposed to litigation, include avoiding the time, expense, and risk of a trial.[26] The decree may provide for a detailed, far-ranging injunction[27] and increases the likelihood of obtaining a better agreement. Moreover, because the interested parties composed the decree, it should be easier to implement than a judge-formulated decree.[28] Ultimately, defendants are more likely to comply with a decree that they helped formulate.[29]

The use of consent decrees also provides important advantages to defendant agencies. Agencies are able to implement their preferred remedial plan without fear of judicial interference. The decrees also protect them from a potential adverse judgment on the merits based on a broad question of law, which the court may be ill-equipped to resolve.[30]

There are also several legal disadvantages associated with the use of the consent decree. Consent decrees circumvent the separation of powers by appropriating public power for private purposes. Moreover, "trial and judgment" serve public purposes and should not be disposed of through the settlement process.[31] Consent decrees may also restrict the true and beneficial adversarial relationship between settling par-

26. Anderson, *supra* note 17, at 726. *See also* Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L. J. 887, 898 (concluding that consent decrees provide the ideal solution to complex Title VII cases). Occasionally, empirical evidence contradicts the advantages of consent decrees. *See* Marina T. Lawson, Note, *Consent Decrees and the EPA: Are They Really Enforceable Against the Agency?*, 1 PACE ENVTL. L. REV. 147 (1983) (noting the difficulty of imposing consent decrees upon administrative agencies).

27. Anderson, *supra* note 17, at 726.

28. *Id.* at 727. *See also* Theodore J. Stein, *Issues in the Development, Implementation, and Monitoring of Consent Decrees and Court Orders*, 6 ST. LOUIS U. PUB. L. REV. 141, 153-54 (1987) (discussing the implementation of consent decrees and court orders).

29. Anderson, *supra* note 17, at 727. *See also* Kathleen S. Schoene, *Voluntarily Unlocking the Schoolhouse Door: The Use of Class Action Consent Decrees in School Desegregation*, 59 WASH. U. L.Q. 1305, 1309 (1982) (finding that the cooperation inherent in a voluntary settlement ensures the long-range success of a consent judgment promoting desegregation).

30. Percival, *supra* note 13, at 331.

31. Owen M. Fiss, *Justice Chicago Style*, 1987 U. CHI. LEGAL F. 1, 15. *See also*

ties,[32] especially in controversies between administrative agencies.[33]

Additionally, consent decrees adversely affect third-party interests without affording those parties any representation.[34] Unlike public court hearings, settlement negotiations often occur in secret, precluding public scrutiny.[35] Consequently, the party controlling the settlement negotiations dominates the bargaining process,[36] thus delegating public policymaking authority to private interests.[37] These potentially unrepresentative decrees bind successors in office, despite their lack of adequate representation in the negotiation process and their failure to assent to the provisions of the decree.[38] As a practical matter, these decrees are often forced upon an agency without consideration of the agency's ability to fund its compliance with the decree provisions.[39]

Resnick, *supra* note 11, at 55 (quoting Systems Federation v. Wright, 364 U.S. 642, 651 (1961)).

Nevertheless, case law supports the "party-control" concept of consent judgments. For example, according to Judge Resnick, judges who interpret decrees should focus on the parties' agreement. *Id.* at 54 (citing U.S. v. ITT Continental Baking Co., 420 U.S. 223, 237-38 (1975)). Judges should decline to explore the purpose behind the "legislation that gave rise to the underlying action." *Id.* It is inappropriate for a judge to force a provision of a settlement agreement upon the parties, absent their assent. *Id.* at 55.

32. Peter M. Shane, *Federal Policy Making By Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 272.

33. *See id.* at 270-76. Procedural barriers govern a consent decree's potential to limit judicial discretion, as well as the decree's potential adverse effect on third-party interests. *Id.*

34. *Id. See also* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 (1988) (discussing both the beneficial and adverse effects of consent decrees, plus third party rights in consent decrees); Randolph D. Moss, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811 (1986) (discussing the third party interest in school desegregation consent decrees); Suzanne Burris, Note, *EEOC Consent Decrees: Nonbinding on Unsatisfied Private Parties under Title VII*, 53 GEO. WASH. L. REV. 629, 644 (1985) (discussing the non-binding effects of an EEOC consent decree on non-interviewing parties); Schwarzschild, *supra* note 26, at 909-10 (noting that consent decrees do not always satisfy every member of a minority class).

35. Shane, *supra* note 32, at 271.

36. Fiss, *supra* note 31, at 11.

37. Jeremy A. Rabkin & Neil E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 274 (1987).

38. Fiss, *supra* note 31, at 7.

39. *Cf.* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 453-55 (1977) (citing court orders compelling state officials to spend unappropriated surplus money to implement remedial decrees). The implementation of consent decrees intrudes on agency autonomy. Timothy S. Jost, *The Attorney*

Although federal courts lack the authority to direct the expenditure of agency funds, a consent decree can require federal courts to order agencies to implement reforms, close facilities, or otherwise alter services.[40]

As a procedural matter, the enforcement, interpretation, and modification of consent decrees all present separation of powers issues.[41] The separation of powers doctrine reflects the constitutional assignment of differing responsibilities and authorities among the three branches of government. The doctrine assigns Congress the responsibility for making laws; the executive the responsibility of implementing laws; and the courts the responsibility for interpreting the laws.[42] Arguably, the consent decree violates the separation of powers doctrine by allowing the judiciary to act in an executive or legislative capacity.[43]

The judiciary is criticized often for supporting settlement by consent decree. Critics allege that the federal judiciary encourages settlement

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General's Policy on Consent Decrees and Settlement Agreements, 39 ADMIN. L. REV. 101, 102 (1987). A concern for agency autonomy may explain former Attorney General Meese's reluctance to tender consent decrees or settlement agreements. The former Attorney General's dislike of consent decrees reflected a desire not to constrain the discretion of executive branch agencies and departments. His policy forbade decrees that (1) mandated revision or promulgation of regulations; (2) required expenditures of unappropriated funds; or (3) divested an agency of its discretion to make policy choices or protect third party rights. *See id.* (discussing former Attorney General Meese's policy).

40. *Implementation Problems in Institutional Reform Litigation*, *supra* note 39, at 453-55.

41. Shane, *supra* note 32, at 268.

42. *Id.* at 278. *See also* Rabkin & Devins, *supra* note 37, at 219 (comparing the authority of the executive branch to enter a consent decree and the options available to private litigants); Lawson, *supra* note 26, at 148 (addressing the separation of powers issues presented in EPA consent decrees); J. Robert Robertson, Note, *The Effects of Consent Decrees on Local Legislative Immunity*, 56 U. CHI. L. REV. 1121, 1137 (1989) (analyzing the problem of integrating executive and legislative powers within one body). Federalism is a separate but related constitutional criticism of consent decrees. *See* Alan Effron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1796, 1804 (1988) (detailing federalism concerns as a source of flaws in consent decrees).

43. Justice Department guidelines in force during the Reagan Administration stated: "[i]t is constitutionally impermissible for the courts to enter consent decrees containing . . . provisions where the courts would not have had the power to order such relief had the matter been litigated." Memorandum from the Attorney General to the Justice Department, (March 13, 1986) (on file with author). The Supreme Court rejected this premise in Local Number 93, International Ass'n of Firefighters v. City of Cleveland, AFL-CIO, 478 U.S. 501, 522-24 (1986).

decrees to avoid litigation.[44] Other critics cite the court's inexperience in detailing remedies, costs, and benefits in consent decrees.[45] The court is removed from the daily operations of administrative agencies; thus it is difficult for the judicial branch to identify the administrative issues relevant to a meaningful remedy. Critics accuse courts of ignoring the widely acknowledged patterns of administrative agency behavior which are relevant to the formulation of a successful decree.[46]

III. THE CENTURY FREEWAY CASE, SETTLEMENT, AND THE DECREE PROVISIONS

A. *Description of Original Complaint and Injunction*

In February 1972 a recently-formed public interest law firm, the Center for Law in the Public Interest, filed a federal class action against both federal and state transportation agencies. The plaintiffs included several residents of the area located within the proposed Century Freeway right-of-way, the NAACP, the Sierra Club, the Environmental Defense Fund, and the "Freeway Fighters."[47] Two months later, the City of Hawthorne joined as a plaintiff. The suit sought to block state acquisition of property for the Century Freeway project pending the approval of environmental impact statements (EIS).[48] The

44. Resnik, *supra* note 11, at 97. Resnick questions whether "a judge who helps shape a proposed consent decree can fairly adjudicate either the adequacy of the representation or the adequacy of the compromise itself . . . ." *Id. See also Implementation Problems of Institutional Reform Litigation*, *supra* note 39, at 435-37 (discussing judicial deficiencies in implementing institutional reform).

45. Horowitz, *supra* note 21, at 1288-1302 (analyzing the issues involved in institutional reform).

46. *See* Anderson, *supra* note 17, at 725-78 (discussing the history of the consent decree and offering suggestions of implementation reform); Stein, *supra* note 28, at 141-59 (discussing how judicial remedies are currently devised, implemented, and monitored and suggesting new approaches for judicial remedies); Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513 (1980) (discussing the competence of court intervention in policy and administration); for a more general treatment of implementation issues, see generally MALCOLM L. GROGGIN, ET AL., IMPLEMENTATION THEORY AND PRACTICE: TOWARD A THIRD GENERATION (1990); DANIEL A. MAZMANIAN & PAUL SABATIER, IMPLEMENTATION AND PUBLIC POLICY (1983).

