The Use of Equitable Tools in Freeway Construction Litigation

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INTRODUCTION

Large-scale transportation projects raise thorny environmental, community development, public policy and legal issues. Frequently, these projects become mired in litigation, particularly since the environmental regulation movement of the 1960s and 1970s. This paper is about the effects of judicial intervention in and management of transportation policy litigation.

Transportation policy disputes are not easily remedied through damages. Instead, courts often find it necessary to invoke their inherent equitable powers to manage and/or resolve the litigation. Courts involved in transportation policy disputes have used three types of equitable tools: consent decrees, special masters and injunctions. Increasingly courts have not only become involved in the resolution of particular disputes, but have also played a role in implementing policy changes that result from the litigation. Some observers see this increasingly involved role of the judiciary as an avenue for underrepresented groups to enforce federal and state environmental policies. Others view this increased intervention

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as an unconstitutional intrusion into decision-making by the executive and legislative branches.

This paper contains four sections. The first section is a discussion of the three equitable tools as used in federal courts. The second section outlines background information about four case studies. The third section is a discussion of equitable tools as applied in each of the case studies. The fourth and final section is a discussion of the implications and lessons to be learned from analyzing the interaction of judicial intervention and transportation planning in the case studies. This final section will also have recommendations and will provide examples of how these lessons could be applied to future transportation disputes.

Background Information on the Equitable Tools Used in Federal Courts

Consent Decrees

A consent decree is "[a]n agreement formalized by the judiciary to settle a lawsuit according to principles agreed to by the parties."[1] The plaintiff and the defendant in the lawsuit negotiate a compromise and then obtain approval of the compromise by the judge presiding over the litigation. The decree allows the parties to fashion their own remedies rather than having a court impose a remedy upon the parties.

Institutional reform plaintiffs seeking some form of action from a governmental agency often use consent decrees. A prime example of this would be school desegregation consent decrees.[2] Typically, a group of plaintiffs seeking to desegregate schools sues local educational institutions. With the supervision of a court, the plaintiffs and the local school district may enter a consent decree arrangement. The decree provides a detailed plan of action to desegregate the schools. The court that approves the decree may also enforce its provisions. Consent decrees are frequently used in situations in which either the executive or the legislative branches of our system of state and federal governments have allegedly violated certain constitutional rights. Other examples of consent decrees involve litigation surrounding the practices of mental institutions, prisons, school systems, employers and other institutions.[3]

A unique characteristic of the consent decree is the need for the ongoing supervision of the court. The result of most litigation is a judicial

1. Dean W. Hestermann et. al., Public Works, the Courts and the Consent Decree: Environmental and Social Benefits of the "Freeway with A Heart" 282 (University of California Transportation Center Working Paper No. 348, 1997).

2. *See* Anthony N. R. Zamora, *The Century Freeway Consent Decree,* 62 S. Cal. L. Rev. 1805, 1840 (1989).

3. *See id.* at 1809.

decision entering a judgment for either the plaintiff or defendant. Once a court has issued a judgment, the parties have very little further interaction with the court or each other. Consent decrees require the supervising courts to monitor and supervise the decree's implementation over time. This forces the courts to assume the role of an enforcer, planner, arbiter and possibly perhaps a counselor.[4]

The Constitutionality of Consent Decrees

Article III of the U.S. Constitution structures the balance of power among the executive, legislative and judicial branches of the federal government. The goal of this structure was to create an equilibrium of power. The executive was provided with the power of initiative and enforcement; the legislature with the power of the purse; and the judiciary with the power of interpretation."[5] This structure forms the basis for the separation of powers that provides a checks-and-balances system of government.

Consent decrees are controversial because they seemingly blur the lines between the branches, thus raising separation of powers concerns. Consent decrees involve courts in areas of developing policy and expropriating money (traditionally areas within the purview of the legislative branch), and courts are responsible for enforcing consent decrees (taking on the enforcement role of the executive branch). Examples of developing policy include mandating courses of conduct or programs for defendant institutions. However, there has been a longstanding legal tradition of allowing courts "judicial flexibility in defining remedies to adequately meet a wrong."[6] In *Brown v. Board of Education*, the Supreme Court stated, "equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[7] Consent decrees are one of many possible tools that a court can use to remedy a dispute.

A consent decree will often involve creating programs and mandating expenditures (but not actually appropriating funds). A decree often requires ongoing court supervision. For example, Congress and the executive branch had already approved and funded the Century Freeway, but the consent decree entered by the court prevented executive agencies of the federal and state governments from distributing these previously appropriated funds. Additionally, the decree created new mitigation programs that neither Congress nor the executive branch had planned.[8]

4. *See id.* at 1815.
5. *Id.* at 1837.
6. *Id.*
7. Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955).
8. *See* Zamora, *supra* note 2, at 1840.

Although controversial, consent decrees are an attractive option for institutional-reform plaintiffs. They allow a group of citizens to change the scope and direction of governmental action without having to lobby the legislative and executive branches. Additionally, because so many actions of the federal government are made by administrative agencies that are relatively insulated from public pressures, consent decrees provide a degree of leverage over the actions of such agencies.

The Advantages of Consent Decrees

The main advantage of a consent decree is the avoidance of litigation, including the time, expense and risks inherent in a trial. Decrees can provide a detailed and comprehensive plan of action that can lead to a settlement of the issues, which pleases both parties. Because both the parties (ideally) jointly fashion the plan of action, there is more of an investment in the outcome for both sides of the litigation. "Defendants are more likely to comply with the decree that they help formulate."[9]

Proponents of consent decrees argue that in order to protect the rights of the minority, the courts must be able to have a means of providing a check and balance to the legislative and executive bodies. The legislative and executive branches often fail to protect the rights of disadvantaged communities in policy-making and courts are in the best position to resist the pressures of the majority.[10] If the democratically elected branches of government require a minority to shoulder an unfair burden in violation of the Constitution, then it is the duty of the courts to step in and vindicate the minority's rights.[11] Similarly, in cases not involving constitutional issues, courts can enable citizens (not just minority groups) to enforce statutory duties upon the government.

Disadvantages of Consent Decrees

The main criticism of consent decrees is that they involve judicial intrusion into roles normally assumed by the executive and legislative branches. The argument is that consent decrees represent an unwarranted extension of judicial power into areas reserved for the other branches of government under our Constitution. According to this viewpoint, courts are the least qualified to become involved in implementation and policy-making.[12]

In addition to the constitutional arguments, critics point out that con-

9. Joseph H. DiMento & Dean W. Hestermann, *Ordering the Elephants to Dance: Consent Decrees and Organizational Behavior,* 43 WASH. U. J. URB. & CONTEMP. L. 301, 306.

10. *See* Zamora, *supra* note 2, at 1843.

11. *See id.*

12. *See id.* at 1816.

sent decrees, rather than saving time, actually contribute to significantly higher costs and lengthy delays in the resolution of disputes. In the case of the Century Freeway, a $500 million project due to be completed in 1983, became a $2.2 billion project completed in 1993.[13]

SPECIAL MASTERS

Special masters are defined as "people appointed to act as the representative of the court for some particular act or transaction."[14] Courts have long had inherent powers at their disposal to assist them in performing their duties, such as special masters, auditors, examiners, and other individuals who may help speed the resolution of litigation.[15]

Courts are increasingly using special masters to help manage complex and lengthy litigation. While the responsibilities and powers of individual special masters are highly dependent upon the facts in each case, courts appoint and monitor all special masters. Special masters generally serve many roles including fact finder, mediator, and as a consultant to the judge supervising the litigation.

In addition to using special masters, courts sometimes appoint monitors. The main difference between special masters and monitors is that monitors frequently do not have any powers to affect the behavior of the monitored. Instead, monitors typically report observations and/or findings to the supervising judge. In the case of the Century Freeway, the court did not employ a special master. Instead, the judge appointed three different individuals to perform a variety of monitoring tasks.

Special masters may also perform technical evaluation services. Certain types of litigation present complicated and/or technical issues. A court with a busy case docket may not have time to understand all the issues presented in certain cases. A court can however, employ a special master to help it evaluate data and other information. In *Sierra Club v. MTC*, for instance, the court employed Professor Martin Wachs to help it understand the technical evaluation issues presented in the case.

Examples of the Use of Special Masters

As litigation has become more complex in recent years, the need for special masters to help manage complicated cases has increased. Wayne D. Brazil identified three types of cases that frequently involve special masters: large scale commercial litigation, mass torts and public law cases

13. Robert Reinhold, *Opening New Freeway, Los Angeles Ends Era,* N.Y. TIMES, Oct. 14, 1993, at A16.

14. BLACKS LAW DICTIONARY 673 (6th ed. 1991).

15. *See* Margaret A. Farrell, *The Function of Special Masters: Administrative Agencies for the Courts,* 2 WIDENER L. SYMP. J. 235, 254 (1997).

where the courts create equitable decrees that govern the operation of institutions over a long-term period.[16] In some particularly complex suits, courts have needed masters not to understand the subject matter of the suit, but rather to help sort through massive amounts of non-technical information.[17]

For example, in a case involving a consent decree governing New York State's treatment of the mentally retarded the court stated:

> The monitoring of a consent judgment that mandates individualized care for thousands of class members and that entails a balancing of the interests of parties with third-party employees, school authorities and community groups is just the sort of "polycentric problem that cannot easily be resolved through a traditional courtroom adjudicative process."[18]

Masters do not have to be attorneys. They often are individuals who help the court evaluate scientific evidence.[19] In the *Sierra Club v. MTC* case, for instance, the court employed Martin Wachs, a transportation planning professor of UCLA (and now at UC Berkeley), as a special master. Wachs helped the court evaluate the defendant's scientific procedures. A later section of this paper addresses this case. Without the use of someone who has specialized knowledge of a highly technical field, a court can become mired in one piece of litigation, trying to sort out the technical issues presented. "Rule 53 is broad enough to allow appointment of expert advisers."[20]

Institutional Reform Contexts

Special masters can be particularly appropriate in institutional reform cases, where the special masters can be "implementation officers."[21] Traditional sanctions used by courts to secure compliance are often not effective in reforming institutions. Injunctions entered by a court could prevent individual violations of personal rights by an offending institution, but injunctions may fail to address systemic abuses in such institutions. Awarding damages to individual plaintiffs does nothing to ensure that future violations will be prevented.[22]

16. *See* Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?* 53 U. CHI. L. REV. 394, 398 (1986).

17. Margaret G. Farrell, *The Role of Special Masters in Federal Litigation,* C842 ALI-ABA 931, 949 (1993).

18. New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 962-63 (2d Cir. 1983), *citing* Hart v. Cmty. Sch. Bd. of Brooklyn, 383 F.Supp. 699, 766 (E.D. N.Y. 1974), *aff'd,* 512 F.2d (2d Cir. 1975).

19. *See* Farrell, *supra* note 15, at 284-85.

20. United States v. Conservation Chem. Co., 106 F.R.D. 210, 220 (W.D. Mo. 1985).

21. Debra Dobray, *The Role of Masters in Court Ordered Institutional Reform*, 34 BAYLOR L. REV. 581, 581 (1982).

22. *See id.* at 583.

Many institutional suits involving the rights of individuals "[r]equire the protection of an affirmative remedial regime, since they are primarily based on a governmental duty to follow a particular course of action."[23] Long-term judicial supervision of an institution is useful in order to reform the practices and procedures of an institution. Yet most courts are under-equipped in time and resources to be able to manage the behavior of a large and complex institution.[24]

Other Uses of a Special Master/Monitor

Courts also use special masters to help resolve litigation involving large numbers of parties or particularly technical or complex subject matters. Because judges often have a large caseload on their docket, they are unable to acquire special skills and knowledge to fashion effective remedies in some institutional reform or highly technical suits. Additionally, judges do not have the time or the resources to monitor compliance with and implementation of their decrees in most institutional reform cases.[25] The *Sierra Club v. MTC* litigation involved highly technical analyses of transportation demand modeling. This was a case where all the parties involved desired the use of a special master. The parties viewed the appointment of the special master as very helpful to the court.

Special masters are also useful when a defendant is unwilling or unable to comply with a court-ordered decree or remedy. Judges may select a special master to oversee compliance with orders because a master can assess the defendant's compliance.[26] Because courts often have to retain jurisdiction for many years, special masters, like consent decrees, function as an administrative mechanism to ensure compliance with orders and distribute damages if appropriate.[27]

History of Special Masters

Special masters have their roots in England and have been used in the United States since colonial times. Typically, special masters have served as administrative assistants, performing such tasks as selling property to settle judgments, holding evidentiary hearings, calculating damages and settling accounts.[28] "Historically . . . the master's duties were more ministerial or procedural than substantive."[29] When the Federal

23. *Id.* at 581.
24. *See id.*
25. *See id.*
26. *See* Farrell, *supra* note 17, at 953.
27. *See* Farrell, *supra* note 15, at 268.
28. *See* James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters.* 66 N.Y.U. L. REV. 800, 800-01 (1991).
29. Dobray, *supra* note 21, at 586.

Rules of Civil Procedure were formulated in 1938, Rule 53 codified the use of special masters.