47. Kathleen Armstrong, Note, *Litigating the Freeway Revolt:* Keith v. Volpe, 2 ECOLOGY L.Q. 761, 761 n.2 (1972).

48. For text of the governing state and federal environmental laws, see National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1970); *see also* California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21165 (West Supp. 1972).

suit also alleged inadequate relocation assistance;[49] denial of equal protection of the minorities and poor residents of the corridor; inadequate public hearings on the proposed project;[50] and violation of due process.[51]

In July 1972 the district court enjoined the Century Freeway.[52] The injunction, issued by Judge Harry Pregerson, called for: (1) preparation of a formal environmental impact statement; (2) additional public hearings on the noise and air pollution concerns; (3) additional studies on the availability of replacement housing for those displaced by the project; and (4) specific state assurances relating to relocation assistance.[53] The court of appeals upheld the decision.[54] Work on the Century Freeway did not resume for seven years following this injunction.[55]

The state completed its environmental analysis of the project in September 1977 and submitted its environmental impact statement to the federal government.[56] The impact statement proposed a reduction in the project from the ten lanes originally planned to only eight lanes and a transitway.[57] The proposal also routed the western portion of the freeway away from the central business district of the City of Hawthorne.[58]

In March 1978 President Carter unveiled his National Urban Policy, which included transportation programs as part of a larger effort to

49. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 [hereinafter Relocation Act], 42 U.S.C. §§ 4601-4655 (1970).

50. Federal Highways Act [hereinafter Highway Act], 23 U.S.C. §§ 501-512 (1968) (repealed 1971).

51. Armstrong, *supra* note 47, at 761 n.7.

52. Keith v. Volpe, 352 F. Supp. 1324, 1351 (C.D. Ca. 1972), *aff'd sub nom.* Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

53. Keith v. Volpe, 352 F. Supp. at 1351. For a detailed analysis of this phase of the Century Freeway litigation, see generally Armstrong, *supra* note 47.

54. Keith v. California Highway Comm'n, 506 F.2d at 698.

55. For background on this transitional phase of the Century Freeway public works project, see Norman Emerson, *The Century Freeway Corridor Project: The Interstate System in Transition*, paper presented at the 59th Annual Meeting of the Transportation Research Board 16 (Jan. 21, 1980) (unpublished manuscript, on file with the *Washington University Journal of Urban and Contemporary Law*).

56. *Id.* at 8.

57. *Id.*

58. *Id.*

promote urban revitalization.[59] In October 1978, pursuant to President Carter's urban revitalization initiative, the United States Secretary of Transportation approved the Century Freeway Project as proposed.[60] On that same day, the parties to the class action announced a tentative settlement.[61]

B. *Settlement*

A number of factors influenced the settlement decision. A court ruling of the inadequacy of the EIS could not be guaranteed.[62] The prospects were questionable that a court would rule that the project violated the consistency requirements of the Clean Air Act.[63] It was not in the plaintiffs' interest to pursue a lengthy and costly trial,[64] especially because plaintiffs felt that litigation was an inappropriate instrument for resolving this controversy.[65]

Moreover, in choosing to settle, the plaintiffs wished to avoid reliance on the California Department of Transportation (Caltrans) to fashion an appropriate resolution to the lawsuit. Caltrans was seen as lacking the knowledge or ability to analyze the project and address the critical social and economic issues at stake.[66] Frustration was causing public support to wane.[67] Finally, through settling, the plaintiffs could seek the defendants' unambiguous commitment to protect the plaintiffs' interests. In short, plaintiffs could fashion a comprehensive settlement that reconciled their varied interests.[68]

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59. Emerson, *supra* note 55, at 9.

60. *Id.*

61. *Id.* at 13.

62. Memorandum to Century Freeway Team 10 (July 28, 1987) (on file with the *Washington University Journal of Urban and Contemporary Law*). In 1978, the Center for Law analyzed numerous Ninth Circuit decisions. The Center's analysis indicated that the court upheld almost every case concerning the adequacy of an Environmental Impact Statement (EIS).

63. *Id.*

64. Author A-1, Notes on History of Litigation, Center for Law (not dated) (on file with the *Washington University Journal of Urban and Contemporary Law*).

65. *Id.* at 1.

66. *Id.*

67. Author A-2, Talking Paper, Center for Law 3 (not dated) (on file with the *Washington University Journal of Urban and Contemporary Law*).

68. *Id.*

C. *The Century Freeway Consent Decree*

Following the execution of the decree, preliminary work commenced.[69] Early in 1981, however, federal budgetary constraints and Reagan administration opposition to the decree imperiled progress on the Century Freeway.[70] In March 1981 the federal government declared that it would not finance replacement housing until the state provided guarantees that it could acquire sufficient financing for the entire freeway project.[71] In May 1981 the federal government announced that it was undertaking a cost-effectiveness study of the entire Century Freeway project.[72] A series of meetings among federal, state, and local officials resulted in amendments to the consent decree, reducing the project's size.[73]

The amended final consent decree, signed on September 22, 1981, advanced five purposes: (1) to permit the I-105 freeway to be built according to the specifications provided in the decree; (2) to provide for a bus or rail transitway within the corridor; (3) to preserve the quantity of housing available in the area affected by the project; (4) to ensure that the affected communities benefit from the enhanced employment opportunities generated by the project; and (5) to avoid further litigation.[74] The consent decree dissolved the preliminary injunction that blocked the project.[75] The district court retained jurisdiction over the consent decree until the dismissal of the action.[76]

Although the transportation aspects of this consent decree[77] raise important public policy issues, the "social engineering" aspects of con-

69. Notes on History of Litigation, *supra* note 64.

70. Interview with C-1.

71. *Century Freeway Plan Periled, Caltrans Says*, L.A. TIMES, April 1, 1981, at A3.

72. *New Blow to Century Freeway Plan*, L.A. TIMES, May 2, 1981, at B1.

73. *Id.*

74. Amended Final Consent Decree, *supra* note 4, at 3. The decree incorporates four appendices. Exhibit A describes the commitments of those agencies providing funding for the transitway. Exhibit B is the housing relocation plan. Exhibit C is the affirmative action plan. *Id.* at 4. Exhibit D graphically depicts the locations of certain transitway features. *Id.* at 8.

75. Amended Final Consent Decree, *supra* note 4, at 5.

76. *Id.* at 16.

77. The transportation elements included a reduction in the size of the project, incorporation of high occupancy vehicle lanes, accommodation of a light rail line, and a reduction in the number of local interchanges. Amended Final Consent Decree, *supra* note 4, at 5-11.

sent decrees raise equally important constitutional concerns.[78] These are most susceptible to the vagaries of the implementation process. An examination of those social elements and their resolution highlights the organizational and interorganizational dynamics which confront dispute resolution by consent decree.

D. *The Housing Program*

The plaintiffs' original complaint in the Century Freeway lawsuit alleged that the defendant agencies failed to: provide adequate relocation payments and assistance programs; submit specific relocation assurances to the Federal Highway Administration; and insure the sufficiency of suitable replacement housing prior to acquiring the right-of-way.[79]

At the time of the lawsuit, FHWA policy required that relocation assistance include: (1) "personal contact" with all those to be displaced; (2) delivery of a brochure which explained the general terms of relocation; and (3) an explanation of the availability of relocation services and payments.[80] The FHWA regulations prohibit the California Division of Highways to displace any homeowner without a ninety-day written notice of their displacement and a list of three comparable and available replacement homes.[81] The State, however, is not required to provide any special assistance for those with special needs.[82]

The courts bore responsibility for monitoring compliance with these state agency regulations. In *Keith v. Volpe*, the court concluded that the Division of Highways adhered to the regulations and that any failures were isolated and *de minimis*.[83] The court did not address specifi-

78. For an analysis of the decree's constitutional implications, see Anthony N. R. Zamora, Note, *The Century Freeway Consent Decree*, 62 S. CAL. L. REV. 1805, 1835-42 (1989).

79. Keith v. Volpe, 352 F. Supp. at 1329. Chapter V of the Highway Act prohibits the FHWA from providing federal funds to a highway construction project that displaces persons living in the project's path unless these "satisfactory assurances" have been met. *Id.* at 1341. The Relocation Act replaced Chapter V of the Highway Act. *Id.*

80. Keith v. Volpe, 352 F. Supp. at 1343-45 (citing FHWA Instructional Memorandum 80-1-68 ¶ 6d(3) (Sept. 5, 1968) and FHWA Instructional Memorandum 80-1-71, ¶ 12a (April 30, 1971)); 23 C.F.R. Part 1, app. A.

81. 352 F. Supp. at 1345.

82. *Id.* Nevertheless, the Division of Highways attempted to analyze the impact of the Century Freeway project on the lives of the elderly and minority groups displaced by the project. *Id.* at 1346.

83. *Id.*

cally the sufficiency of the existing regulations. Nevertheless, the court enjoined right-of-way acquisition for the project until the state provided project assurances on the availability of replacement housing and the adequacy of the state's relocation program.[84]

Ordinarily, absent a showing that the plaintiff is likely to prevail on the merits, injunctive relief in an equity action is inappropriate.[85] However, the court reasoned that this case was unique. Unless the plaintiff received immediate relief, for example a preliminary injunction, the value of this relief would be worthless.[86] In summary, the court sought to determine at the outset the adequacy of the housing program.[87] The court ordered a state analysis of the supply of housing in light of increased relocation payments and increased replacement

84. *Id.* at 1350. The court's holding is consistent with the requirements of the 1971 Amendment to the Relocation Act. This provision extends the three basic requirements of Chapter V of the Highway Act, *see supra* note 79, providing that a state highway department may not financially support any phase of a construction project causing the displacement of any persons until it has "satisfactory assurances" that:

(1) relocation payments are provided;

(2) the state provides a written statement specifying when housing accommodations are available;

(3) the public is adequately informed of all available relocation payments and services;

(4) the state provides a person ninety days written notice before requiring him to move from his home, farm or business location;

(5) the state assures that its program is realistic and effectively relocates individuals and families to decent, safe and sanitary housing.

Keith v. Volpe, 352 F. Supp. at 1343. The Relocation Act requires the state to make these assurances to a specific project. *Id.* General statewide assurances are not acceptable. *Id.* Although the California Division of Highways argued that it had satisfied these assurances, the court found that the guarantees made by the Division were "general statewide assurances," and did not single out the Century Freeway Project. *Id.* at 1344.

85. Keith v. Volpe, 352 F. Supp. at 1349.

86. *Id.*

87. *Id.* The court stated:

No one can be completely sure, on the basis of the studies heretofore conducted, that the available replacement housing is adequate. . . . The time to determine whether the shortcomings in the housing availability studies are significant is now. . . . The shortcomings and uncertainties left by the existing housing availability studies should be resolved.

Id.

The court found that the state's studies failed to consider: (1) that people other than those displaced by the Century Freeway will seek housing in the relevant housing markets; (2) that the construction of the freeway necessitates the demolition of housing; and (3) the need for additional data regarding current housing availability and the quality of that housing. *Id.*

housing construction and renovation.[88]

Caltrans acknowledged the necessity of a provision in the decree for housing replenishment or replacement or both.[89] The plaintiffs concerned themselves with the designation of a "lead agency" for the housing program and the determination of the number of new units ultimately to be built.[90] They preferred that the state's Department of Housing and Community Development (HCD), not Caltrans, oversee the program.[91] The plaintiffs relied on the fact that HCD was an independent and autonomous organization, as well as an expert in the housing field.[92] The parties did not decide the number of units to be relocated and rehabilitated at that time.[93]

E. *Consent Decree Housing Provisions*[94]

In October 1979, under the terms of the consent decree, HCD as-

88. *Id.*

89. Memorandum from Richard G. Rypinkski to the Los Angeles Department of Transportation Legal Division 1 (Feb. 15, 1979) (on file with the *Washington University Journal of Urban and Contemporary Law*).

90. *Id.*

91. *Id.* at 4.

92. *Id.* Further, the plaintiffs did not want Caltrans to control the housing program because Caltrans was a party to the suit. *Id.*

93. Memorandum, *supra* note 89, at 5-6. In 1979, Caltrans released a Community Housing Needs Study that focused on the loss of affordable housing and its impact on the community. *See* State of California Department of Transportation, Norwalk to El Segundo Freeway-Transitway Community Housing Needs Study 1 (1979) [hereinafter El Segundo Freeway]. The study confirmed the need for affordable housing, reflecting the significant impact of the I-105 transportation project on the housing supply. *Id.* at 2. The study noted that, in 1970, the demand for additional units exceeded 3,600. *Id.* Seven years later, this figure would increase to 49,500. *Id.* This surge resulted from general inflation, insufficient local construction of affordable units, increasing regional population, and the acquisition and displacement of other public projects. *Id.*

By 1977, approximately 6,000 affordable housing units were acquired for the I-105 project. The authors of this study claimed that this project significantly aggravated an already serious housing shortage. *Id.* at 37. Lynwood, which lost seven percent of its affordable housing stock, and Paramount, which lost three percent, sustained the greatest loss of housing. *Id.* at 6-7. The study recommended three mitigation measures aimed at replenishing the supply of low and moderate income housing and lessening the freeway's impact on the housing supply: (1) attempt to relocate or rehabilitate the maximum number of housing units presently located within the right of way for I-105 project; (2) renovate the existing housing units located outside of the project's right of way; and (3) construct new housing units. *Id.* at 37. *See also* CAL. HEALTH & SAFETY CODE § 33334.5 (West 1979) (mitigating harm to owners of low and moderate income housing by restricting rehabilitation plans).

94. This section of the text is derived primarily from the author's report for

sumed responsibility for the construction of 4,200 housing units.[95] The requirement of new units addressed the housing replacement needs of households yet to be displaced, and it replenished the reduced supply of available housing. The consent decree established a series of zones, each six miles further away from the project than the prior zone.[96] Each zone was assigned a relative priority in the overall scheme of constructing the 4,200 units of housing. The consent decree also established eligibility requirements and affordability guidelines for the displaced homeowners seeking replacement housing.[97] In September 1981, budgetary restrictions initiated by the United States Department of Transportation led to an amendment of the consent decree[98] and reduced the housing production goal to 3,700 units.[99]

As amended, the housing portion of the project consists of three major elements. The first, known as the "1025 Element," required the state, acting through HCD, to rehabilitate or construct 1,025 housing units pursuant to prior FHWA approval.[100] The second element, known as the "1175 Element," required the state to rehabilitate or construct at least 1,175 units for corridor residents eligible for benefits under the Relocation Act.[101] These units comprised the "last resort housing" for eligible residents within the I-105 right-of-way, who remained without housing. The third element is the "110 Element." It required federal defendants to authorize $110 million for state construction of the maximum number of housing units obtainable with these funds.[102] The combination of these three elements was expected to produce 3,700 housing units. The decree permits an increase in the federal funds in response to higher construction cost for new one-family homes.[103]

The decree established a "Staging Plan" to allow freeway construc-

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Caltrans. *See* Final Report, *supra* note 2, at II-31, II-32 (on file with the *Washington University Journal of Urban and Contemporary Law*).

95. *Id.* at II-13.

96. Final Consent Decree, app. B, *supra* note 4, at 11.

97. *Id.* at 2-6.

98. Amended Final Consent Decree, *supra* note 4.

99. Final Report, *supra* note 2, at II-13, II-14. The cost of the housing program was about half of the cost estimated in the 1979 decree.

100. *See* Amended Final Consent Decree, app. B, *supra* note 2, at 4.

101. *Id.*

102. *See* Amended Final Consent Decree, app. B, *supra* note 4, at 2.

103. Subsequently, the $110 million program was adjusted to $126 million. Final Report, *supra* note 2, at II-43, n.3.

tion while ensuring the availability of all decree-mandated housing.[104] The staging plan permitted freeway construction to proceed prior to the relocation or replacement of housing. The decree further established a "Review Plan," to allow for modification of the timing and scope of the housing program.[105] In deciding whether to modify the Staging Plan, the court was to consider whether the housing program caused undue delay in construction of the freeway, whether the corridor communities could absorb the housing, and whether the housing program was effective.

Under the project, a percentage of housing units was to become available for occupancy as the state awarded a given percentage of the freeway construction contracts. The decree did allow the state to award the first half of the freeway contracts prior to the construction of any replacement or replenishment housing. Prior to awarding the second twenty-five percent of the freeway contracts, the decree required that the state make available at least thirty percent of the housing units required under the decree.[106]

F. *Structure for Planning and Implementation*[107]

HCD served as the lead agency responsible for the coordination and implementation of the housing program.[108] The Project Director for the I-105 project assumed responsibility for the following: (1) acquiring sites for replacement housing; (2) preparing a formal Housing Plan; (3) soliciting bids; (4) selecting subcontractors; and (5) awarding contracts.[109] The Director was to locate as many replacement units as possible within the six mile primary zone on either side of the freeway right-of-way. Absent space in the primary zone, the Director utilized more distant secondary or tertiary zones.[110]

The decree also established a Housing Advisory Committee (HAC)

104. *Id.*

105. *Id.* at 5.

106. *Id.* In 1987, Caltran's progress on the freeway exceeded HCD's housing production. Ultimately, Judge Pregerson eliminated the freeway and housing phasing requirement because it became apparent that progress on the freeway far exceeded HCD's construction pace. Final Report, *supra* note 2, at II-32.

107. This section of the text is derived primarily from the author's report for Caltrans. *See* Final Report, *supra* note 2, at II-32.

108. Amended Final Consent Decree, app. B, *supra* note 2, at 9.

109. *Id.* at 10.

110. *Id.* at 11.

to assist and consult with the Project Director.[111] Sixty members comprised the HAC. No more than thirty-three were representatives of official agencies; the plaintiffs and HCD jointly selected the other twenty-seven.[112] The HAC was responsible for conducting public hearings on the Housing Plan and ultimately approving the Plan.[113]

Federal and state defendants assumed responsibility for the funding, development, and implementation of the Housing Plan. Caltrans received reimbursements for all project costs; all ineligible costs, including housing project administration costs and overhead were to be assumed by Caltrans. FHWA approved all final budgets. HCD had authority to interact directly with federal defendants in any activity related to the implementation of the housing program.[114]

G. *The Affirmative Action Issue*

The affirmative action component of the Century Freeway was not a response to a claim against Caltrans for discriminatory employment practices or discriminatory practices in awarding contracts.[115] Judge Pregerson noted this in his order denying the Associated General Contractor's motion to intervene.[116] Moreover, the plaintiffs' original complaint did not allege any race or sex discrimination with respect to

111. *Id.*

112. *Id.* at 11-12.