Authority for Special Masters

Federal courts have four sources of legal authority to appoint a master: 1) the consent of the parties; 2) the inherent authority of the court; 3) the Magistrates Act (this paper does not analyze this method because it was not used in any of my case studies); and 4) Federal Rules of Civil Procedure (FRCP) Rule 53.[30]

Inherent authority

American courts have the inherent power to use various tools and mechanisms to enable special masters to carry out their duties. These powers include the ability to appoint individuals unconnected with the court, with or without the consent of the parties, to amplify and clarify issues, monitor compliance, distribute funds, and to make tentative findings.[31] In the cases *Brown v. Board of Education* and *Swann v. Charlotte-Mecklenburg Board of Education*,[32] the Supreme Court recognized that equitable principles allow courts great flexibility in shaping their remedial decrees. Courts need to tailor their remedies to fit the nature and context of particular cases.

FRCP Rule 53

The provisions of Rule 53 do not address the use of special masters in the remedial context. The provisions address a master's responsibility in discovery and in settling factual issues in cases.[33]

Implementation Under Rule 53

Rule 53 was adopted in order to codify the existing practice of referring matters to special masters.[34] Rule 53(b) states:

> [a] reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

30. *See* Farrell, *supra* note 17, at 936.

31. *See* Ex parte Peterson, 253 U.S. 300, 312-14 (1920).

32. Brown v. Bd. of Educ., 349 U.S. 294 (1955); Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1 (1971).

33. *See* DeGraw, *supra* note 28, at 808.

34. Erin L. Dailey, *Constitutional Law – Can a Special Master Function as a Surrogate Judge?*, 27 SUFFOLK U. L. REV. 1054, 1058 (1993).

Rule 53 is meant to provide courts with a "flexible and adaptable method for resolving questions and conflicts which might otherwise impede the process of litigation."[35] The Supreme Court in *Ex parte Petersen* stated that:

> [w]here accounts are complex and interconnected, or the documents and other evidence voluminous, or where extensive computations are to be made, it is the better practice to refer the matter to a special master or commissioner than for the judge to undertake to perform the task himself.[36]

Courts are allowed to confer additional powers upon special masters besides receiving evidence and collecting damages. A reference to a special master can include the power to impose sanctions or to adjudicate disputes. A master with a broad reference can engage in administrative, managerial and policy-making functions.[37]

The order of reference is the primary source of guidance to the master's authority in a particular case.[38] Rule 53(c) provides that a court's reference to a master may limit the master's powers and may delegate only certain issues or acts for the master to perform. The order may also prescribe a time and a place for the term of the master's service.

There are compelling reasons to create a reference order that is very specific as to the duties of the master, but there are also good reasons to allow the master some flexibility. Specificity gives the parties notice of the standards they are expected to meet and provides guidance to the master. Flexibility, however, allows the master to adapt his or her role and duties to changing circumstances and allows the monitor to exercise professional discretion.[39]

Under Rule 53, special masters have the ability to receive and evaluate evidence submitted by the parties. The master may require the production of documents, rule on the admissibility of evidence, subpoena witnesses, put them under oath and examine them. Thus, unless the order of reference to the special master prescribes limits otherwise, a special master has broad powers to regulate all proceedings and to take all necessary steps in order to carry out his duties under the order.[40] The list of potential powers listed in Rule 53 (such as referee, auditor, examiner and assessor) is not meant to be exclusive. Judges have in the past given masters unenumerated authorities, such as the ability to hire experts, in-

35. Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211, 222 (1995).

36. 253 U.S. at 313 (1920).

37. *See* Roy Reynolds et. al., *Court Monitors and Special Masters in Mental Disability Litigation: Variables Affecting Implementation of Decrees,* 12 MENTAL AND PHYSICAL DISABILITY L. REP. 322, 323 (1988).

38. *See* DeGraw, *supra* note 28, at 804.

39. *See* Reynolds et. al., *supra* note 37, at 332.

40. *See* Farrell, *supra* note 17, at 945.

vestigate facts, conduct informal and *ex parte* proceedings, and mediate disputes or settlements.[41]

Rule 53 provides no guidance or standards to aid in selecting a master. Suggestions for special masters may come from individual parties to the litigation or from the judge.[42] The parties to the litigation may agree upon a particular master, but if they do not, the judge has the power to impose the appointment of a particular master. Typically, if the judge has to select a master, he will attempt to get the consent of the parties.[43] The appointment of a special master under Rule 53(b) can be appealed through a writ of mandamus filed in an appellate court immediately after the appointment is made by the District Court.

Frequently, masters circulate their findings to the different parties in a draft form before formally presenting them to the court. This allows the parties to comment on the draft. If a party is dissatisfied with the master's findings, a court may hear the objection and try the issues.

The costs of a special master are typically allocated between the parties to the litigation.[44] Unlike judges, special masters are not recognized and compensated by the judicial system as a public good that is needed for dispute resolution.[45] Rule 53(a) provides that the payment shall be paid "out of any fund or subject matter of the action which is in the custody and control of the court as the court may direct."

The Constitutional Limits on the Authority of Special Masters

Article III of the U.S. Constitution grants a litigant in federal court the right to a hearing before a federal judge who has the attributes of lifetime tenure, irreducible salary and presumed political independence. Because federal litigants have a Constitutional right to a trial before an Article III court, there are limits on the ability of courts to delegate certain judicial responsibilities. The court cannot abdicate its role in the federal system.

Appellate courts will vacate non-consensual references where the delegated powers were overbroad.[46] Therefore, a court may not (without the consent of both parties) refer a fundamental issue of the case or controversy to an adjudicator who does not possess the fundamental attributes of an Article III court. The Supreme Court has held that the exercise of essential judicial functions by non-Article III personnel vio-

41. *See* Farrell, *supra* note 15, at 253.
42. *See id.* at 275.
43. *See* Farrell, *supra* note 18, at 955.
44. *See* Farrell, *supra* note 16, at 247.
45. *See id.* at 273.
46. *See* Braun, *supra* note 35, at 216.

lates the separation of powers.[47]

Non-consensual referrals to special masters are supposed to be the exception, not the rule. Under a proper Rule 53 appointment, the judge has control over the appointment, powers, responsibilities, salary and tenure of the master(s).[48] A judge, however, must review the findings of a special master.

> Anything less than independent review by the court, particularly any determination of liability and apportionment, would surely have been just the sort of abdication of the judicial function guarded against in the formulation of Rule 53 governing the appointment of special masters.[49]

The use of special masters can also implicate federalism issues. In institutional reform suits involving state institutions like prisons, school districts or housing for the mentally disabled, the use of a special master by a federal court to monitor a decree can involve "de facto federal administration of a state institution" by a person who is not employed by the institution.[50]

Institutional reform suits often involve reforming extensive practices of these institutions. Some commentators have worried that this is an inappropriate role for courts and special masters. These commentators argue that the actions performed by some special masters should be performed by legislatures because the relief sought is often prospective and affects large numbers of people, similar to regulation or a legislative rule.[51] The special master may become so involved in supervising an institution that the master will perform functions of each of the three branches of government: adjudication, rulemaking and enforcement. Additionally, the special master does not have the independence and neutrality of an official with life tenure and irreducible salaries like a federal judge.[52] If both parties to litigation waive their rights to have an Article III judge preside over their civil trial, nothing prevents a court from delegating certain responsibilities to another official.[53]

Exceptional Circumstances

FRCP Rule 53(b) allows a reference to a special master if the court can show "exceptional conditions" requiring the need for additional assis-

47. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).

48. *See* Farrell, *supra* note 15, at 297.

49. Robert H. Freilich, *Editor's Comment: The Use of a Special Master in Complex Environmental Litigation*, 29 URB. LAW. 1, 6 (1997).

50. *See* Braun, *supra* note 35, at 220.

51. *See* Farrell, *supra* note 15, at 237.

52. *See id.* at 288.

53. *See* Peretz v. United States, 501 U.S. 923, 936 (1991).

tance or when the issues are very complicated.[54]

What qualifies as "exceptional" is open to debate. To a court facing an overloaded case docket and/or time pressures, the conditions facing it may seem exceptional. Appellate courts, however, do not find these circumstances exceptional enough to justify a reference to a special master.

The Supreme Court in *La Buy v. Howes Leather Co.*[55] set basic standards for what qualifies as an exceptional condition. In *La Buy* a District Court judge referred two antitrust cases to a special master, citing congestion on his calendar and the complexity of the issues posed in the cases.[56] The Supreme Court held that the references by this judge were "little less than an abdication of the judicial function depriving the parties of the trial before the court on the basic issues involved in the litigation."[57] Therefore, congested trial calendars, complex cases, and potentially lengthy litigation are not the type of "exceptional circumstances" warranting the appointment of a special master. The use of special masters in institutional reform cases has grown from this narrow conception.[58]

The Master in the Consent Decree Context

Courts have often used special masters as agents of the court to monitor compliance with a consent decree. A special master in this context may have the authority to conduct site visits, hire expert consultants, or collect and analyze data. The master, as a monitor, can report to the court and assist the judge in framing the legal issues and in assessing compliance. If the special master finds that a defendant institution has not been in compliance, the court may hold the institution in contempt of court.[59]

For example, in *Hart v. Community School Board of Brooklyn*, the court appointed a master to investigate for and consult with the court in technical aspects of desegregation so that the court could fashion an effective remedy.[60]

The Advantages of Special Masters

As litigation has become more complex and judges' workloads have become heavier in recent years, special masters have become an attrac-

54. FED. R. CIV. P. 53 (b).

55. 352 U.S. 249, 255-56 (1957).

56. *See* Howes Leather Co. v La Buy, 226 F.2d 703,703-04 (7th Cir. 1955), *aff'd*, 352 U.S. 249 (1957).

57. *See La Buy*, 352 U.S. at 256.

58. *See* DeGraw, *supra* note 28, at 802-03.

59. *See* Dobray, *supra* note 21, at 591.

60. 383 F.Supp. 699, 766-68 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

tive litigation management tool.[61] Special masters can resolve preliminary disputes and clear the way for the court to decide the major issues of the case.[62] Additionally, as in the case of Professor Wachs, special masters frequently have specialized technical knowledge that regular courts do not have. While the use of a special master may end up being costly to the parties, a master is likely to help shorten the length of the controversy, thus lowering overall costs to the parties.[63]

A special master may also help facilitate non-adversarial negotiations between opposing parties. If a reference allows the special master to make certain decisions, this can give the master court authority to ensure that the parties cooperate. The special master also can interact with the parties in a more informal and flexible interaction than normally would be allowed by the judge.[64] A master may also help preserve any level of existing relations/communications between the parties, thereby avoiding deterioration into non-communication.[65] By appointing a special master, courts can provide litigants with a judicial figure who has the time and interest to discuss their matters in detail, and to work with both parties to reach a fair resolution.[66]

In the context of an institutional reform consent decree, a special master is often the most effective way to ensure effective implementation of the decree.[67] Attempting to reform the practices of an entire institution poses considerable challenges to a court. Appointing a special master enables the court to exercise flexibility in the remedial stage.[68]

This Disadvantages of Special Masters

The use of a special master can present troubling constitutional questions. Special masters can exercise judicial power without being judges appointed under Article III of the Constitution. The Supreme Court has indicated that the use of such individuals can violate the separation of powers doctrine and perhaps the due process clause. However, the benefits of such a delegation - such as efficiency and expertise- may outweigh the infringement on Article III values of independence and impartial adjudication.[69]

As discussed earlier, appointing a master adds costs to the litigation

61. *See* Brazil, *supra* note 16, at 417.
62. *See* Braun, *supra* note 35, at 218.
63. *See* Farrell, *supra* note 15, at 274.
64. *See* Braun, *supra* note 35, at 218-19.
65. *See* Martin R. Dix et al., *Land Use and Environmental Dispute Resolution: The Special Master*, 69-NOV FLA. BAR JOURNAL 63, 67 (1995).
66. *See* Farrell, *supra* note 15, at 286.
67. *See* Reynolds et al., *supra* note 37, at 322.
68. *See* Dobray, *supra* note 21, at 602.
69. *See* Farrell, *supra* note 15, at 289.

for both of the parties. Additionally, the use of a master can actually delay resolution of the issue by overwhelming the judge with large amounts of information that the judge must review *de novo*. The judge, by using a special master, can become distant from the parties and from the case.[70]

Other commentators worry that as special masters are used more frequently, this makes adjudication too informal. Adjudication becomes removed from the public eye and supervision. Judges may come to rely on masters to the point where they are no longer exercising proper judicial management functions.[71] If a special master is employed to provide extensive technical expertise, there can be a risk that the judge might abdicate his ultimate responsibility to decide the case at hand.[72]

Appointing courts frequently accept the findings of a master without question.[73] Parties to the litigation often do not have an opportunity to challenge the master's findings,[74] and a court may accept the findings of a master without testing the findings in an adversarial setting.

Additionally, the findings or deliberations of the special master are often not published. Like a private settlement, the deliberations and decisions of a master "deprive the public of the benefit of understanding what considerations are significant to the resolution of the claims involved, and what might be the predictable result in similar cases in the future."[75] A judge may accept the findings made by a master, but these findings are not made public. While a final decision of a court may be published, the findings of the special master, which may have shaped the formal decision, are not published.