113. Amended Final Consent Decree, app. B, *supra* note 2, at 12, 14.

114. *Id.* at 18-19.

115. Since the early 1970s, consent decrees have been used to settle numerous race and sex discrimination suits. Final Report, *supra* note 2, at VI-1. Title VII was the basis of the majority of these suits. Title VII is the section of the Civil Rights Act of 1964 that addresses discrimination in employment. Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e-1, 2000e-17 (1982)). The "Title VII consent decree" remedies alleged discriminatory employment practices, usually relating to hiring, promotions, or lay-offs. In addition to the Title VII affirmative action consent decree, parties employ affirmative action consent decrees to settle equal protection suits. Although they are based on the equal protection clause of the Fourteenth Amendment to the United States Constitution, these suits often encompass allegations of employment discrimination. Equal protection consent decrees differ from Title VII consent decrees because they intend to settle discrimination suits against governmental entities. Police departments, fire departments, and public school districts are often defendants in suits settled by equal protection consent decrees. Final Report, *supra* note 2, at VI-1.

116. The judge wrote that "[n]o allegations of employment discrimination were made in the original complaint." Memorandum and Order Denying Motion to Intervene, Keith v. Volpe, 352 F. Supp. 1324 (C.D. Ca.) (No. 72-355-HP) (1972) [hereinafter Motion to Intervene].

hiring or contracting practices. Absent these allegations, the claim ordinarily would be insufficient to induce a court to authorize an affirmative action program. In this respect the Century Freeway decree is unique.[117]

H. *Consent Decree Affirmative Action Provisions*

Three parts comprised the affirmative action plan mandated by Appendix C of the consent decree: The first part established "employment goals" by requiring contractors to hire female and minority employees;[118] the second part required contractors to utilize "minority and women-owned business enterprises (MBEs and WBEs)";[119] and the final part established "regional business preferences" by requiring the employment of individuals engaged in business in the corridor area.[120] Although the plan provided a monitoring mechanism, it failed to elaborate on the implementation of these programs.

A summary of federal affirmative action requirements puts into perspective the affirmative action goals of the Century decree. Roughly seventy-five percent of Caltrans' projects receive federal funding. Therefore, Caltrans must comply with the Department of Labor employment discrimination guidelines.[121] These federal guidelines do not establish fixed, numerical employment goals for the entire nation. Rather, Labor Department standards require that the proportion of minority labor employed in a federally funded project be equivalent to the percentage of experienced minority laborers in the Standard Metropolitan Statistical Area (SMSA) where the project is to be located.[122]

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117. It is difficult to identify the nexus between the plaintiffs' original complaint and the affirmative action provisions of the consent decree. However, during the consent decree negotiations of 1979 and 1981, Caltrans was involved in a minority contracting dispute regarding the Grove-Shafter Freeway in Oakland. In April 1979 the Secretary of Business and Transportation, Alan Stein, suspended construction of that freeway because of complaints concerning the minimal participation of minority subcontractors. *See Minority Complaints Halt Work on Oakland Freeway*, S. F. CHRON., April 24, 1979, at A5. This controversy fails to establish an agency-wide pattern of slow response to affirmative action mandates. Nevertheless, it reflects a heightened sensitivity to the freeway's costs to minority communities. Final Report, *supra* note 2, at VI-5.

118. Amended Final Consent Decree, app. C, *supra* note 4, at 18-22.

119. *Id.* at 5-17.

120. *Id.* at 22-23.

121. Final Report, *supra* note 2, at VI-6. *See* Exec. Order No. 11, 246, 41 C.F.R. § 60 (1978) (delineating the Standard Federal Equal Employment Opportunity Construction Contract Specifications).

122. HAMILTON, RABINOVITZ AND ALSCHULER, INC., Meeting the Employment

The decree's employment provisions satisfied the Labor Department standards, while achieving the decree's affirmative action objectives.[123]

Prior to 1987, federal law required states to spend ten percent of FHWA funds on Disadvantaged Business Enterprises (DBEs) and two percent of FHWA funds on WBEs. In 1987 Congress amended this provision. Now Congress requires states to spend at least ten percent of their FHWA funds on all DBEs, including WBEs.[124]

1. Equal Opportunity Employment Goals

The consent decree establishes specific hiring goals for each trade employed in the construction projects covered by the decree. After 1981, the decree required these goals to reflect specific demographic data on the corridor. Under the decree, Caltrans established apprenticeship and training programs with specific enrollment standards.[125]

Goals of the Century Freeway Consent Decree 7 (1988) (unpublished report, on file with author).

123. The report stated that:

> . . . what distinguishes the Century Freeway employment goals that were agreed to in the Consent Decree was not their prohibition of discrimination, nor their requirement of affirmative action, nor their setting of numerical goals. Rather, the distinguishing features were:
>
> (1) The establishment of specific levels of employment attainment that were geared to the demography of the Century Freeway Corridor and were apparently intended to be met from residents of the Corridor;
>
> (2) The special efforts specifically required of Caltrans to inform contractors of these goals; and
>
> (3) The creation of CFAAC [the Century Freeway Affirmative Action Committee] to monitor the attainment of these goals.

Final Report, *supra* note 2, at VI-6 (quoting HAMILTON, RABINOVITZ, AND ALSCHULER, INC., Meeting the Employment Goals of the Century Freeway Consent Decree 11 (1988)).

124. Final Report, *supra* note 2, at VI-6. A DBE is a business owned and controlled by one or more socially and economically disadvantaged individuals. A DBE must comply with the Small Business Administration's definition of a "small business." Surface Transportation and Uniform Relocation Assistance Act, Pub. L. No. 100-17, 101 Stat. 132 (1987). Individuals presumed to be socially and economically disadvantaged include African-Americans, Hispanic-Americans, Native-Americans, Asian-Pacific Americans, Asian-Indian Americans, and women. No general federal standards exist with regard to regional business preference. Final Report, *supra* note 2, at VI-6 n.3.

125. Amended Final Consent Decree, app. C, *supra* note 4, at 18-21. The decree requires the contractors on the I-105 projects to exercise "best efforts" to meet the goals of the decree. The contractors must document these efforts. Under the decree, a bid or proposal will be considered non-responsive if it fails to establish an affirmative action plan that facilitates the specified employment goals. *Id.*

In addition, the decree established the Century Freeway Affirmative Action Committee (CFAAC). Numerous organizations, possessing varied interests in the Century project, comprised CFAAC. The Committee assumed responsibility for six tasks: (1) monitoring affirmative action compliance; (2) participating in affirmative action goal setting; (3) participating in bid conferences; (4) participating in the process of awarding contracts; (5) monitoring contractors; and (6) increasing minority participation through recruiting efforts aimed at minority and women owned business.[126] CFAAC reported its findings to the court.

2. Minority Business Enterprise Program

The decree required Caltrans to set participation goals for minority and women-owned businesses. Caltrans based these goals on the number of businesses located within the corridor region that were capable of working on specific projects.[127] Caltrans, with CFAAC's assistance, was to develop outreach and technical programs aimed at all minority and women-owned businesses eligible to participate in the program.[128] The decree required Caltrans to follow a specific process in awarding contracts.[129]

126. *Id.* at 26-27. Members of CFAAC included representatives from Caltrans, FHWA, the Los Angeles County Board of Supervisors, NAACP, NOW, the Mexican-American Opportunity Foundation, and the Governor of California. In April 1988 four court-appointed members joined the CFAAC Board. Final Report, *supra* note 2, at VI-7.

127. *Id.* at 6. *See also* 49 C.F.R. § 23.45(g) (1991) (discussing the percentage of work to be awarded to MBEs). The decree defines a M/WBE as a business which is at least 51% owned by one or more minorities or women and whose management and daily business operations are controlled by one or more such individuals. Amended Final Consent Decree, app. C, at 5-6.

128. *Id.* at 7-8. To ascertain eligibility, the decree requires Caltrans to publish a list of certified M/WBEs and to explain how a M/WBE subcontractor's work counts toward contract goals. *Id.* at 8-9.

129. *Id.* at 9-15, 23-25. In general, bidders are ineligible for contract awards if they fail to satisfy M/WBE goals and fail to demonstrate reasonable efforts to achieve those goals. *Id.* at 14. Once the bid from a contractor is accepted, the decree requires the general contractor to make good faith efforts to replace a M/WBE subcontractor that fails to perform the job with another M/WBE subcontractor. *Id.* at 15. In addition, the decree describes the duties of CFAAC and Caltrans regarding mandated pre-bid, pre-award, and pre-construction conferences. *Id.* at 23-25. Finally, the decree, through the Regional Business Preference Program, affords corridor businesses the opportunity to participate in jobs created by the project. *Id.* at 22-23. For example, the program requires not only that contractors subcontract to corridor businesses but also that the general contractors patronize local eating establishments, suppliers, and caterers. Final Report, *supra* note 2, at VI-8.

Under Exhibit C of the plan, Caltrans must specify the exact number of contracts available to minority contractors and the exact number of jobs available to minority workers. Moreover, the amended portion of the decree sets the project's equal opportunity goals higher than the employment goals established under the MBE provision of the 1977 Public Works Act and its subsequent regulations.[130]

I. *Establishment of an Office of the Advocate for Corridor Residents*

The decree also created an Office of the Advocate for Corridor Residents (Advocate). The Advocate's office was to: (1) operate a local office; (2) monitor compliance with all applicable state and federal regulations pertaining to the relocation rights of those displaced; (3) collect complaints from displaced homeowners; (4) provide relocation benefit information; (5) assist displaced homeowners with complaints regarding eligibility for benefits, amount of payment, or provision of adequate replacement housing; (6) assist displaced homeowners in resolving disputes with Caltrans; and (7) request Caltrans to correct significant, widespread noncompliance.[131] The decree funded the Advocate's office in the same manner as other project costs.[132] The plaintiffs selected the Advocate, although, under some circumstances, the court could remove the Advocate. The Secretary of Business, Transportation and Housing provided the final forum for the Advocate, Caltrans, and the plaintiffs to appeal the funding decisions of the Director

130. Parts of Appendix C were modeled after federal legislation and regulations. The contract set-aside provision for MBEs and WBEs is modeled after § 103(f)(2) of the Public Works Employment Act of 1977. It provides that: no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least ten percent of the amount of each grant shall be expended for minority business enterprises. 42 U.S.C. § 6075(f)(2) (1988). The minority and female employment provision reflects regulations developed by the federal Office of Contract Compliance Programs (OFCCP) of the Department of Labor. 41 C.F.R. § 60 (1978) (implementing the promotion criteria advanced in Executive Order 11,246 and insuring equal opportunity to government contractors). Although the equal opportunity goals of the Century Freeway decree were initially established in the absence of any specific study, Caltrans eventually commissioned an outside consultant to oversee the project. Sandra Turner, Employment Study: Century Freeway Transitway 73-84 (June 1984) (unpublished manuscript, on file with the *Washington University Journal of Urban and Contemporary Law*). The consultant's report recommended the adoption of more ambitious goals for minority and female employment. *Id.* at 75. These goals for employment usually increased over time, while subcontracting goals were established on a project by project basis. Final Report, *supra* note 2, at VI-9.

131. Amended Final Consent Decree, *supra* note 4, at 11.

132. *Id.* at 11-12.

of Housing and Community Development.[133]

IV. PROCESS, STRUCTURE, AND CONTENT: ORGANIZATION THEORY AND IMPLEMENTATION OF THE CONSENT DECREE

The literature on consent decrees as an alternative to litigation suggests a number of critical "ingredients" in any successful consent decree.[134] Several propositions are derived from this literature. These propositions suggest that a successful consent decree considers the unique character of the agencies it will affect. The propositions are evaluated from the perspective of the hundreds of participants involved in the implementation of the Century Freeway consent decree.[135]

A. *Recognizing and Surmounting Bureaucratic Limitations and Rivalries*

Courts often assume that the most significant obstacle to implementing a consent decree is the formulation process. Unfortunately, organization theory and experience counter this assumption. Many forces and interests, some not necessarily represented in litigation, become relevant. The decree's implementation depends on organizations whose behavior often lies beyond the reach of the court issuing the decree. Even if the parties comply with the decree, there is no guarantee that its goals will be met.

The Century Freeway consent decree required the creation of a complex, interorganizational network, comprised of several entities. Ultimately, six key participants formulated the decree: Caltrans, Century

133. *Id.* at 11-14.

134. *See supra* notes 26-46 and accompanying text for a discussion of the general advantages and disadvantages of the consent decree. A successful decree is generally defined as an agreement that is fairly formulated and efficiently implemented.

135. This section of the Article summarizes the evaluations of these propositions made by 125 attorneys, administrators, monitors, engineers, and other implementors of the decree. All unattributed quotations presented in this and subsequent sections of the article are drawn from confidential interviews with these individuals. *See* Final Report, *supra* note 2, at IV-26 to IV-36. We asked interviewees to assess the accuracy of each proposition in light of their knowledge of the Century Freeway decree's implementation. The majority of respondents perceived each of the following seven propositions as important in explaining implementation of the Century Freeway decree. *Id.* at IV-25. Our interviews also revealed a general weakness of the consent decree: it fails to recognize the existing characteristics of organizational relations, and attempts to impose new, ambiguously defined organizational roles on the agencies involved.

Freeway Affirmative Action Committee (CFAAC), the Office of the Advocate, the Center for Law, the Federal Highway Administration (FHWA), and Housing and Community Development (HCD).[136] Although Caltrans worked with FHWA previously, it was unfamiliar with the other four groups. The HCD existed prior to the formulation of the consent decree, yet in order to fulfill its mandate under the decree, HCD created new roles for its members. The Office of the Advocate and CFAAC arose in response to the social impacts of the Century Freeway Project. The Center for Law in the Public Interest was a fledgling group prior to the decree. Given the mutual unfamiliarity among these six entities, it became necessary to develop new reporting, coordination, and oversight procedures.

Caltrans alleges that the decree disrupted the decision-making process by introducing six different parties into a dispute originally involving only one class of plaintiffs and one group of defendants. Hostility and conflict existed between Caltrans and the Center for Law, which advocated social programs required pursuant to the decree. Conflicts existed between Caltrans and the Advocate and CFAAC, the organizations created explicitly to provide monitoring and oversight of Caltrans. In addition, dissension existed between Caltrans and HCD, two sister state agencies assigned responsibility for the highway and housing programs respectively.

Caltrans' employees expressed skepticism about the selection of HCD as the state agency primarily responsible for the decree's housing program. Many interviewees agreed that the decision lacked a rational assessment of the two agencies' records in housing production. Rather, HCD became the lead agency in the housing program as a result of an oddly convivial relationship between the Center and HCD. Moreover, the assignment appeared as a threat to Caltrans' autonomy over the project's construction. These perceptions colored the relationship between HCD and Caltrans throughout the implementation of the decree.[137]

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136. Final Report, *supra* note 2, at IV-25. In addition, Caltrans maintained relationships with the Century Freeway Technical Assistance Program and the Century Freeway Pre-apprenticeship Training Program. Our data did not allow meaningful analysis of these relationships; however, they are not central to understanding this report. For an academic analysis of the interorganizational networks involved in this consent decree, see Myrna Mandell, *Application of a Network Analysis to the Implementation of a Complex Project*, 37 HUM. REL. 659, 660 (1984).

137. The perception that Caltrans was improperly denied responsibility for the housing program was particularly strong among Caltrans' right-of-way officials who

Caltrans viewed HCD as a forced partner, which earned a "special place" in the consent decree program because of its tie to Governor Brown's administration. Caltrans personnel felt pressured to cooperate with less competent partners because of a relationship based mainly on fiscal and political considerations and not on any mutual respect. Numerous Caltrans' respondents mentioned HCD's lack of experience with large scale projects, personnel weaknesses, vague and unsubstantiated notions of corruption, and poor understanding of administrative policies and procedures.

By early 1987 Caltrans was to have awarded fifty percent of the freeway construction contracts. However, after losing its bid for assignment as the lead agency for the housing program, Caltrans neglected the program. Consequently, for some time the housing program failed. It lacked consistent leadership. Four different executive directors attempted to run the Century Freeway Housing Program within a very short time. As of May 1983 HCD determined that only thirty-two housing units out of a required 3,700 units were constructed. A review of the housing program found poor management, a lack of leadership, incompetence, and widespread morale problems.[138] In addition, vacancies existed in more than thirty percent of the program's authorized positions. Friction existed between CFHP and Caltrans and between CFHP and the Federal Highway Administration.[139]

In early 1983, Caltrans now under a new administration, reassessed its role in the housing program, focusing on staffing and managerial needs. Caltrans expressed concern that the lack of housing production might slow progress on freeway construction. Caltrans also feared that the project might suffer financial problems as a result of the housing program's problems.

Caltrans realized its interest in a successful housing program, regardless of which agency assumed the lead. HCD did not spend its own money for housing construction. Rather, like all other freeway-related projects, Caltrans and FHWA assumed all costs associated with the housing program. The state and federal highway budgets financed

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bore the responsibility for monitoring the expenditures and performance of HCD, the agency that was assigned to administer the housing program.

138. For a substantive description of the Director of HCD's annual report, see State of California Department of Housing and Community Development, Annual Report to the Legislature (1985) (on file with the *Washington University Journal of Urban and Contemporary Law*).

139. *Id.* at 1.

the frequent cost overruns. Subsequently, if the federal government refused to reimburse Caltrans for housing program costs, because of procedural or other improprieties on the part of HCD, Caltrans bore the entire cost of the disputed item. The management review ultimately concluded that "the single most significant reason the housing program is behind schedule is [the Caltrans] Director's . . . instruction to Division of Right of Way personnel to 'stay out' of the housing program to the 'greatest extent possible.' "[140]

Caltrans' posture toward HCD changed dramatically. Instead of neglecting the housing program, Caltrans became engrossed in it. HCD and the Center for Law interviewees felt that Caltrans was overzealous in its monitoring of HCD.[141] Despite the reduction in the bitterness and hostility between the agencies, the housing program's progress continued to lag. In June 1989 the court restructured the housing program, retaining HCD as the lead agency under a new dual-track program. However, the court reallocated $60 million to a public-private partnership program outside the aegis of HCD. Housing construction remained slow, prompting the court to suggest that the parties suspend the entire project pending the resolution of housing construction and maintenance problems.[142]

The imposition of FHWA regulations, tailored to road construction projects rather than housing projects, presented another obstacle for HCD's housing construction efforts.[143] FHWA interviewees justified their intense scrutiny of housing program activities on the basis of the housing program's need to produce a large number of units in a short period of time and on FHWA's distance from actual administration of the program.