In the context of an institutional reform case, a special master is often given a broad reference to monitor the organization. These references may be too broad. A special master may have the authority to conduct extensive investigations, hold hearings, and may even be able to control the operations of the defendant institutions. A special master may also be able to impose sanctions upon the institution, and may substitute his discretion in the place of the regular heads of the institution.[76]

Preliminary Injunctions

A preliminary injunction is a powerful tool for plaintiffs seeking to prevent some form of institutional action or practice. For instance, a pre-

70. *See* Farrell, *supra* note 17, at 964.
71. *See* Brazil, *supra* note 16, at 394.
72. *See id.* at 419.
73. *See* DeGraw, *supra* note 28, at 848.
74. *See* Brazil, *supra* note 16, at 419.
75. *See* Farrell, *supra* note 15, at 284.
76. *See* DeGraw, *supra* note 28, at 832-33.

liminary injunction was issued in 1974 to prevent construction of the Century Freeway before the Freeway consent decree was adopted. In the case of the 710 Freeway, a preliminary injunction issued in 1973 remained until 1998, frustrating the California Department of Transportation's (CalTrans) plans to build the freeway. Another injunction in 1999 stopped the project again. In the *Sierra Club v. MTC* litigation, a preliminary injunction entered by the court prevented the MTC from approving freeway-related projects in the Bay Area until the court approved the MTC's new air quality forecasting methods.[77] This injunction spurred the agency into reforming some of its practices.

In the context of environmental and planning-related suits, preliminary injunctive relief is an important tool for plaintiffs. Plaintiffs in these types of suits often seek to stop government agencies from constructing projects that would have an irreparable effect on the communities surrounding the projects. Without the use of a preliminary injunction, the defendant government institution could have continued to build a project while the case was being litigated. A "bureaucratic steamroller" could have potentially mooted the claims of the plaintiff if the project was finished before the litigation was completed.[78] Preliminary injunctions are powerful because if an enjoined party does not observe the injunction, a court can hold the non-observing party in contempt, which could lead to a fine or a jail sentence. Preliminary injunctions are a recognition by the judicial system that damages are sometimes inadequate to redress a wrong. Damages cannot adequately compensate a person whose home near the path of a freeway is permanently affected by the noise and pollution. Some parties want to stop a project altogether rather than be compensated for any harm they might suffer.

Preliminary injunctions are not to be granted easily. Courts are reluctant to use them except in extreme circumstances. Analyses of the decision whether to grant a preliminary injunction or not are often highly fact specific. Because preliminary injunctions can seriously interfere with the operations of an agency and have serious societal consequences, most commentators and cases caution against eagerness to use them.

Preliminary injunctions are different from permanent injunctions. Permanent injunctions are injunctions issued after a trial, and seek to permanently affect the behavior or actions of the enjoined party.[79] The standards used by courts to evaluate whether to issue a permanent or preliminary injunction are very similar. These include a balancing of the

77. Sierra Club v. Metro. Transp. Comm'n, Nos. C89-2044 TEH, C89-2064, 1991 WL 424980 (N.D. Cal. March 11, 1991).

78. *See* Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989).

79. *See* Ann E. Heiny, *Formulating a Theory for Preliminary Injunctions: American Hospital Supply Co. v. Hospital Products Ltd.*, 72 IOWA L. REV. 1157 (1987).

parties' interests that might be affected by an injunction[80] and whether or not there are would be adequate legal remedy after a trial on the merits.[81]

Preliminary injunctions are forms of pre-trial relief. The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm, while the plaintiffs bring their case to court.[82] Preliminary injunctions are most appropriate in situations where there would be no adequate legal remedy for the plaintiff seeking the preliminary injunction if the plaintiff were ultimately to prevail on merits of the case.[83]

Rules and Procedures for Preliminary Injunctions

Preliminary injunctions are derived from the inherent equitable powers of a court. Rule 65 of the Federal Rules of Civil Procedure governs the use of injunctive relief in federal courts.[84] According to this rule, a party who seeks a preliminary injunction must demonstrate: 1) The threat of immediate irreparable harm; 2) The likelihood of success on the merits; 3) The comparative hardship to the parties if the injunction were granted; and 4) The determination that the public interest would be better served by issuing than by denying the injunction.[85]

Courts have used numerous approaches in evaluating whether to grant a preliminary injunction. The most important factor to a court is usually whether the plaintiff can avail himself of a traditional legal remedy if he wins on the merits of the case. If the plaintiff is unable to secure an adequate legal remedy, the court may be more willing to enter a preliminary injunction. The court is looking to see whether the plaintiff will suffer irreparable injury if the challenged action is allowed to go ahead, but the plaintiff ultimately wins. Courts are also concerned about the possible effects of granting a preliminary injunction upon the defendant and third parties.[86]

Security Requirement

Rule 65(c) require plaintiffs who obtain preliminary injunctive relief to post some form of security in order to compensate the defendant for his losses if the court later determines that the preliminary injunction was

80. *See* Stephen C. Yeazell, Civil Procedure 348-366 (1996).

81. *See id.* at 368-69.

82. *See* Daniel Riesel, *Temporary Restraining Orders, Preliminary Injunctions and Stays Pending Appeal in Environmental Litigation,* SA85 ALI-ABA 899, 905 (1996).

83. *See* Dan B. Dobbs, Law of Remedies 184 (1993).

84. Fed. R. Civ. P. 65.

85. *See* John G. Mills et al., *The Developing Standard for Irreperable Harm in Preliminary Injunctions to Prevent Patent Infringement,* 81 J. Pat. & Trademark Off. Soc'y 51, 54 (1999).

86. *See* Dobbs, *supra* note 83, at 166.

wrongly issued.[87]

However, courts retain the authority to dispense with the security requirement. If the plaintiff is sympathetic and/or short of funds, a court is more likely to waive the requirement. This is particularly true in cases brought by plaintiffs seeking to vindicate the public interest.[88]

Irreparable Harm

The term "irreparable harm" is likely to be the most important factor to a court weighing the decision to issue a preliminary injunction or not. In *New York v. Nuclear Regulatory Commission*, the court stated that allegations of irreparable harm must be actual and eminent, "and not remote or speculative."[89] Therefore, courts are likely to require evidence of clear risks or harms likely to result from the project. Mere speculation is not enough.[90]

> Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable . . . the injunction usually will be granted.[91]

Analytical Processes

A decision to issue a preliminary injunction inevitably turns on the facts of individual cases. The judge has to make an objective and subjective evaluation of the harms at stake for both the plaintiff and defendant, and the plaintiff's chance of success on the merits.[92] Courts have shown an amazing lack of consistency in applying analytical frameworks to preliminary injunction decisions.

> This dizzying diversity of formulations, unaccompanied by any explanation for choosing one instead of another, strongly suggests that the phrases used by the courts have little impact on results in particular cases. [T]he various standards articulated by courts and treatises rest on no coherent theory about the purpose of preliminary relief.[93]

The lack of consistency between courts has led to forum shopping

87. FED. R. CIV. P. 65(c).
88. *See* DOBBS, *supra* note 83, at 205.
89. New York v. Nuclear Regulatory Comm'n, 550 F.2d 745, 755 (2d. Cir. 1997).
90. *See* Riesel, *supra* note 82, at 910.
91. *See* Ohio Oil v. Conway, 279 U.S. 813, 814-15 (1929).
92. *See* DOBBS, *supra* note 83, at 185.
93. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 527 (1998).

and to a general level of confusion about what courts expect for preliminary injunction standards.[94]

The Ninth Circuit has announced two different standards in recent years. In *Alpine Lakes Protection Society v. Schlapfer,*[95] the court set out three factors to evaluate whether a plaintiff's motion for a preliminary injunction should be granted: 1) have the movants established a strong likelihood of success on the merits?; 2) does the balance of irreparable harm favor the movants?; and 3) does the public interest favor granting the injunction?[96] The last category is particularly relevant to the use of injunctions in environmental cases. Certain plaintiffs in environmental litigation may represent public interest organizations, and thus may speak on behalf of a community or the public in general.

More recently, the Ninth Circuit has announced another set of standards for granting preliminary injunctive relief: the movant must show: 1) a likelihood of success on the merits and the possibility of irreparable injury or 2) serious questions are raised and the balance of hardships is weighted towards the movant's side.[97]

If the court discerns that a lawsuit involves public interest factors, rather than purely private interests, it may be more likely to grant a preliminary injunction.[98] This is in part due to the difficulty of calculating intangible damages after a project has been completed and has affected the surrounding communities in numerous ways.

The Evolution Towards Balancing The Equities

Courts deliberating preliminary injunction requests often balance the equities to decide whether to issue an injunction. In the context of nuisance suits, a plaintiff is normally able to show that a legal remedy would be inadequate. However, a court may still not issue a preliminary injunction if it determines that the relative hardship placed upon the defendant could outweigh the hardship placed on the plaintiff.[99] This balancing approach was first developed by courts evaluating permanent injunctions.

Until the late 1960s, American courts usually took a fairly strict approach towards protecting property interests in a nuisance context. If a plaintiff was able to establish a nuisance, a court would generally issue a permanent injunction, no matter how small the harm to the plaintiff or how big the harm to the defendant. This "all-or-nothing" approach sometimes led to extreme results. This approach came under increasing

94. *See* Heiny, *supra* note 79, at 1161-62.
95. 518 F.2d 1089, 1090 (9th Cir. 1975).
96. *See id.*
97. *See* Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992).
98. Van De Kamp v. Tahoe Reg'l Planning Assoc., 766 F.2d 1319, 1324 (9th Cir. 1985).
99. *See* DOBBS, *supra* note 83, at 51.

criticism, especially in the context of a good faith encroacher. A good faith encroacher was someone who may have encroached on his neighbor's property, purely by accident. Extreme approaches by courts mandated removal of the encroachment, no matter how slightly it affected the plaintiff's property or how much it cost the defendant to remove the encroachment.[100]

This strict approach valued property rights above all else. An example of this approach outside the encroachment context was the New York case of *Rick v. West.*[101] The plaintiffs in *Rick* were seeking to sell 15 acres of a 62-acre subdivision to a hospital, so that the hospital could build upon the 15 acres. However, the subdivision had a restrictive covenant restricting land uses to residential uses only. Everyone in the subdivision, except the defendant, consented to the sale of the land. The defendant owned a ½ acre property and refused to consent to the sale. The court approached the case by noting,

> [i]t is not a question of balancing equities, or equating the advantages of a hospital on this site with the effect it would have on the defendant's property. . . . The fact that the owner of a ½ acre parcel was the only owner in the tract who refused to release the restrictive covenant did not make his right to enforcement of the covenant less deserving of protection.[102]

Thus, the court would not allow the plaintiffs to sell the land.

Courts are now more likely to consider balancing the relative hardships between the plaintiff and defendant when considering a preliminary injunction. This is true even if the plaintiff has established a likelihood of success on the merits and irreparable harm.[103]

Approaches towards balancing the equities are exemplified in two cases, *Boomer v. Atlantic Cement Co. Inc.,*[104] and *Spur Industries v. Del Webb Development Co.*[105] In *Boomer,* the court refused to enjoin the operation of a large, polluting cement plant. The court found that the harm (mainly economic harm to the surrounding communities from loss of jobs) that would result from closing the plant exceeded the benefits to the plaintiffs. The court balanced the equities to determine whether the benefits of a permanent injunction would outweigh the costs.[106]

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100. *See* James Thompson, *Permanent Injunctions in Copyright Infringement: Moral and Ethical Justifications for Balancing Individual Rights Instead of Following Harsh Rules,* 7 S. CAL. INTERDISC. L. J. 477, 487-88 (1998).

101. Rick v. West, 228 N.Y.S.2d. 195 (N.Y. 1962).

102. *Id.* at 200.

103. Jerry B. Blackstock & Rick D. McMurtry, *TROs, Preliminary and Permanent Injunctions in Patent Cases,* 531 PLI/PAT 191, 203-4 (1998).

104. Boomer v. Atlantic Cement Co. Inc., 26 N.Y.2d 219 (N.Y. 1970).

105. Spur Indus. v. Del Webb Dev. Co., 108 Ariz. 178 (Ariz. 1972).

106. 26 N.Y.2d 219 (N.Y. 1970)

In *Spur Industries*, a development was gradually growing closer to a previously existing large feed-lot for livestock. The feed-lot produced significant odors, and the development sought to enjoin the operations of the feed lot. The Arizona court did enjoin the operation, but only on the condition that the developers pay the costs of moving the feed-lot to a more suitable location.[107]

Courts are also less likely to require that the plaintiff prove that he is likely to succeed on the merits. If the irreparable harm is sufficiently serious, courts are willing to be more lenient when requiring the plaintiff to prove his likelihood of success. The Second Circuit has required 1) irreparable harm and 2) either (a) probable success on the merits or (b) a balance of hardships tipping decidedly in the plaintiff's favor.[108] Preliminary injunctions are likely to be denied if the total benefits from a preliminary injunction are outweighed by the costs or disadvantages of the injunction.[109]

An unusual mathematical application of this balancing approach was done by the 7th Circuit in *American Hospital Supply Corp. v. Hospital Products Ltd.*[110] In this decision, Judge Posner stated that the court would grant a preliminary injunction if: $P \times H_p > (1-P) \times H_d$, where P is a probability, H is irreparable harm for the plaintiff and for the defendant, and the subscripts denote the plaintiff and defendant, respectively.[111] Under this formula, a plaintiff with a less than 50% chance of succeeding on the merits still might be able to get a preliminary injunction if the irreparable harm is sufficiently large, and the defendant's irreparable harm is relatively minor.[112] For example, if the plaintiff's irreparable loss is $300,000, and he has a 40% chance of winning, then under this equation, his claim is worth $120,000. The defendant's irreparable loss is $100,000, and he has a 60% chance of winning. His claim is worth $60,000. Therefore, under this formula, even though the defendant will more likely than not win at trial, the plaintiff still gets an injunction.