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140. *Id.*

141. Later in 1983, HCD's Executive Director for the Century Freeway Housing Program wrote that the "most serious threat to consent decree implementation is the blatant and undisguised attempt by Caltrans to assume control of the housing program." Mendel D. Hill, Summary Director's Report: Department of Housing and Community Development, Century Freeway Housing Program (Mar. 15, 1983) (unpublished report, on file with author). An attorney with the Center for Law described the burden placed on HCD to satisfy "an administration that has second-guessed them every time they went out to buy a pencil . . . . That's not in the best interests of the program." Interview with PL-2.

142. Judge Harry Pregerson, Address at Status Conference (Sept. 21, 1990).

143. One HCD official said that this arrangement was partly responsible for "more overlapping checks and balances and assignments of responsibilities than any other program that I have been associated with . . . in state government for twenty-five years." Interview with H-1.

Bureaucratic rivalries existed even within individual parties to the decree. For example, interviewees both inside and outside Caltrans criticized overlapping management controls. Caltrans' local civil rights staff often conflicted with civil rights personnel located in the Caltrans' Sacramento headquarters. According to interviewees, the headquarters retained functional responsibility for the decree's civil rights programs. However, the headquarters lacked supervisory responsibility for local managers. These problems persisted throughout the decree's implementation. Interviewees offered several reasons for the persistence of these organizational problems. The reasons focused on intraorganizational or interorganizational factors: (1) the new and unfamiliar CFAAC approach to affirmative action; (2) territorial conflicts among Caltrans' administrators; and (3) the lack of commitment to civil rights issues by some senior Caltrans administrators.[144]

B. *Gathering and Analyzing Compliance Dates*

Virtually all respondents considered mechanisms for gathering and analyzing compliance data an essential component of any consent decree. However, most thought the Century Freeway consent decree lacked this component. Those who claimed that the decree contained sufficient monitoring mechanisms blamed the various parties for failing to satisfy the decree's information-gathering responsibilities.

For example, Caltrans officials and CFAAC officials blamed each other for the failure to gather data on the employment of women, minorities, and corridor residents on the various construction projects. A consultant to the court indicated in a report that, until 1988, CFAAC concentrated all its monitoring activity on the MBE and WBE components of the affirmative action program.[145] Unfortunately, decree implementors and overseers failed to obtain reliable data concerning the decree's other affirmative action programs because Caltrans never developed adequate management information systems (MIS).[146]

144. *See, e.g.*, Interview with Ct-2 and Ct-5.

145. CFAAC relied on the theory that "if MBE/WBE subcontractors were hired, they in turn would hire sufficient minority and female employees to meet the employment goals. CFAAC thus set up an elaborate process to monitor MBE/WBE attainment, but hoped to monitor prime and subcontractor employment compliance mainly through statistical information from a Management Information System (MIS) provided by Caltrans." HAMILTON, RABINOVITZ, AND ALSCHULER, INC., *supra* note 123, at 14-15.

146. Perhaps a more fundamental problem is the difficulty of defining "compliance" in the context of this decree. The decree contains few deadlines and virtually no quanti-

Information management is a general issue relevant to the implementation of any consent decree. The sharing of data, views, concerns, and analysis could potentially have mitigated the organizational differences that plagued the Century Freeway decree. Most Caltrans respondents agreed that the decree theoretically provided for the free exchange of information. Nonetheless, the parties never exchanged information freely.[147]

A small minority of Caltrans' interviewees alleged that their coworkers purposefully obstructed the flow of information to CFAAC, providing only information explicitly requested. Others indicated that Caltrans withheld certain information based on confidentiality concerns. Still others cited the quarterly reports and status conferences as the only means of promoting the free exchange of information under the decree. Finally, the remainder of respondents suggested that problems with the exchange of information resulted less from intentional obstruction than from the simple unwieldiness of the data.[148]

C. *The Court's Function*

The court-agency relationship is a particularly important interorganizational factor in consent decree implementation.[149] Virtually all

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tative standards by which to assess the extent of compliance. Some interviewees concluded that compliance meant the successful negotiation of the decree's procedural hurdles, such as holding special pre-award conferences or approving M/WBE goals for projects. Others thought that "compliance" required only a scheduled date for a contractor to begin work. A senior Caltrans administrator admitted, "[t]here are so many, many gray areas in compliance." Interview with Ct-8.

147. One interviewee from Caltrans summarized the decree's shortcomings:

> But what [the decree] doesn't provide for, and what's a shame, is an openness. . . . There was never a whole lot of trust . . . . Because we felt . . . information [would be used] against us, our people tend to not be open and sit down and say, "Hey . . . this is what we're doing, this is why we're doing it.". . . We just don't think we can trust any of them. In fact, we don't trust many of our own employees for the exact same reason, which maybe is bureaucratic paranoia. But it's a shame because the main purpose of CFAAC especially was to get information about what we were doing out there. Yet we turned into adversaries. So that's the sad part of that.

Interview with Ct-11.

148. "I know that there's a perception that somehow we have a whole bunch of information that we probably don't have. It's probably a lot of facts floating around, but I doubt that it's collected any way that makes sense to anyone." Interview with Ct-18.

149. Professor Anderson has noted that: "The inescapable fact is that — although a consent decree is an agreement between the parties — it is consummated only by judicial approval. This order is accompanied by the judge's responsibility to be involved in the implementation of the agreement. The crucial problem is to determine what

those interviewed concluded that an understanding of the judge was central to understanding the implementation of the consent decree.

The consent decree judge is viewed with deep respect and even admiration by all the respondents who come before him. Respondents are virtually unanimous in their appreciation of the judge's personal commitment to the consent decree. However, they indicated a strong sense of frustration with the court's micro-management of the case and with its approach to dispute resolution. Many Caltrans officials sensed a judicial bias in favor of the plaintiffs; a particularly troublesome prospect considering the judge's freedom in interpreting the document's requirements.[150]

The plaintiffs also experienced frustration with the judge's style in administering the case. The plaintiffs hoped that the judge would pressure Caltrans to produce the results prescribed under the decree. Instead, the judge exhibited extraordinary patience and tolerance throughout the proceedings. The plaintiffs criticized the judge's desire to compromise rather than assume a firm position. In this view, the judge became too involved in formulating compromises, as opposed to simply resolving disputes.[151] This resulted in ineffective enforcement of the decree. The judge's desire to form a consensus among the parties, rather than dictate a particular resolution diluted enforcement efforts and frustrated many of the parties.

Disputes among parties to a consent decree frequently plague implementation of the decree, despite the fact that the decree appears to settle the litigation. Lloyd Anderson, an associate professor at the University of Akron School of Law, identifies three stages in the judge's role as ultimate supervisor of a decree: (1) the non-interventionist stage, where the judge is rarely involved; (2) the mediative stage, where

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should be the proper level of such involvement." Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. ILL. L. REV. 579, 586.

150. Interview with Ct-22.

151. This evaluation typifies the ideal judicial role in a consent decree proceeding:

> As is the case with dispute resolution, the judge can effectively perform the enforcement function if he becomes sufficiently involved, but few have chosen to devote the large amount of time necessary for a thorough job. Rather, judges often attempt to extend their efficacy by relying on committees, panels, or special masters to aid them . . . . These efforts have had minimal effect because the court's delegatees have had inadequate resources and power. Moreover, their power has depended largely on reinforcement by the judge, which entails long delays before orders are implemented by Defendants.

Implementation Problems in Institutional Reform Litigation, *supra* note 39, at 459.

the judge, perhaps using monitors or a master, helps parties resolve differences; and (3) the adjudicative stage, where the judge simply resolves the issue.[152] The judge's selection of an appropriate posture is key in resolving disputes. If judges assume passive roles, fostering consensus rather than adjudicating an issue, they may needlessly inhibit the implementation process.

It is difficult to categorize Judge Pregerson's dispute resolution strategy using these criteria. Interviewees from the plaintiff, defendant, and amicus parties criticize the judge's "too-consistent" approach to dispute resolution. Although the judge appeared actively involved in resolving disputes, he merely prodded the parties to reach mutually acceptable solutions to their disputes. Parties involved with the Century Freeway case concluded that this approach caused unnecessary delays and fostered animosity over relatively petty issues susceptible to a quick judicial resolution. Besides delay, the informal approach encouraged *ex parte* communication and created potential difficulties in finding parts of the record.

D. *Spotting Bureaucratic and Political Impediments*

The decree formulation process must specifically consider the bureaucratic and political hurdles associated with implementation. Development of a formal implementation plan[153] and evaluations by experts familiar with the affected bureaucracies aid in determining the feasibility of implementation.[154]

The interviewees identified no such formal fact-finding stages. Although the plaintiffs' attorneys considered the seven-year injunction period as a fact-finding stage, it is not clear that any facts emerged during that period. The Caltrans attorneys most active in the decree negotiations either lacked knowledge of any fact-finding efforts, or they criticized the depth and validity of the studies performed under the agreement. The other defendants subscribed to a "backroom consultation" model of consent decree negotiation,[155] where a small group of

152. Anderson, *supra* note 17, at 761.

153. Stein, *supra* note 28, at 151.

154. Implementation Problems in Institutional Reform Litigation, *supra* note 39, at 457, *citing* Johnson & Wood, *Judicial, Legislative, and Administrative Competence in Setting Institutional Standards*, in THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 528, 535-40 (1976).

155. Interview with Ct-33. "Backroom Consultation" is defined as a process not readily opened to broad involvement.

lawyers believe that they have all the information necessary to properly draft the decree.

A number of interviewees suggested improvements to the decree, but they required a better fact-finding process. For example, some interviewees recommended the establishment of a production-oriented agency to lead the housing construction project. Such an agency need not adhere to the policies and procedures designed for the management of highway construction projects rather than housing construction projects. The interviewees noted that the regulations relevant to a highway construction project are not interchangeable with regulations governing a housing construction project.

E. *Detailing Defendant's Obligations*

Whether a decree that contains detailed expectations for each agency facilitates implementation or compliance with the decree is unclear. Detailed expectations eliminate ambiguity and simplify an organization's ability to act. However, critics of highly-detailed directives deem them counterproductive. The detailed expectations may alienate the agencies by eliminating agency discretion and requiring strict adherence to the letter of the law, as opposed to its spirit. What's more, a consent decree that attempts to cover all details cannot, in fact, be exhaustive.

Most Caltrans interviewees understood their obligations under the decree. Some felt that a more detailed explanation of their powers under the decree would preclude any agency discretion and lead to inappropriate judicial administration of a state agency.[156] FHWA respondents differed over the optimal amount of detail that a consent decree should contain. Some found the Century decree too detailed. Those individuals favored a decree with general goals, giving the implementing agencies discretion over how to attain those targets. Others fault the Century decree as leaving substantive issues open to excessive interpretation.

Some plaintiff and CFAAC interviewees criticized the decree's failure to provide specific deadlines and adequate levels of detail. According to CFAAC officials, the decree permitted neglect and ultimately delays in the plan's completion. The plaintiffs' attorneys stated that, although it is impossible for a decree to anticipate all unforeseen cir-

156. Caltrans respondents noted the lack of an adequate description of the procurement process for housing units. Uncertainty surrounded the parties' respective responsibilities.

cumstances, skepticism of bureaucracies justifies very detailed procedures and objections. A minority of the plaintiffs' attorneys disagreed. Rather, they sought only a statement of procedures for resolving unforeseen problems.

The decree contained deadlines for the phasing requirement of the highway and housing components of the project. The decree allegedly included these particular deadlines to ensure simultaneous progress on both the housing program and the highway. Satisfaction of the deadlines became the ultimate objective, without regard to the ability of the housing program's administrative or organizational structure to comply with those deadlines.

F. *Dispute Resolution*

Many Caltrans respondents questioned the efficacy of the dispute resolution agencies created under the decree. Others denied that the decree even created dispute resolving agencies. Rather, those Caltrans respondents who denied the existence of these agencies concluded that the decree fostered otherwise avoidable disputes. Moreover, the decree supplanted formal administrative review of property acquisition and the dispensation of relocation benefits with an unwieldy adversarial system.

CFAAC respondents criticized the lack of an independent dispute resolution body.[157] These interviewees acknowledge the judge's attempt to use his staff and a special counsel as an independent dispute resolution body. However, similar to the judge, they served as a facilitator, assisting the parties in choosing a mutually agreeable course of action. They did not mandate any particular course. The plaintiffs' attorneys argued the need for such a body. One attorney theorized that the judge declined to appoint a special master in the interest of preserving the duties traditionally assigned to him.[158]

The literature recommends a different organizational strategy, the use of a monitor whose sole authority is to gather information, assess the defendants' compliance with the decree, report to the court, and offer assistance in resolving minor disputes. The Century Freeway de-

157. Some CFAAC respondents saw CFAAC as a dispute resolution body; however, it lacked final authority to resolve disputes. For example, under the decree, the Director of Caltrans has the authority to reject a decision by CFAAC, if the bid is not responsive to consent decree requirements. Amended Final Consent Decree, app. Exhibit C, *supra* note 2, at 26.

158. Interview with Ct-45.

cree lacks such an organizational strategy. Interviewees identified at least six organizations or individuals possessing "sole authority" to monitor implementation and resolve disputes.[159] The parties agreed that the purported monitors were ineffective. However, they were not in agreement as to the identity of the monitor or as to a better choice.

The variety of organizations and individuals mentioned as potential monitors reflects the confusion surrounding the role of these organizations or individuals. Additionally, it reflects the judge's willingness to allocate nominal monitoring and reporting authority to a variety of entities, rather than granting a single individual or organization the status of sole Master.

G. *Non-Party Interests and Involvement*

When the interests of plaintiffs and defendants are greatly divergent, it is difficult to implement consent decrees. The absence of a common settlement objective exacerbates these difficulties. Additional problems arise when non-parties to the settlement become parties to implementation. The parties and non-parties often differ on important substantive aspects of the decree. An analysis of the defendants' and the plaintiffs' varied interests demonstrates the problem of non-party involvement in implementation.

Although Caltrans and FHWA shared many similar interests, their opinions differed in other areas, such as the proper funding for the special counsel and the proper funding for reimbursement of housing program costs. According to several interviewees, the defendants' implementation efforts also suffered because of a lack of identifiable and coherent structure. One official described Caltrans' structure as internally incoherent. The director's agenda was much broader than that of Caltrans' rank and file engineers. Another Caltrans official explained that people outside the department were unable to determine the responsibilities of the various administrators and engineers. Under the consent decree, even Caltrans insiders had difficulty defining individual roles.

In addition, Caltrans was unable to identify the plaintiffs' interests with regard to the implementation of the decree. There was no clear process for the plaintiffs' lawyers to communicate with the original plaintiffs. Without this means of communication, it was difficult to as-

159. The "monitors" included CFAAC; the Center for Law; The Corridor Advocate; the court clerk; a special counsel, who oversaw the restructuring of the housing program; and a "special consultant" to the court.

certain what could be done to pursue the plaintiffs' interests. Unfortunately, the litigation and consent decree processes did not provide for effective participation of the named plaintiffs in their representation.

According to an HCD official, the project failed to fully reconcile divergent plaintiffs' interests. Some plaintiffs held business and employment training interests, while others were concerned about housing provision. One HCD official noted the conflict between high-level housing production and the social goal of affirmative action.

Implementation of the consent decree was difficult, in part because the plaintiffs altered their position. At first, the plaintiffs adamantly opposed any freeway project. Eventually, however, the plaintiffs expressed a willingness to accept some form of corridor freeway.[160]

The respondents disagreed on whether to include non-parties in decree negotiations. Those who believed that non-parties deserved a role in the negotiation process argued that people affected by the decree were entitled to influence its provisions, especially those pertaining to housing. To many critics, the exclusion of HCD, which did not participate meaningfully in the negotiation of the decree, made little sense. HCD, after all, was the agency which was going to be responsible for implementation of one of the decree's most controversial aspects—the several thousand unit housing program. These critics cite the exclusion of HCD from the negotiation process as an explanation for some of the organizational and financial problems plaguing the decree's implementation.[161]

Although officials of the corridor cities reviewed and commented on the various drafts of the consent decree, they lacked any significant role in decree negotiations. Most of corridor cities' concerns were addressed by the time the negotiators reached the drafting stage. One city official from Downey, a city located in the freeway corridor, indicated that the city's primary interest was in the continued progress of the project. Caltrans had already satisfied all the cities' demands prior to the lawsuit.

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160. A state official noted:

> They stated it right up front at the beginning . . . . We want to stop this project. We want money to go to transit . . . . I think maybe the hand-writing was on the wall as far as they were concerned despite their efforts to kill the project. Even with the support of the Brown administration they were not going to do it.

161. One Center for Law attorney expressed little sympathy for HCD's desire to be more involved: "Sure, people say, for example, that HCD was not a participant in the drafting, and got stuck with doing some of the stuff. But my view is that they're the State of California, and if they can't get their act together . . ."

Other city officials doubted the capacity of the corridor cities to assume a larger role, even if they desired. According to one city manager, local elected officials and his staff lacked the sophistication necessary to play a greater role in the decree's negotiation and implementation process.

Representatives from HCD, as well as local officials, noted the importance of continuing community input in the implementation of the housing program. These officials speculated that greater HAC participation in the implementation of the plan might have served the communities better. Some thought that the disbanding of the HAC impaired efforts to persuade local jurisdictions to accept decree-mandated housing projects.[162]

The lack of community representation at the housing construction phase of the decree's implementation was a disappointment. Furthermore, local officials felt that their communities lacked sufficient information about the housing plans. There was no central control over changes in the implementation scheme.[163]

V. SUMMARY AND CONCLUSIONS

The implementation of the Century Freeway consent decree, when viewed in the context of organizational theory, suggests several general conclusions that apply to the implementation of any consent decree.

Proponents of consent decrees must be realistic in assessing the potential for cooperation among the organizations that are the subjects of proposed reforms. In litigating proposed reforms, defendant agencies often have deep and entrenched organizational cultures, which are not easily rocked by the fiats of the judiciary, no matter how detailed or eloquent. Even within a single jurisdiction, the organizational cultures

162. For example, the City of Hawthorne attempted to block the siting of decree mandated housing by limiting the low income housing. The district court enjoined the City's efforts and found the limitations to be discriminatory. *See* Keith v. Volpe, 618 F. Supp. at 1160 (holding that the California Division of Highways sufficiently complied with statutes designed to aid persons displaced by federal aid highway projects).