The Breadth of the Injunction

A preliminary injunction may be broad or narrow in terms of what activities it prohibits. In the case of freeway construction, a preliminary

107. 108 Ariz. 178 (Ariz. 1972).

108. *See* Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1359 (2d Cir. 1976); Consolidated Gold Fields PLC v. Minorco, 871 F.2d 252, 256 (2d Cir. 1989), *modified by*, 890 F.2d 569 (1989); Securities & Exchange Comm'n v. Unifund SAL, 910 F.2d 1028, 1036 (2d Cir. 1990).

109. *See* DOBBS, *supra* note 83, at 166.

110. 780 F.2d 589 (7th Cir. 1985).

111. *See id.* at 593.

112. *See* DOBBS, *supra* note 83, at 190.

injunction can merely stop construction of the freeway itself, or the preliminary injunction can be broader to include prohibiting the defendant agencies from conducting preparatory activities prior to the actual resolution of the litigation. These preparatory actions can include property condemnation and acquisition, design work, and purchasing of construction supplies. If only the actual construction of the freeway is blocked, the defendant highway agencies can still spend enormous amounts of money and time on design work, property acquisition, entering contracts, and purchasing supplies and equipment to construct the freeway. This allows the agency to build up a momentum towards building the freeway that a court might take into consideration when determining whether the project should eventually be approved or not. If a project already has enough momentum (the "steamroller" concept), a court may find that a lawsuit is moot because so much of freeway work has already been completed. Additionally, preparatory actions by an agency may lead to undesirable results such as vacant land, condemned homes and blight. During the pendancy of the Century Freeway and the 710 Freeway injunctions, homes and land owned by CalTrans were often poorly maintained. This led to blight and crime in areas near the proposed path of the freeway.

An example of a broad injunction is the injunction entered in *Stop H-3 Ass'n v. Volpe.*[113] In *Stop H-3*, the court enjoined the defendant government from pursuing any design work contracts while the injunction was still pending. The court stated:

> [t]he only purpose for the design work is to advance the highway project itself. Because the contracts would involve the further expenditure of more than two million dollars, completion of these contracts would increase the stake which the federal and state agencies already have in the [highway] segment, as is.[114]

The Use of Environmental Injunctions

Environmental statutes, such as the National Environmental Protection Act (NEPA), often specify that courts have the discretion to enjoin violators of the statute. Environmental preliminary injunctions may be used more frequently because an environmental injury is often irreparable. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often of permanent or at least of long duration, i.e., irreparable."[115] Therefore, if a movant is able to show that an environmental harm is "sufficiently likely, the balance of harm will usually favor the issuance of a preliminary injunction to protect the envi-

113. 349 F. Supp. 1047 (D. Haw. 1972).

114. *Id.* at 1048-49.

115. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987).

ronment."[116] However, the Supreme Court has cautioned that there should be an "appreciable harm" to the environment, not merely a simple violation of an environmental statute.[117]

In *Seattle Audubon Society v. ESPY* [118] and *Portland Audubon Society v. Babbitt,*[119] the Ninth Circuit affirmed a preliminary injunction issued by a district court halting sales by the Forest Service and Bureau of Land Management of timber from lands inhabited by the endangered spotted owl until they prepared a detailed impact statement that considered new, scientifically reliable information. Because the court was willing to issue a preliminary injunction, this forced the executive branch to reconsider its approach to managing public forestland.[120] Similarly, the injunction issued in the *Sierra Club v. MTC* litigation forced the MTC to re-develop new modeling practices. The injunction also prompted a new approach towards what kind of language they would use in planning documents. Because the injunction forced these executive agencies to reconsider their practices, these lawsuits had an effect on the practices of a government institution beyond the controversy at issue in the case.[121]

Factual Background on the Case Studies

The Century Freeway

The Century Freeway in Los Angeles County is one of the most expensive freeways ever built in the United States. The project was commenced during a time of burgeoning interest in the environmental movement and in the rights of lower-income communities. Additionally, Congress and the state of California had passed rigorous environmental review statutes. After nine years of litigation, the Century Freeway was eventually built under the terms of a consent decree, entered into by the CalTrans and the Center for Law in the Public Interest (CLPI).

The Century Freeway runs 17.3 miles from the city of Norwalk to the city of El Segundo, near Los Angeles International Airport, in southern Los Angeles County. In addition to six lanes for single-occupancy vehicles, it has two high occupancy vehicle (HOV) lanes, and the Green Line subway system runs down the middle of the lanes. "It was far more than a mere road. It also became a community development enterprise, an environmental improvement program, a housing project, and a legal prece-

116. *Id.*

117. *See* Riesel, *supra* note 82, at 928.

118. 998 F.2d 699 (9th Cir. 1993).

119. 998 F.2d 705 (9th Cir. 1993).

120. *See* Andrea L. Hungerford, *Changing the Management of Public Land Forests*, 24 Envtl. L. 1395, 1429 (1994); Interview with Robert Best, Former Director of CalTrans in Sacramento, Cal. (Mar. 19, 1999).

121. *See* Hungerford, *supra note* 120, at 1396.

dent that may well shape all future freeway construction."[122]

The legal history surrounding the freeway project began in 1972, when residents in the construction zone, represented by the CLPI, sued in federal district court to block construction of the freeway. The suit alleged that CalTrans and the Federal Highway Administration (FHWA) had not complied with federal and state environmental policies. The plaintiffs obtained an injunction halting the project pending resolution of the dispute. After nine years of negotiations, the parties entered into a final consent decree. Federal District Court (and later 9th Circuit Judge) Harry Pregerson approved and monitored the consent decree.[123]

The Century Freeway was unique because it was the first freeway built according to the terms of a consent decree. Judge Pregerson called it "the freeway that has a heart."[124]

Century Freeway Consent Decree Specifics

The actual implementation of the Century Freeway consent decree was a long, expensive and complicated undertaking. Some basis facts and figures are below:

- Century Freeway Project Planning begins - mid 1950s
- Litigation begins - 1972
- Final court settlement - 1981
- Construction begins - 1982
- Housing construction begins - 1983
- Freeway construction ends - 1993
- Housing construction - ongoing
- $2.2 billion for the freeway overall[125]
- $500 million for right-of-way acquisition[126]
- $553 million or more for housing units[127]
- $400 - $450 million for the light-rail line[128]

The consent decree provided for a replacement housing program, an affirmative action employment and training plan and environmental mitigations. While the court believed that it was "a complex, but innovative settlement that promises to benefit the entire Southern California com-

122. Joseph DiMento et. al., *The Century Freeway: Design by Court Decree*, 9 ACCESS 7 (1996).

123. *See* Zamora, *supra* note 2, at 1805-6.

124. Robert Trombley & Ray Herbert, *Road Paved with Good Intentions*, L.A. TIMES, Dec. 27, 1987, at A1.

125. *See* Reinhold, *supra* note 13.

126. *See* Trombley, *supra* note 124, at 1.

127. CALIFORNIA DEPT. OF HOUSING AND CMTY. DEV., CENTURY FREEWAY HOUSING PROGRAM: ANNUAL REPORT 10 (1993).

128. *See* Trombley, *supra* note 124, at 1.

munity for years to come",[129] others believed that it was a feeble attempt to create a panacea for societies' ills.[130][131] Each major component of the decree and its implementation is discussed below.

Housing

The consent decree mandated the construction of replacement housing for area residents displaced by the project. This program came about due to the plaintiffs' original complaint in the Century Freeway lawsuit. The 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."[132]

The terms of the consent decree gave the state Housing and Community Development Department (HCD) the responsibility for the construction of 4,200 housing units. The decree also dictated the eligibility requirements and affordability guidelines for the displaced homeowners seeking replacement housing. In 1981, due to budget restrictions initiated by the U.S. Department of Transportation, the decree was amended and only 3,700 units were required.[133]

Housing Policy

Many CalTrans and FHWA workers believed that the displacees' needs would have been met by the pre-existing state statutes. "The generation of the 4200 unit figure in the decree was generally perceived as an arbitrary goal. . .the purpose of agreeing on this goal was to allow the freeway to proceed."[134] Thus, many of the parties in charge of construction saw the housing program as a low priority. One interviewee from HCD posed an interesting point about the decree: "[The Housing Plan] only has a useful life of about two years. . .because after it was finalized. . .market conditions, environmental conditions, political conditions, changed to a point where you almost need another one [consent decree]."[135] The decree was worded so as to give its implementation flexibility, yet the most complained about aspect of the decree by all the

129. *See* Zamora, *supra* note 2, at 1824.

130. Interview with Joseph Montoya, Former Chief Legal Counsel of CalTrans, in Sacramento, Cal. (Feb. 25, 1999).

131. Interview with Jerry Baxter, Former Head of District Seven, CalTrans, in La Canada, Cal. (Mar. 3, 1999).

132. *See* DiMento and Hestermann, *supra* note 9, at 313.

133. *See* JOSEPH H. DIMENTO, CALTRANS, COURT INTERVENTION, THE CONSENT DECREE, AND THE CENTURY FREEWAY II-13-14 (1991).

134. DiMento, *supra* note 133, at V-6.

135. *Id.* at V-13.

agencies was that it was too loose in its language.[136]

Another aspect of the decree created phasing provisions. Due to the plaintiffs' mistrust of CalTrans, the decree provided that the housing would be constructed in phases. CalTrans could not build the freeway, unless housing was also built. As CalTrans built portions of the freeway, set numbers of housing units also had to be built.[137]

Underestimated Costs & Performance

High costs, shoddy construction, high vacancy rates and fierce community opposition were some of the other problems encountered during the initial implementation of the consent decree. The cost to build the replacement housing was originally estimated at $50,000 - $70,000 per unit,[138] but had by 1993 ended up costing roughly $113,000 per unit.[139]

Some sources stated that HCD's inexperience, bureaucratic bungling, and top-heavy management were the main contributions to the high costs. The problems of the lead housing agency led to vague project specifications, inconsistent inspections and slow payments. The delayed payment schedule reportedly led to several sub-contractor failures.[140]

Another problem that the decree did not foresee was the strong community opposition to the low and moderate income housing along the southern tier of the city and county of Los Angeles. Most of the area residents saw the housing as "low-income housing" and wanted to protect their own interests. Ironically, some of the strongest advocates and champions of the housing clause in the decree were among the most vehement opponents of construction in their own communities.[141] Contrary to the low-income housing belief, by 1993 40% of the units went to "moderate-income" families, 30% "low income" families, 20% to "very low income" families and 9% to "very, very low income" families.[142] This decree failed to take into account NIMBYism and class prejudices in communities where the housing was built.

Affirmative Action Provisions

In an effort to revitalize and to provide for the well-being of the area residents, the court included an affirmative action program in the consent decree provisions. What made the Century Freeway decree unique in this

136. *See id.* at IV-21-25.

137. *See* DiMento and Hestermann, *supra* note 9, at 317.

138. *See* Trombley, *supra* note 124, at 1.

139. *See* CALIFORNIA DEPT. OF HOUSING AND CMTY. DEV., *supra* note 127, at 10.

140. *See* Robert Trombley & Ray Herbert, *Road Paved with Good Intentions*, L.A. TIMES, Dec. 30, 1987, at A1.

141. *Id.*

142. *See* CALIFORNIA DEPT. OF HOUSING AND CMTY. DEV., *supra* note 127, at 4.

respect was that the affirmative action program was not a response to any claims against CalTrans for discriminatory employment practices or in awarding contracts.[143] The CLPI pushed for the affirmative action provisions as part of the consent decree settlement, and CalTrans accepted it.

The decree had "employment and business plans of affirmative action for the benefit of the corridor communities, women and minority group members."[144] The plan had three parts: 1) employment goals to be met by requiring contractors to hire female and minority employees; 2) a requirement that contractors utilize 'minority and women-owned business enterprises; and 3) the establishment of 'regional business preferences' by requiring that individuals engaged in business in the corridor area be employed.[145]

Affirmative Action in contracting

The decree set goals in terms of using minority and women owned contracting businesses in the construction process. A Minority Business Enterprise (MBE) is a business that is owned and controlled by at least 51% ethnic and racial minorities. A Women's Business Enterprise (WBE) is a business that is owned and controlled (at least 51%) by women.[146]

In 1996, CalTrans prepared a final summary report for Judge Pregerson about the consent decree's affirmative action achievements. As of August, 1995, CalTrans published the amount of total payments paid out to contractors, broken down by MBE and WBE categories. By 1995, CalTrans had paid

- 22% of total final contracting payments to MBEs.
- 4% of total final contracting payments to WBEs.
- 3% of total final contracting payments to either MBEs or WBEs (not identified)

This meant a total of 29% of final contracting payments went to either MBEs or WBEs.[147] This compares favorably to other figures provided by CalTrans. In the period of 1984-1993, CalTrans in all of its projects (including the Century Freeway) paid out only 19% of its contract amounts to MBEs and WBEs.[148]

Early in the construction process, many false-front arrangements de-

143. *See* DiMento and Hestermann, *supra* note 9, at 319.

144. *See* Zamora, *supra* note 2, at 1831.

145. *See* DiMento and Hestermann, *supra* note 9, at 319.

146. Notice of Mot. and Mot. of Def. State of California Ex. 4, at 5, Keith v. Volpe, No. CV 72-355 HP (C.D. Cal., filed Apr. 1996).