163. According to one city official:

> Change in program design, upscaling or downscaling of a specific project, availability or lack of availability of money for a plan [were not scrutinized.] . . . Someone should have a list of . . . all the inner players, the people, the court, and others in it. Somebody should have been there in the situation saying, "change your expectations communities." If you are told that this is going to be done on time you might have gotten ready . . . to coordinate other programs to our agenda. When our agenda changed, we should have said something to you all to bring you along . . . these state agencies don't do that.

differ across agencies. In fact, they may vary within a single organization. Thus, efforts to compel different units, divisions, and administrative agencies to cooperate in obtaining a common goal may encounter significant resistance. The law is not impotent in directing new relations among complex organizations. Rather, efforts to coordinate varied complex organizations must reflect an understanding of the history of interorganizational relations, the potential for enhanced responsibilities within organizations, and the viability of monitoring of compliance. Further, advocates of change must analyze the policies and procedures of the targeted organizations in order to assess whether they will be able to operate effectively under the new policies and procedures imposed upon them.

The mandates of a consent decree often require additional staff. Crafters of consent decrees must assess the ability of a target organization to attract the high quality professionals needed to execute the new directives. For example, an agency with housing policy experience may lack the knowledge to successfully recruit builders of housing. A state highway agency, historically dominated by engineers, may fail in efforts to attract leading civil rights professionals.[164]

In an ideal world of implementation, targeted defendant organizations have discernable and homogeneous interests. Here it is relatively easy to project whether a target organization will comply with the consent decree. In reality, despite common oversight, agencies might still have divergent goals. In these circumstances, the assessment phase is more important. Perhaps the decree should be simplified, reducing the expectation for congenial relations among different bureaucracies. Modest successes may benefit institutional reform more than a proclamation of unobtainable, grandiose objectives.

In addition to obstacles inherent in interorganizational relations, drafters of consent decrees must recognize the existing limitations on the processing and exchange of information. Even the best-intentioned administrators, willing to implement a consent decree in a spirit of cooperation, may be constrained by an inability to create, access, analyze, and disseminate information. This inability hampers consent decree negotiations.

Consider limitations on the role of the judiciary. Again, intentions

164. State highway departments are notable among public bureaucracies for their hostility toward changes in civil rights and environmental regulations. *See* Mark H. Rose & Bruce E. Seely, *Getting the Interstate System Built: Road Engineers and the Implementation of Public Policy, 1955-1985*, 2 J. POL'Y HIST. 23, 33 (1990).

and judicial competencies are not the limiting factors. Rather, expectations of ongoing, continuous, harmonious reporting from the executive to the judiciary on important matters on which the courts lack expertise may be unrealistic. While monitors may be desirable in selected circumstances, the efficacy of these roles is not clear. There are several concerns: (1) uncertainty concerning the necessary implementation skills for a monitor; (2) resentment concerning the monitor's authority; and (3) the requirement for judicial scrutiny over certain aspects of implementation.

Despite the challenges involved in implementing consent decrees, consideration of issues related to organizational behavior increase the likelihood of successful implementation. First, successful implementation depends on committed individuals.[165] Despite severe structural flaws and organizational constraints that impeded implementation of the Century Freeway consent decree, many observers felt that the "right people" could have overcome these obstacles.[166]

Second, a decree's public policy goals are best implemented when those affected by the decree are allowed to participate in its formulation. This is a basic finding in the social psychology of organizational behavior.[167] In the present case, most Caltrans interviewees felt excluded from the formulation of the decree. The Center for Law, through sympathetic Brown administration officials, dictated the terms of the decree to Caltrans. Indeed, the consent decree signed in 1979 contained virtually all of the plaintiffs' original settlement demands. The affirmative action provisions exceeded those demands.[168] Accord-

165. Anderson, *supra* note 17, at 778. Anderson's consent decree analysis concerned prison reform, deinstitutionalization of the mentally ill, and school construction decrees. Many interviewees agreed with Professor Anderson regarding the primacy of this factor. Its importance was surprising, however, in light of the large number of respondents who gained an appreciation of the role of bureaucratic rivalries and inertia in implementing the decree. *See* DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS (1984) (reaching a conclusion similar to Professor Anderson's).

166. Some Caltrans respondents indicated that "the vision thing" is a necessary ingredient to successful implementation.

167. *See, e.g.*, JOSEPH F. DIMENTO, MANAGING ENVIRONMENTAL CHANGE 99-110 (1976) (participation and responses to MEPA act); WILLIAM A. MEDINA, CHANGING BUREAUCRACIES (1982) (discussing management improvement and problem development); MARSHALL W. MEYER, CHANGE IN PUBLIC BUREAUCRACIES 72-96 (1979) (discussing effects of differing variables in organizational structure).

168. Had litigation continued, it is unlikely that the decree-mandated construction of thousands of housing units and the existence of CFAAC would be included in the project. According to Caltrans attorneys, the decree was unusual because it awarded the plaintiffs more than they originally demanded. The rank and file Caltrans engineers

ing to attorneys who negotiated the decree, its basic components were in place after the first few negotiating sessions. Some described the negotiations as "funny" because the Caltrans Director and other senior officials in the Brown administration generally concurred with the Center for Law position. On most issues, the question was not whether the Center's demands would be incorporated into the settlement, but rather, how broad Caltrans' accedence would be. Rank and file Caltrans engineers and administrators, most of whom thought that plaintiffs' original allegations lacked merit, opposed the negotiations which led to the signing of the consent decree. The senior administrators to whom drafts of the consent decree were circulated lacked "veto" authority over the major elements of the decree. They possessed only a limited power to comment on the decree.[169]

Resentment, derived from a perceived "imposed agreement," has hampered efficient decree implementation.[170] According to Caltrans officials, defendants failed to move quickly; there was significant intra-

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conflicted with the decree's social goals of achieving affirmative action. Caltrans interviewees regarded the agency's support for civil rights as adequate. These interviewees acknowledged that affirmative action was never a high priority. Other Caltrans interviewees criticized the department's civil rights record. One senior Caltrans official admitted that the affirmative action provision for MBEs and WBEs in the 1982 Surface Transportation Act caught the department "flat-footed." According to interviewees, during the years following its establishment, the department's Civil Rights Office was a "dumping ground for incompetents." A small minority of Caltrans interviewees noted a lack of commitment among senior Caltrans officials to civil rights programs. The lack of commitment to civil rights hampered the operations of the District 7 Civil Rights Branch during consent decree implementation.

169. Several heated debates occurred. Parties failed to agree on the size of the housing program, the duties of the ombudsman, the Corridor Advocate, and the lead agency for the housing program. Initially, a majority of Caltrans interviewees approved of the housing program's inclusion into the decree. Most felt that the housing project served the general welfare. However, less than one-third approved of HCD as the lead agency. Twenty percent felt the assignment promoted the general welfare. One-third of Caltrans interviewees identified their sister agency as an opponent in decree implementation. Caltrans' hostility toward the housing program derives primarily from a perceived error in the assignment of various agencies to oversee implementation.

170. This point, however, is often overlooked by experts in the field of remedy. For example, a colloquium examining judicial intervention in the management of executive agencies focused on the administration of consent decrees. However, it left "to legal debate" any concerns about the propriety of institutional reform litigation and resultant consent decrees. For an extensive account of the colloquium, see ROBERT C. WOOD, REMEDIAL LAW: WHEN COURTS BECOME ADMINISTRATORS (1990). The interviews indicated that officials questioned the legitimacy of the settlement process among implementation officials. Consequently, their responses to the questions influenced their administrative behavior.

agency conflict; the defendants "selectively" complied; and at some levels, the defendants simply opposed the decree.[171] Some felt that personnel in the state and federal transportation agencies hoped to see the housing program fail in order to avoid the precedent of including housing as a component in future federal projects. Because defendants widely perceived the decree as a negative aberration, several defendant agency employees found it difficult to embrace. Compliance with the decree conflicted with their professional advancement.[172]

Finally, advocates of consent decrees might benefit from the drafting of detailed goals and the creation of monitoring procedures. The alternative of postponing the task of determining goals and monitoring procedures is incompatible with common understandings of collective action.

171. Implementation is complicated when an implementor's attitude towards a policy differs from that of other policy-makers. *See, e.g.*, Charles S. Bullock III, *Conditions Associated with Policy Implementation, Implementation of Civil Rights Policy* 184-207 (Charles S. Bullock III & Charles M. Lamb, eds., 1984); Ernest Alexander, *From Idea to Action: Notes for a Contingency Theory of the Policy Implementation Process*, 16 ADMIN. & SOC'Y 403 (1985). In the Century Freeway case, interviewees traced its eventual demise to changes in political administrations (from Brown to Deukmejian at the state level, and from Carter to Reagan at the federal level). Also, the new group of decree implementors inherited questionable programs which they philosophically opposed. For example, a senior FHWA administrator under President Reagan called the decree "an abomination and an abuse of the power of the judiciary." Interview F-1.

172. "There weren't real clear messages that if you made things happen on Century Freeway that this was good for your career." Such messages can be important. Even individuals with deeply-held beliefs that a policy is illegitimate will modify their behavior when the probability is high that severe sanctions for noncompliance will be invoked. *See, e.g.*, Daniel A. Mazmanian and Paul Sabatier, *The Implementation of Public Policy: a Framework of Analysis, Effective Policy Implementation* 3-35 (Daniel A. Mazmanian & Paul Sabatier, eds., 1981).

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