147. *Id.* at 6.

148. *Id.* at 7.

veloped as a kickback scheme to exploit loopholes in the decree. Some prime contractors hired minority or female subcontractors on the condition that the contractor would retain a substantial percentage of the work. Some of the minority and women firms were willing to make such deals because the guarantee of "60% of something is better than 100% of nothing."[149] The final CalTrans report did not mention this phenomenon.

Another problem for the affirmative action program was the complicated nature of the construction process. By the late 1980's, many small MBEs and WBEs went out of business due to red tape, long payment delays, and other problems associated with large-scale federally-financed projects. Failure rates for minority- and woman-owned businesses trying to take advantage of the high affirmative-action goals during the early years of implementation were believed to be at least 80%-90%.[150] Major contributing factors to the high rate of failure were: lack of sufficient capital, lack of coordination between CalTrans and the contractors, slow money disbursements, trying to grow too fast, lack of managerial skills, and lack of concern on the part of CalTrans and other state agencies. "Many small contractors who tried to cope with the bureaucratic demands of the Century Freeway project without accountants, bookkeepers, or lawyers have slipped beneath the waves."[151] Again, this issue was not mentioned in the final report, and there was no updated information available.

Affirmative Action Employment

By 1995 CalTrans reported that approximately 52.6% of all construction employees were ethnic/racial minorities, and 5.4% were women. This also compares favorably to figures CalTrans provided from 1988. In that year, the minority share of the total CalTrans construction workforce in the state was 38% ethnic racial minority and 3.6% female.[152]

Thus, it appears that the decree did prod CalTrans into involving more minority women businesses and employees than CalTrans would have absent the decree. Given that the route of the freeway ran through many predominantly minority neighborhoods, this was an important goal of the decree.

Transportation Design Specifications

Due to the suit's environmental claims, the consent decree detailed

149. Robert Trombley & Ray Herbert, *Road Paved with Good Intentions*, L.A. TIMES, Dec. 29, 1987, at A1.

150. *See id.*

151. *Id.*

152. *See* Notice of Mot. and Mot. of Def. State of California Ex. 4, *supra* note 146, at 9.

design specifications for the freeway. "A significant but often overlooked feature of the consent decree is its emphasis on transportation."[153] The decree influenced and changed

> the number of freeway lanes; (b) the establishment of Transit/HOV lanes located in the freeway's median and convertible to a full-blown light rail line; (c) the installment of ramp meters for the purpose of minimizing congestion; (d) the number of freeway interchanges, both local and freeway-to-freeway; (e) the implementation of noise attenuation measures described in the FEIS; (f) the allocation of local, state, and federal monies to support bus service for the HOV lanes; (g) the development of facilities to support bus service in the HOV lanes; (h) the participation of the Federal Highway Administration (FHWA) in funding the light rail and the commitment of Federal-Aid Interstate monies to fund transit/HOV support facilities; (i) the development of a transit-way, or highway, feeding into the Harbor Freeway interchange, a major freeway-to-freeway intersection; (j) the ability to challenge the flow of discretionary federal funds to local transit agencies failing to contribute to the additional costs associated with the construction of transit/HOV stations.[154]

The consent decree encompassed a level of detail that covered most of the major design specifications.

Physical Mitigation of the Century Freeway

The design of the Century Freeway itself changed several times during the drafting of the EIS. "Early visions of the freeway included ten lanes dotted by over twenty interchanges."[155] However, the final downscoped project incorporated in the amended consent decree included six lanes for traffic, two High Occupancy Vehicle lanes, ten interchanges (from the east to west ends of the project), ten transit stations, ramp metering/HOV bypass lanes and landscaping/noise attenuation.[156]

One unique aspect of the Century Freeway was the light rail system. Some officials saw that inclusion of the light rail as "revolutionary" and "the most positive part of the project."[157] However, the concurrent construction of the light rail system with the freeway was not emphasized or indicated under the terms of the consent decree. In 1977, the State considered the inclusion of rail to the project, and ultimately concluded in an EIS that the inclusion would be plausible if the voters decided to develop a region-wide fixed rail-system. In 1980, the Los Angeles voters approved of the rail system funded by a one-half cent sales tax under Proposition

153. Zamora, *supra* note 2, at 1825.
154. Zamora, *supra* note 2, at 1825-26.
155. DiMento, *supra* note 133, at X-12.
156. *See id.* at X-2.
157. *Id.* at X-13.

A.[158]

Surprisingly, in CalTrans' analysis of the I-105, they believed that the differences in construction and design mandated by the decree were not significantly different from what would have been done absent the decree. Therefore, the impacts on the actual freeway itself specifically attributed to the consent decree were minor.[159]

Office of the Advocate

The Century Freeway consent decree mandated the creation of six essential participants to work together in a "complex interorganizational network"[160] in order to implement the various aspects of the decree. The entities were: CalTrans, Century Freeway Affirmative Action Committee (CFAAC), the Office of the Advocate, the CLPI, the Federal Highway Administration (FHWA), and HCD. Of these six organizations, only CalTrans and FHWA had worked together previously. Given the unfamiliarity between these groups, it became necessary to develop new procedures to handle coordination, oversight and reporting.

The decree created the Office of the Advocate to assist the residents in the construction process and to defend and advocate for them by monitoring the various agencies. 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.[161]

The decree allowed the court to specify the amount needed to fund this office. It also provided that the court could remove the Advocate.[162]

Sierra Club v. MTC

The *Sierra Club v. MTC* litigation involved the highly technical issues of State Implementation Plans (SIP) and conformity with the Clean Air Act. The plaintiffs, a variety of environmental and public interest organizations, brought suit against the MTC, the California Air Resources Board, the Association of Bay Area Governments, the governor, and the

158. *See id.* at X-11.
159. *See id.* at X-13.
160. DiMento and Hestermann, *supra* note 9, at 323.
161. *Id.* at 322.
162. *See id.*

Environmental Protection Agency. For reasons of simplicity, this case study only considers that part of the lawsuit filed against the MTC.

SIPs are documents prepared by the states for the Environmental Protection Agency to demonstrate how the states propose to improve air quality in order to be in conformity with the Clean Air Act. The SIP's purpose was as a plan of action for the states and metropolitan transportation planning agencies. The part of the SIP that applied to the Bay Area was not fully implemented, and the Bay Area had failed to achieve air pollution reductions mandated by the Clean Air Act. The MTC as a regional planning organization had helped develop the part of the SIP that applied to the Bay Area. The lawsuit alleged that in the Bay Area section of the SIP the MTC had committed to carry out a variety of air improvement steps and had failed to do so. The lawsuit sought to force the MTC to carry out the steps outlined in the SIP and to reform some of the agency's forecast modeling practices.[163]

The plaintiffs argued that the MTC should be required to implement all of the components in the regional air quality plan. The MTC argued that implementation plans serve as guidelines, not strict commitments, and therefore should be interpreted broadly and flexibly. The federal District Court ultimately held that the plan constituted a set of commitments that the MTC would have to implement. The paper will not review this part of the court's decision.[164]

The other portion of this case, which concerns the research in this paper, involved the court's evaluation of the MTC's modeling methods to determine whether highway projects in the MTC's regional transportation plans and programs conformed to the SIP. On this matter, the court again ruled against the MTC and held that its modeling methods were inadequate and outdated. Because of these flaws, the court issued an injunction against the MTC. The injunction prevented the MTC from approving any new highway projects until adequate modeling procedures were developed. Once the MTC submitted new modeling procedures, the court employed a special master to help evaluate the highly technical nature of the modeling projections.[165]

710 Freeway

The 710 Freeway controversy is an on-going matter that involves the proposed construction of a freeway segment in Los Angeles County. The proposed segment would connect the 210 Freeway to the ending point of

163. *See* Mark Garrett & Martin Wachs, Transportation Planning on Trial 39-40 (1996).

164. *See id.* at 54-56.

165. *See id.* at 70-71.

the existing 710 Freeway, which ends in the city of Alhambra. The route of the segment (which has varied, but not substantially, over the years) is proposed to go through portions of Los Angeles, South Pasadena and Pasadena. CalTrans approved the plans to construct this connector in 1964. During the 1960s, CalTrans acquired many properties (fee simple absolute interests) in the cities of Los Angeles, South Pasadena and Pasadena for the purposes of creating a right-of-way for the freeway.

In 1973, the City of South Pasadena filed a suit seeking to enjoin the construction of the freeway on the basis that CalTrans and federal government had approved the freeway without the preparation of an EIS or an EIR.[166] The court issued an injunction under a stipulated judgment, whereby CalTrans acknowledged that no EIS had been prepared, and agreed to create one.[167]

After the court entered the injunction, CalTrans began to prepare an EIS. During the 1970s and early 1980s, CalTrans proposed two different routings that the Federal Highway Administration (FHWA) ultimately rejected.[168] In 1986, CalTrans produced a draft EIS that proposed a modified route. However, the EIS did not include non-freeway alternatives. Thus, in 1990 Pasadena developed its own "low build" alternative and requested that CalTrans evaluate the proposal in a revised or amended draft EIS. CalTrans refused to include this plan in its final EIS, and issued the final EIS in 1992.

In 1998, six years after CalTrans had produced its final EIS, the District Court lifted the injunction on the basis that CalTrans had completed the EIS. The court also held that the plaintiffs would have to file any challenges to the adequacy of the final EIS (among other things) in a new complaint rather than a supplemental complaint to the original 1973 action.[169] The city's current suit challenges the adequacy of the final EIS and requests an injunction.

In 1999, Federal District Court Judge Dean Pregerson, the son of Harry Pregerson, who supervised the Century Freeway litigation, enjoined the project again, based upon various claims of the plaintiffs.[170]

Side Effects of the Injunction

As part of the original 1973 injunction, the District Court issued a injunction decree prohibiting CalTrans from acquiring any properties in

166. City of South Pasadena v. Volpe, No. 73-81-WJR (C.D. Cal., filed Jan. 1973).

167. Interview with Benjamin Salvaty, Former CalTrans Counsel, District Seven, in Los Angeles, Cal. (Mar. 4, 1999).

168. Brief for Pls. at 4-5, City of South Pasadena v. Slater, No. CV98-6996 CDDP (C.D. Cal. filed Nov. 16, 1998).

169. *See id.* at 4.

170. City of South Pasadena v. Slater, 56 F.Supp. 2d 1106 (C.D. Cal., 1999).

the right-of-way unless the acquisition was based on a hardship to the property owner from the project or voluntary acquisition. The injunction included a provision prohibiting CalTrans from removing or demolishing any structure previously acquired for the project, with exceptions for public health and safety.[171] Additionally, the consent decree provided that the state should try to maintain all the structures that it already owned and prevent them from becoming nuisances.[172]

However, as documented in a series of *Los Angeles Times* articles in 1995, CalTrans has not used its best efforts to maintain the structures within the right-of-way.[173] This negligence has been particularly troublesome because of the historical nature of many of the properties in South Pasadena.

According to the *Los Angeles Times*, CalTrans owns 610 homes in the path of the freeway. Nearly 1/4 of these properties are vacant or uninhabitable, and many of the 69 homes that are listed as historic landmarks are in a serious state of disrepair. Additionally, CalTrans now claims that some of the properties are beyond cost-effective repair and thus should be demolished.[174]

The Cypress Freeway

In October of 1989, the Loma Prieta earthquake heavily damaged the Cypress Freeway that ran through Oakland. The most heavily damaged section of the freeway was a double-decker segment that went through the middle of a West Oakland community. After the rubble had been cleared and life began to get back to normal, CalTrans and the West Oakland community began to consider rebuilding the freeway. Initially, CalTrans had planned to rebuild the freeway exactly where it had been before. However, the West Oakland community, politicians and planning professionals all argued that the freeway should be rebuilt so as not to divide West Oakland again.[175][176]

The destroyed segment of the Cypress Freeway had been constructed in 1957. At that time, the state built the freeway through a

171. *See* Brief for Pls., *supra* note 168, at Ex. 5, 91.

172. *Id.*

173. *See* Chip Jacobs & Richard Winton, *Homes Owned by CalTrans Not Kept Up, Records Show*, L.A. Times, Apr. 26, 1995, at A1; Chip Jacobs & Richard Winton, *Officials Plan to Pressure CalTrans to Repair Houses*, L.A. Times, Apr. 27, 1995, at B1; Chip Jacobs, *CalTrans Under Fire on Homes Along 710 Route*, L.A. Times, May 18, 1995, at B3.

174. *See* Chip Jacobs & Richard Winton, *Homes Owned by CalTrans Not Kept Up, Records Show*, L.A. Times, Apr. 26, 1995, at A1.

175. Interview with Warren Widener, Former Alameda County Supervisor, in Piedmont, Cal. (Feb. 19, 1999).

176. Interview with Edward Blakeley, Former Professor of City and Regional Planning, UC Berkeley, in Los Angeles, Cal. (Mar. 3, 1999).

predominantly African-American neighborhood that had a vibrant commercial and community life. The freeway physically divided the West Oakland neighborhood, which helped cause the gradual decline of the area. The construction of the Cypress was similar to other CalTrans freeway projects, which negatively affected other low-income, predominantly minority communities. Examples include the Santa Monica and the Santa Ana freeways in Los Angeles. When the freeway had to be rebuilt, the West Oakland community saw an opportunity to unify the community and vigorously argued against rebuilding in the same location.[177]

Local politicians and a local grass-roots organization began to suggest other alternatives. A relatively short process of negotiations between CalTrans, the community and local leaders resulted in a new alignment for the freeway. This new alignment re-routed the freeway segment away from the heart of the West Oakland community towards existing railway lines that skirted the residential sections of West Oakland.

For the West Oakland community, CalTrans' decision to rebuild the Cypress in the alternative location was a major victory. The construction of the freeway itself proved much less controversial than the choice of where to build a freeway. CalTrans took a more active role in working with the surrounding community, including setting up an office to provide information about the freeway. CalTrans also established programs to help local businesses impacted by the reconstruction and to achieve affirmative action goals in hiring for construction workers.[178]

Equitable Tools as Aplied in the Case Studies

Consent Decrees

The Century Freeway

Background to the creation of the consent decree

Of the four selected case studies, a consent decree was used only in the Century Freeway case. The use of this equitable tool lasted for over ten years. It was the most complicated and involved use of an equitable tool in any of the case studies.

Carlyle Hall, one of the plaintiffs' counsel that filed the original suit in the Century Freeway consent decree case, conceptualized a consent decree as follows:

> A consent decree is sort of a constitution for how you are going to deal with this major problem, setting up allocations of responsibility, setting up monitoring mechanisms, setting up accountability mechanisms, setting up mis-

177. *See* Widener, *supra* note 175.
178. *See id.*

sions, and setting up overall standards.[179]

The CLPI lawsuit against CalTrans challenged the adequacy of the environmental impact statements for the freeway, and whether or not the newly enacted NEPA applied to projects already partially approved before NEPA's passage. The ultimate resolution of the lawsuit was an injunction that prevented the construction of the freeway for approximately seven years until the parties drafted a consent decree. During those seven years, CalTrans prepared an EIS. However, even though CalTrans was preparing an EIS, the head of CalTrans at the time, Adriana Gianturco, had wanted to stop the freeway project altogether. She instead wanted to use federal funding for creating carpool lanes and light rail along other existing freeways in the Southern California basin.[180] According to Gianturco, the consent decree was developed by the plaintiffs, the CLPI and CalTrans because the plaintiffs capitulated under the pressures of the long-standing injunction. From the point of view of the head of CalTrans at the time, the consent decree was entirely a proposal from the plaintiffs' side and not the result of negotiations. Gianturco believed that ultimately CalTrans was the real winner because the freeway was constructed. Gianturco did not view the substantive provisions of the consent decree as really providing anything more than they could have gotten without the lawsuit. She pointed out that CalTrans already built replacement housing and had established some affirmative action hiring programs before the consent decree was written.[181]

John Phillips, who was the lead plaintiffs' counsel during the consent decree negotiations, defended the decision to create a consent decree. He pointed out in contrast to Gianturco's desire to stop the freeway, "our lawsuit was not to kill the freeway, to build a lawful freeway."[182] He noted that there were numerous problems affecting the freeway path, and that the uncertainty over the project was doing no one any good. "I saw no end in sight. We had to have some resolution. If the injunction were ultimately lifted, then CalTrans would go back to its old ways. We wanted a resolution that would be constructive for the community." Phillips felt that providing some certainty, along with a construction project that provided many side benefits, was the best resolution of the case for the plaintiffs and communities involved.[183]

Gianturco's view was a unique viewpoint. Joseph Montoya was the

179. Interview with Carlyle Hall, Hall and Associates, in Los Angeles, Cal. (Mar. 5, 1999).

180. Interview with Adriana Gianturco, Former Director of CalTrans, in Sacramento, Cal. (Feb. 25, 1999).

181. *Id.*

182. Telephone interview with John Phillips, Former Pls.' Counsel, Center for Law in the Public Interest (Apr. 25, 1999).

183. *See id.*

former head of the legal division of CalTrans. At the time the parties were developing the consent decree, Montoya was the head of the legal division of CalTrans, District Seven, which encompasses the Los Angeles area. According to Montoya, the impetus for CalTrans to enter the consent decree was "politics." Montoya argued that while Gianturco and the administration of Governor Jerry Brown were opposed to this freeway, the local communities in the right of way of the freeway pressured the state to build the freeway. There was also the impetus of large amounts of federal money already approved for the project. These factors prevented the freeway from actually being cancelled. Montoya stated once the administration realized that the project could not be stopped easily, politics dictated that the administration enter what Montoya viewed as a very favorable consent decree for the plaintiffs.[184]

Drafting of the Decree

Once CalTrans and the plaintiffs made the decision to agree to a consent decree, the actual drafting of the consent decree did not take long. Judge Pregerson did not participate in the drafting of the document, but Pregerson did say that "CalTrans and the Center for Law in the Public Interest knew what I wanted."[185] Whether the consent decree was a victory for either CalTrans or the plaintiffs, once the consent decree implementation had begun, many in CalTrans saw it as a loss.[186] Those who saw the decree as a loss thought that the specifics of the consent decree were influenced by the Brown administration and the politics of the environmental movement, which originally prompted the lawsuit. Robert Best was the Deputy Director of CalTrans until 1976 and the Director of CalTrans from 1988 to 1991. He stated, "the litigation no longer was about a transportation facility, but became an issue of what could be loaded on the project by way of community benefits and so forth." The cynical view was that the consent decree became a major source of income for the CLPI. According to Best, the CalTrans staff viewed the consent decree as an insult.[187]

The actual specifics of the consent decree transferred most of the responsibility, particularly for building affordable housing, to HCD. Best and Gianturco both thought that giving HCD primary authority was a severe flaw in the design of the consent decree. Helene Smookler, another member of the plaintiffs' counsel, noted that HCD's handling of the

184. *See* Montoya, *supra* note 130.

185. Telephone Interview with Judge Harry Pregerson, 9th Circuit Court of Appeals (Apr. 11, 1999).

186. *See* Best, *supra* note 120; Baxter, *supra* note 131, Montoya, *supra* note 130.

187. *See* Best, *supra* note 120.

program "was a disaster, with a capital 'D'."[188] John Phillips admitted that in hindsight, it was a mistake to give housing responsibility to HCD. He claimed that most of the problems were due to political changes, specifically the shift from the Brown to Deukmeijian administrations. "If I had known who would be in charge I would have never agreed to it."[189]

Best and Gianturco both argued that CalTrans could have done many of the consent decree's provisions itself instead of involving a new layer of bureaucracy.

> The structure of the consent decree essentially said to CalTrans, 'You people can't do this. We won't have you people do this.' So CalTrans had no interest now. Was it in CalTrans interest to reach out and show that the consent decree works by having it being done by somebody else? Give me a break.[190]

Best claimed that if it had been left solely to the decision makers at CalTrans, CalTrans would have never entered the specific decree that eventually resulted. "The consent decree was a political statement in regards to the negative consequences of a major public works project like this in an urban area." Best claimed that the consent decree would have never been signed by an administration other than the Jerry Brown administration, and that many of the attorneys at the CLPI had strong connections to high levels of the Brown administration.[191]

Because CalTrans staff saw the decree as a political development, an attitude developed within CalTrans that if they could not be trusted to implement such provisions of the consent decree, "we will go back to drawing straight lines between two dots."[192]

Gianturco argued that CalTrans should have implemented most of the decree because CalTrans had prior experience, especially in building housing. Gianturco pointed out that HCD had never built a unit of housing before the decree. She argued that developing housing programs were "not something you developed over night."[193] Phillips countered this by arguing that given CalTrans' record at the time the decree was being drafted, "the last thing we wanted was to have CalTrans do the housing."[194]

Other parties mentioned that so much of the implementation program was dependent upon an organization [HCD] that had very little ex-

188. Interview with Helene Smookler, General Counsel, Southern California Association of Governments, in Los Angeles, Cal. (Mar. 4, 1999).

189. *See* Phillips, *supra* note 182.

190. *See* Best, *supra* note 120.

191. *Id.*

192. *Id.*

193. *See* Gianturco, *supra* note 180.

194. *See* Phillips, *supra* note 182.

perience, and thus, they had to reinvent the wheel. Robert Best argued that granting so much responsibility to HCD made the decree "totally unworkable."[195] Helene Smookler recognized during her tenure as a housing monitor during the late '80s that HCD was not effectively carrying out the affordable housing provisions. She said that she spent most of her time trying to transfer control of the affordable housing development to private non-profit groups.[196] In 1995, the housing program was privatized, and now operates as the Century Housing Fund. Although the housing construction program under the decree was phased out, federal financing for housing construction remained, and now the Century Housing Fund is permanently functioning as a affordable housing financing agent.[197]

Advantages and Disadvantages of the Consent Decree

The opinions of my interview subjects on the advantages and disadvantages of the consent decree were highly dependent on whether they were associated with plaintiffs' counsel or with the defendant, CalTrans. All sides acknowledged major implementation problems.

From the point of view of CalTrans, some of the advantages of the consent decree included the fact that it converted a single purpose project into a project with multiple purposes,[198] the jobs training program helped employ and train a large number of disadvantaged people, and although its implementation was a major problem, some of the housing provisions were viewed as positive.[199]

Although they acknowledged some positive effects, the CalTrans officials had a very negative view of the specifics of the consent decree. When Montoya was asked about the disadvantages he stated, "there were a myriad." The main complaint of CalTrans officials included the housing program, the Office of the Advocate, the enormous cost increases produced by the consent decree, the inability of institutions to effectively implement the decree, the open-ended nature of the decree and the personalities involved.[200]

As might be expected, representatives of the CLPI had a very different view of the consent decree. Carlyle Hall and Helene Smookler were primary plaintiffs' counsel at different periods of the decree's implementation. They both acknowledged that there were serious implementation

195. *See* Best, *supra* note 120.

196. *See* Smookler, *supra* note 188.

197. Telephone interview with Alan Kingston, Chief Executive Officer, Century Housing Corp. (April 9, 1999).

198. *See* Montoya, *supra* note 130.

199. *See* Baxter, *supra* note 131.

200. *See* Montoya, *supra* note 130.

problems, particularly involving HCD. However, overall they viewed the consent decree as having provided a powerful lesson to both CalTrans and other communities affected by large public works projects. In addition, they were very proud of the large number of housing units constructed and they viewed the hiring program as having provided employment training and opportunities to many inner-city residents.[201]

Relations Amongst the Parties in the Consent Decree

The consent decree established new layers of bureaucracy and involved additional existing state bureaucracies. Murray Brown, a monitor during part of the implementation period, observed that there were so many parties involved and so many functions were spread out among the various parties that it led to an over-decentralization that made implementation difficult. Brown also sensed resentment on the part of CalTrans because many outside parties were involved in the construction of a freeway.[202] George Crawford, another monitor employed by the court in the last years of the implementation of the decree, believed that a central problem was that "you had a variety of competing agencies and institutions competing to gain control in the context of an adversarial process." According to Crawford, it is imperative when trying to understand the consent decree to understand that "the terms of the decree were much less important than the process."[203]

Judge Pregerson observed that it is not easy to work with a large bureaucracy such as CalTrans. According to him, it is difficult to get a variety of different parties from different perspectives, experiences and backgrounds to work together.[204] All the parties agreed that it was difficult to ask a large institution, primarily concerned with highway building, to become involved in a large array of social programs and to cooperate with a large group of outside parties. The people inside government are not used to working with outside people and organizations. According to Best, asking an institution such as CalTrans to become involved with outside parties is "generally a prescription for disaster." Best thought it would have been better to use established institutions to implement the decree instead of creating new ones.[205]

Plaintiffs' counsel also recognized the institutional limitations of the consent decree. In terms of the involvement of CalTrans, Smookler

201. *See* Hall, *supra* note 179; Smookler, *supra* note 188.

202. Interview with Murray Brown, Former Professor, California State University, Los Angeles, in Los Angeles, Cal. (Mar. 4, 1999).

203. Interview with George Crawford, Former Special Counsel to Judge Pregerson, phone interview (Mar. 17, 1999).

204. *See* Pregerson, *supra* note 185.

205. *See* Best, *supra* note 120.

noted, "you are asking a construction company to implement social goals." This led to implementation difficulties, Smookler argued, because CalTrans viewed its role primarily in terms of civil engineering and not in terms of working with communities, developing affirmative action programs, or becoming involved in community development. "Civil engineers and planners don't want to get involved in affirmative action or mediation efforts." Without more training, it is difficult to have civil engineers implement a variety of social goals.[206]

Some of the participants argued that the decree set up antagonistic relationships between the parties. Jerry Baxter thought that it was particularly difficult to work with the Office of the Advocate. He believed that the Office had to find fault with CalTrans or else they would not receive funding. "The whole problem with the consent decree was that you were paying people to be antagonistic."[207] According to Baxter, this was not the way to structure a working relationship.

There were also difficulties due to the interactions of the personalities involved. Judge Pregerson himself noted that personalities were "the nature of the beast." He believed that his biggest responsibility was to get the various parties to realize their common goals. He regarded himself as "the benign head of a family trying to get all the sides to work together." He compared working with all the parties to "herding cats." Pregerson stated that he had to use skills and methods that went beyond the normal duties of a judge, beyond simply sitting at his bench and "calling balls and strikes." According to Pregerson, the hardest part of the consent decree was not building the freeway but trying to get people to cooperate. "I really had a rowdy bunch."[208]

Flexibility Versus Specificity

The design of the consent decree was open-ended and flexible. While flexibility was needed to respond to different goals and situations, this very flexibility may have allowed CalTrans to become intransigent.

Because the consent decree was so open-ended, it fell upon the judge to encourage the parties to cooperate and negotiate. However, for a variety of reasons, negotiation and cooperation between the plaintiffs and defendants did not proceed smoothly. The looseness of the process allowed the parties to stall and to try to make their own arrangements without a common procedure followed by everyone and approved by the judge.[209] The effect of this flexibility "was to slow things down. When-

206. *See* Smookler, *supra* note 188.
207. *See* Baxter, *supra* note 131.
208. *See* Pregerson, *supra* note 184.
209. *Id.*

ever someone wanted something, they would have to go back to the court, and the court would throw them into a negotiating session."[210]

These negotiating sessions were creations of Judge Pregerson, who preferred to have the parties work out the problems themselves rather than ruling on them. However, most of the parties said that these sessions were unproductive and reflected Pregerson's idealism rather than an understanding of the antagonistic relationship between CalTrans and the plaintiffs. Montoya mentioned that some of the CalTrans attorneys who participated in these sessions called Pregerson's approach the "hot tub approach." It was a process by which everyone was to sit together in a room and try to negotiate a peaceful settlement of the dispute.[211]

However, the flexibility of the decree did have its advantages. Murray Brown believed that if the consent decree had been more tightly constructed and specific, the parties might not have agreed to it at all. Leaving the details of the decree to future negotiations and implementations may have led to a variety of difficulties, but it also may have been the only way to get everyone to agree to a form of settlement.[212]

Baxter also believed that the CLPI had too much flexibility, and the Office of the Advocate had too much support from the judge and the terms of the decree. According to Baxter, because of the antagonistic relationships and the fact that there was no strong enforcement mechanism, CalTrans and the plaintiffs were frequently in court with Pregerson, and "it was just a zoo." Baxter also noted that the court gave oversight responsibilities to Helene Smookler, an attorney from the CLPI. "The way it was set up it automatically pitted those people against CalTrans. Those people were there by design, fighting with each other, all of this called for by the structure of the consent decree."[213]

Political Administration Changes

The Century Freeway consent decree was primarily developed during the Jerry Brown administration and the Jimmy Carter presidency. It was mainly implemented during the Deukmeijian administration and the Reagan presidency. Everyone interviewed agreed that Republican administrations had a very different perspective on the consent decree than did their predecessor Democratic administrations. As John Phillips put it, "when the administrations changed, that completely changed the landscape."[214]

Carlyle Hall pointed out that the consent decree was developed in a

210. *See* Montoya, *supra* note 130.
211. *Id.*
212. *See* Brown, *supra* note 202.
213. *Id.*
214. *See* Phillips, *supra* note 182.

context of administrations that regarded social goals as positive. However, the consent decree was not finalized until the Republican administrations were firmly entrenched.

Joseph Montoya said that these political changes affected the process "tremendously. That's when you really started getting into personality problems." Montoya pointed out that when the Brown administration was in office, the process went fairly smoothly, and the plaintiffs were getting almost anything they wanted. This was because there was a strong working relationship between the plaintiffs, the Brown administration and high levels of the CalTrans administration. When the administrations changed, "it was night and day between the two administrations." Montoya stated that both the Deukmeijian and Reagan administrations recognized that they were obligated to implement the decree, but they really did not want to. Therefore, practical resistance from the administrations began to filter down through CalTrans and affected the implementation of the decree.[215] Judge Pregerson stated, "I could have run a smooth operation if I had had the power to decide who was going to run CalTrans."[216]

When Reagan was elected, the Federal Highway Administration tried to renegotiate the decree. This delayed the eventual implementation of the program. Carlyle Hall said, "the Republicans saw this as a Democratic deal" and thus wanted to reform and revamp the affected provisions.[217] However, Montoya noted that there was considerable pressure from local politicians to accept the freeway project and move forward with it. Because the Reagan administration was so reluctant to pay for the freeway, this actually led to a downscaling of the size of the freeway.[218]

The administrations could not stop the project, "but they certainly didn't lift a finger to help."[219] All these changes led Smookler to observe that one of the biggest problems with using a consent decree is that political administrations can change, especially when a consent decree takes a number of years to implement. Smookler was not sure, however, how the political changes of the administration could have been anticipated in the structure of the consent decree.[220] Carlyle Hall could also not think of specific ways in which the consent decree could have been changed to account for political changes. They both thought that the real problems

215. *See* Montoya, *supra* note 130.

216. *See* Pregerson, *supra* note 185.

217. *See* Hall, *supra* note 179.

218. *See* Montoya, *supra* note 130.

219. *See* Smookler, *supra* note 188.

220. *Id.*

were problems of implementation, not the design of the decree itself.[221]

CalTrans officials involved on the ground, however, thought that administrative changes were not so important. Jerry Baxter said that he never noticed a change in CalTrans brought about a change in administration in Sacramento.[222] Heinz Heckeroth, Jerry Baxter's predecessor as Chief of District Seven, thought that what was more important were shifts in the electorate and in terms of society's willingness to enter into these types of social contracts. These shifts were reflected in electoral changes of administrations. Instead, the administrations were a reflection of the general population's views on these types of issues.[223]

The Effects of the Consent Decree

When asked about the long-term effects of the decree, the interviewees had widely divergent opinions. Adriana Gianturco stated that the consent decree had very little effect on CalTrans because "it was seen as a total back-down by environmental organizations." She pointed out that CalTrans still got to build its freeway; it just had to do it under a consent decree.[224] Jerry Baxter argued that the consent decree process had no lasting effect on CalTrans "other than the fact that everyone I know is committed to never allowing it to happen again."[225]

Joseph Montoya recognized the negative impacts of the consent decree on CalTrans, but also pointed out some of the positive impacts of the negative experience. While Montoya pointed out that the consent decree "scared the hell out of them [CalTrans,]" he stated that "overall it made them much more aware of environmental problems. If nothing else, part of this was the fear that 'we really better take care of these things going in so that we don't get caught in a bind and have to litigate.'" Montoya saw this as "a real benefit."[226]

Echoing this point was Carlyle Hall. He argued that the consent decree forced CalTrans to be more than just a freeway construction company. "CalTrans now understands that its mission is transportation as a whole."[227]

Most of the interviewees agreed that CalTrans has changed as an organization in its approach to community development, environmental impacts and community relations. Some of the specific effects that the

221. *See* Hall, *supra* note 182.

222. *See* Baxter, *supra* note 131.

223. Interview with Heinz Heckeroth, Former Head of District Seven, CalTrans, in Sacramento, Cal. (Mar. 19, 1999).

224. *See* Gianturco, *supra* note 180.

225. *See* Baxter, *supra* note 131.

226. *See* Montoya, *supra* note 130.

227. *See* Hall, *supra* note 179.

plaintiffs pointed to include the fact that concepts such as high-occupancy-vehicle lanes (HOV lanes) and light rail lanes are now embraced by CalTrans. Initially, according to the plaintiffs, CalTrans fought tooth and nail against having to incorporate those elements. Helene Smookler also pointed out that the Century Freeway lawsuit was the first environmental justice lawsuit ever filed. She said that the importance of this could be seen in the fact that when the Department of Transportation adopted and wrote environmental justice regulations for highway construction, they were based on the Century Freeway lawsuit. "If anything important came out of this lawsuit it is this."[228]

Robert Best also acknowledged many of the effects of the consent decree, but he noted some irony too. Best noted that when he was in CalTrans before 1976, he believed that for the time, CalTrans was a progressive institution. He pointed out that CalTrans had created a replacement-housing program and a scenic highway program and had implemented environmental review processes. All of these programs were developed before the federal government had adopted laws like NEPA and before the state had enacted laws like the California Environmental Quality Act (CEQA).[229] According to Best, when Adriana Gianturco took over CalTrans in 1976, CalTrans had already been established as a fertile ground for many of her ideas. Best believed that Gianturco sought to institutionalize more community-minded and progressive ideas within CalTrans. However, when Best came back in 1988 to head CalTrans, he sensed that CalTrans had actually regressed from its progressive stances of the mid 1970s. He attributes much of this regression to the experience with the Century Freeway consent decree. He argued that the ironic effect of the consent decree was that many of the ideas and principles that Adriana Gianturco worked so hard to institutionalize within CalTrans were thwarted by CalTrans' experience with the consent decree. CalTrans became a reactionary organization. The staff became very hostile to any idea that was associated with the consent decree. "The worst effect of the consent decree was that it undermined the changes that Adriana Gianturco tried to make to get important value changes introduced into the construction of transportation facilities."[230]

The last effect to consider is whether CalTrans would ever enter into another consent decree such as this one. Robert Best said that CalTrans would never again enter into a consent decree that was like "that consent decree."[231] George Crawford believed that there would never be another experience like this decree because Judge Pregerson was a unique judge

228. *See* Smookler, *supra* note 188.
229. *See* Best, *supra* note 124.
230. *Id.*
231. *Id.*

in his willingness to become involved with a very lengthy litigation process.[232] Judge Pregerson has asked Joe Montoya to write a book detailing the Century Freeway experience. According to Montoya, Pregerson wants to create a series of guidelines to help parties the next time a similar situation arises. However, Joseph Montoya told the judge, "there isn't going to be a next time."[233]

Indeed, the prospect of another brand new freeway created in the middle of an urban environment in California is highly unlikely. Jerry Baxter said that CalTrans' mission has changed. The mission is no longer creating brand new freeways, but instead is now a mission of tinkering with the system and closing gaps.[234]

Whether or not the consent decree was a victory or loss for CalTrans, Heinz Heckeroth pointed out that it was defeat in terms of process because the construction became mired in extended litigation.

Preliminary Injunctions

Preliminary injunctions were used in three of the four case studies in this paper. In the Century Freeway case, the court issued a preliminary injunction in 1973 that prevented the construction of the freeway until 1982. In the case of the 710 Freeway, an injunction was entered in 1973. That injunction was lifted in 1998 when CalTrans formally approved a final EIS. The plaintiffs in the case re-filed their lawsuit, and in 1999, a federal court judge enjoined further construction of the project. Finally, in the case of *Sierra Club v. MTC*, a preliminary injunction prevented the MTC from continuing any freeway projects until the court had approved its conformity methods.

The Century Freeway

When the court entered the injunction in 1973, this action surprised not only CalTrans but also the national government. Because the Century Freeway lawsuit was one of the first environmental justice lawsuits in the country, it received much attention. It was a wake-up call to state agencies about the importance of new federal and state laws such as NEPA and CEQA.[235] What was different about the injunction was that it required CalTrans to prepare an EIS.

According to Montoya, CalTrans had no experience preparing EISs. Because of CalTrans' inexperience, the creation of the EIS took a significantly longer time than it would today. Additionally, while the EIS was

232. *See* Crawford, *supra* note 203.
233. *See* Montoya, *supra* note 130.
234. *See* Baxter, *supra* note 131.
235. *See* Smookler, *supra* note 188.

being drafted, a variety of federal regulations and laws were being enacted and amended by Congress, forcing CalTrans to reformulate the EIS.[236]

Montoya called the period between the initial entry of the injunction and the creation of the consent decree the "seven dead years." During this seven-year period, a variety of problems occurred in the path of the freeway construction project. Before the entry of the injunction, CalTrans had already acquired a significant number of properties in the proposed path and had begun to demolish some of the structures in them. However, once the court entered the injunction, CalTrans could no longer acquire any more property and could not demolish any properties except under special circumstances. This left CalTrans owning homes that no one inhabited, and thus significant problems associated with blight developed in the corridor region. These problems included a variety of criminal acts, problems with rodents and people using some of the vacant lots as general junkyards.[237] During this time, Montoya recounted many telephone calls he received from a variety of property owners in the area wanting to know what CalTrans was doing.

Some of my interview respondents believed that the problems associated with blight put pressure on CalTrans to settle the lawsuit, so that the construction of the freeway could begin. Carlyle Hall believed that CalTrans had a fear that Judge Pregerson would continue the injunction. He also thought that at the same time CalTrans was receiving tremendous public pressure from the cities and residents along the freeway path to settle the case.[238] However, Robert Best did not feel that the blight problems put much pressure on CalTrans to settle, but rather the settlement was a result of political decisions in the hierarchy of CalTrans administration.[239]

Adriana Gianturco had a different view. She regarded the development of blight as a possible strategy on the part of CalTrans' lower-level staff. In her view, letting the housing deteriorate and become infested with blight factors put pressure upon neighborhoods that might have originally have opposed the freeway. Communities that might have been opposed to the freeway were instead pressured to consent to the freeway, in order to remove all of the problems associated with the vacant land and homes. In fact, Gianturco believed that the plaintiffs collapsed under the pressure of all the problems associated with the blight. In her view, the plaintiffs consented to the freeway under the terms of the consent decree, instead of trying to stop the freeway altogether, because it was

236. *See* Montoya, *supra* note 131.
237. *See* Hall, *supra* note 179; Pregerson, *supra* note 184.
238. *See* Hall, *supra* note 179.
239. *See* Best, *supra* note 124.

better than the corridor of abandonment.[240]

John Phillips acknowledged that the injunction did place some pressure on the plaintiffs because the plaintiffs did not want to harm the communities by prolonging the never-ending problems associated with blight. Because the situation was unstable for the foreseeable future, the CLPI saw a consent decree as a way to bring closure to the dispute, while also having a project that spread out many side benefits to the communities.[241]

All sides agree that the injunction did have a dramatic effect on CalTrans in terms of shaking it up. As Carlyle Hall said, "there's nothing like the threat of a sword to get people's attention." This threat grabbed the attention of CalTrans and forced them not only to prepare an EIS for the Century Freeway, but to also come up with procedures to prepare EIS documentation for other transportation projects.[242]

The 710 Freeway

In 1964, the California Highway Commission adopted the 710 Freeway connector. During the late 1960s, South Pasadena raised a variety of objections to the project because the proposed freeway would bisect the city. In 1973, South Pasadena and CLPI filed a lawsuit challenging the project. This lawsuit is still in the courts, although today the city of South Pasadena and its attorneys manage the litigation.

Benjamin Salvaty was an attorney for CalTrans during the time of the original lawsuit. At the time the lawsuit was filed, CalTrans had prepared few documents examining the effects the 710 Freeway would have on surrounding communities. The injunction forced CalTrans to evaluate the project extensively. The injunction also revealed that at CalTrans "nobody took the initiative to do it [environmental review] in the absence of laws saying you must do it."[243]

Therefore, in 1973 CalTrans agreed to a preliminary injunction that allowed them some flexibility to acquire properties in the right of way while environmental documents were prepared. According to Salvaty, CalTrans stipulated to the injunction because "we felt there wasn't sufficient environmental investigation done."[244] CalTrans thought that the injunction, as it was negotiated, was something they could live with and something with which South Pasadena could live. Salvaty argued that the stipulated injunction was the best resolution that could have come out of the situation in 1973 because CalTrans had done so little preparatory en-

240. *See* Gianturco, *supra* note 180.
241. *See* Phillips, *supra* note 182.
242. *See* Hall, *supra* note 179.
243. *See* Salvaty, *supra* note 167.
244. *Id.*

vironmental documentation. "We would have lost in 1973."[245] Salvaty also mentioned the fact that CalTrans felt it had a very favorable [to their side] judge in the original 1973 case and therefore they were relatively pleased with the entry of the injunction given the circumstances.[246]

What is remarkable about the 710 Freeway injunction is that it lasted for approximately 25 years, only being rescinded in 1998 (and was enjoined again in 1999). During this very long time, CalTrans drafted different environmental impact statements, but only had a final EIS approved by the court last year. Many are surprised that the 710 Freeway is still on the books as a project to be completed. According to Adriana Gianturco, she had thought that the project had been killed during her administration. "That freeway is like a phoenix. It just keeps rising up from the ashes. I thought it was dead."[247] Most interviewees thought that the primary reason the project had not been killed was the fierce determination of the cities of Alhambra and Pasadena to have the extension built to serve their perceived transportation needs.[248]

Robert Best also argued that CalTrans staff wanted to build the freeway for engineering and transportation planning reasons. However, he believes that without the active support of Pasadena and Alhambra, CalTrans would have probably dropped the project.[249]

During the pendancy of the injunction, there have been serious problems with blight, though nowhere near the amount of problems that were associated with the Century Freeway injunction. This is in part because the area of property affected by the 710 Freeway is much smaller than in the Century Freeway corridor.[250]

The injunction in the 710 Freeway case had a strong impact on CalTrans. According to Salvaty, the 710 Freeway experience was one of many injunctions that CalTrans faced in the 1970s that prodded CalTrans to develop the expertise it needed to do proper environmental evaluations.

> At the time we entered into the stipulated injunction, they [CalTrans] really didn't have the knowledge and expertise and certainly not the experience to do the environmental work and analysis that was necessary. I think probably over the years they've gained that.[251]

Best argued that the 710 Freeway experience has had more of an impact upon CalTrans as an institution than the Century Freeway experi-

245. *Id.*
246. *See* Salvaty, *supra* note 167.
247. *See* Gianturco, *supra* note 180.
248. *See* Best, *supra* note 120.
249. *Id.*
250. *See* Jacobs, *supra* note 174.
251. *See* Salvaty, *supra* note 167.

ence. "That's an injunction that's had an institutional effect because it showed to CalTrans that no matter how good your case is, if you can't generate community support for what you are doing, you may not get it done." According to Best, CalTrans now has a strong desire to avoid the "South Pasadena type of thing, where we had permanent opposition."[252] This experience in South Pasadena has carried over to other projects CalTrans has done, including the rebuilding of the Cypress Freeway.

Best also believed that the 710 Freeway injunction was a problem for CalTrans because there was community opposition to the freeway. In contrast, the main opposition to the Century Freeway was from the CLPI and not so much organized opposition from the communities in the path of the freeway. According to Best, the best way to kill a project is the strategy used by South Pasadena. He argued that if a community is able to get a court to issue an injunction because of some possible procedural error, this can effectively kill a project.[253]

I also asked my interviewees about the point raised by Gianturco, that plaintiff groups may feel a pressure from the length of the injunction to settle the case earlier than they would have if they had had more resources and time. Ben Salvaty thought that given CalTrans' resources and the fact that it is a permanent bureaucracy, it is very difficult for a plaintiff to maintain an appetite for litigation against such an adversary. He claimed that CalTrans has the ability to overwhelm plaintiffs with resources and energy.[254]

Adriana Gianturco also raised the point that injunctions do not necessarily stop an agency from doing any work on a project. During her tenure, she had fought to prevent CalTrans' engineers from working on projects that were not funded or under an injunction. However, she believed that there was bureaucratic resistance to her efforts to stop work on enjoined projects. She blamed this on what she believed was an attitude among CalTrans engineers during that time. This attitude was that if the engineers kept working on the project that was enjoined, and if the plaintiffs ultimately gave up or lost, there would be freeways plans ready to be implemented as soon as the injunction was removed.[255]

Sierra Club vs. MTC

In the complicated *Sierra Club vs. MTC* litigation, the District Court judge at one point entered an injunction preventing the MTC from approving any further transportation projects in the Bay Area. The court

252. *See* Best, *supra* note 120.
253. *Id.*
254. *See* Salvaty, *supra* note 167.
255. *See* Gianturco, *supra* note 180.

would not lift the injunction until air quality conformity could be assessed under a procedure that the judge had approved. This injunction received publicity in both the *San Francisco Chronicle*[256] and the *Wall Street Journal*.[257]

The injunction also spurred the MTC to act. According to Francis Chin, the general counsel of the MTC, the injunction was helpful because it made the MTC move quickly to get rid of the litigation.[258] According to David Cooke, outside counsel for the MTC, the injunction sped up processes and procedures that were already underway. Echoing a theme that Adriana Gianturco mentioned, Cooke said that the injunction did not stop the MTC from working on projects that were somewhere along the development pipeline.[259]

The injunction was unique because it did not apply to a specific project, but rather to all the projects that the MTC was evaluating for approval. Because the injunction was so broad, the MTC did not want the injunction to last and did not want to be engaged in endless debate with the other parties. This is one reason the court hired a special master to help resolve the case.[260]

The effect of the injunction and the lawsuit on the MTC was profound. According to Chin, the agency is now much more risk-averse in its planning and it tries not to draft any language that would commit it to a course of action. Chin regretted the change, saying, "we should be a planning agency and not so much a risk management agency."[261] However, Chin pointed out that since the agency adopted the strategy, it has not been sued over its planning methods.[262]

Alan Waltner, with the plaintiff's counsel, argued that government agencies in general are much more sensitive to government requirements than they had been before. He believed that this was in part due to courts' willingness to enter injunctions.[263]

Evaluation of Injunctions/Proposals for Reform

Since many of the environmental laws were enacted in the 1960s and 1970s, injunctions have become a frequent tool of plaintiffs wishing to

256. Editorial *Judicial Coup in Transportation,* S.F. EXAM., Sept. 24, 1989.

257. Editorial, *Justices vs. Judges*, WALL ST. J., Jan. 12, 1990.

258. Interview with Francis Chin, General Counsel of the Metropolitan Transportation Commission, in Oakland, Cal. (Feb. 23, 1999).

259. Interview with David Cooke, Former Outside Counsel for the Metropolitan Transportation Commission, in San Francisco, Cal. (Mar. 11, 1999).

260. *See* Chin, *supra* note 258.

261. *Id.*

262. *Id.*

263. Interview with Alan Waltner, Former Plaintiff's Counsel, Sierra Club, in Oakland, Cal. (Mar. 31, 1999).

stop or alter the course of a project. As David Cooke put it, "injunctions are a part of life."[264] He thought, however, that injunctions do not pose a serious problem to agencies if the agencies are following proper procedures and laws. Francis Chin also thought that injunctions could be a useful tool when utilized properly. He cautioned, however, that parties frequently use injunctions as a political or delay tool and not so much to address a particular controversy.[265] When injunctions are used as a political tool, they are intrusive upon the discretion of government agencies. Having said that, Chin recognized that injunctions have forced agencies to realize that they cannot build projects without consensus.[266]

Both Robert Best and Jerry Baxter believe that in the context of environmental laws, it has become too easy to get an injunction from a federal judge. According to Jerry Baxter, the structure of the environmental laws on the books currently allows anyone to "go find a sympathetic judge that is going to be sympathetic to your cause."[267] Agencies adopt extensive fact-finding and evaluation methods because of the extensive procedural requirements of both NEPA and CEQA. Because there are so many requirements, it is often very easy for a plaintiff's group to convince a judge that the defendant agency has not complied with a particular aspect of the relevant laws. This can hold up an entire project for years until the process has been corrected.[268]

Jerry Baxter also cited the problem that the timeliness of a court's approval of the changes made by the defendant agency often leads the plaintiffs to claim that the original EIS is out of date due to changes in transportation policy, the law and demographics. This is precisely what happened in the case of the 710 Freeway.[269]

Robert Best pointed out that injunctions usually prevent projects that are substantively legal, but procedurally deficient. Injunctions usually do not say that the freeway cannot be built, but rather that the process used to build the freeway needs to be improved.

> There's probably nothing that legally stops it [the 710 Freeway] from being built, except for the fact that there are so many laws out there that relate to how you put a highway project together that no matter how well you do it, there's always going to be an opening where someone can claim it wasn't done exactly right.[270]

In terms of using an injunction as a political tool, Best argued that

264. *See* Cooke, *supra* note 259.
265. *See* Chin, *supra* note 258.
266. *Id.*
267. *See* Baxter, *supra* note 131.
268. *See* Best, *supra* note 120.
269. *See* Baxter, *supra* note 131.
270. *See* Best, *supra* note 120.

injunctions can be used by plaintiff groups to stop a project "until you can get the political strength to kill the project, or until you can drive up the costs."[271] While the courts do not stop the freeway project from being built at all, the use of an injunction can give the plaintiffs more time to find extra-judicial means of stopping the project altogether. Thus, Best argued that South Pasadena's strategy of always being able to find a way to get a court to issue an injunction is probably the most effective way to kill a project.[272]

Best also stated that injunctions pose no cost to plaintiff groups, which is an incentive to seek an injunction.[273] Plaintiffs are not required to bear the consequences of an injunction. Traditionally, if a party sought an equitable remedy, that party had to post a bond to pay for the negative costs associated with the injunction if the plaintiff ultimately lost. In the case of public interest, however, plaintiffs are not usually required to post any bond. If a court ultimately lifts the injunction, there are no costs to the plaintiff group. "Plaintiffs are not required to bear the consequences of an injunction. You get equitable relief without any equitable responsibilities."[274]

Offering a different perspective, Adriana Gianturco argued that enjoined agencies should not continue working on projects and should not continue acquiring properties in the right of way of a proposed freeway. When a government agency keeps acquiring so much property "it makes the EIS meaningless."[275] While the EIS may give some face value to evaluating a variety of alternative paths because the defendant agency already owns property in a pre-selected path, the actual chosen route is almost a given in the EIS.[276]

The ultimate effect of these injunctions may be to make public works project building so expensive and so complicated that projects will not be built. Baxter thought that there may never be another significant public works project built in the state. He believes that this is because environmental laws allow plaintiffs to march into a courtroom and receive an injunction relatively easily, if they get a favorable judge.[277] Perhaps the most interesting comment about the use of injunctions as a strategic political tool came from Warren Widener, the former County Supervisor from Alameda County who was involved in the rebuilding of the Cypress Freeway. According to Widener, he realized that CalTrans probably could

271. *Id.*
272. *Id.*
273. *Id.*
274. *See* Best, *supra* note 120.
275. *See* Gianturco, *supra* note 180.
276. *Id.*
277. *See* Baxter, *supra* note 131.

rebuild the Cypress Freeway right through the heart of Oakland if the rebuilding issue went to court.[278] However, he and other community groups subtly threatened CalTrans: "I know I can't stop them, but I can sure as hell delay them" with the use of an injunction.[279] It is this kind of threat that CalTrans most fears, and this is perhaps why Best senses that the 710 Freeway injunction has had more of an affect on CalTrans than the consent decree in the Century Freeway.[280]

Special Masters/Monitors

Special masters or monitors were used in two of the case studies. In the Century Freeway case, the court employed three types of monitors (although never a special master). In the *Sierra Club vs. MTC* litigation, the court employed a special master, Professor Martin Wachs, to help it evaluate some of the highly technical issues presented in the case.

The Century Freeway

Due to the complexity of the consent decree, Judge Pregerson appointed three different types of monitors to help implement the Century Freeway consent decree. Murray Brown was a professor at California State University at Los Angeles and a childhood friend of Judge Pregerson. His role was to attempt to resolve disputes between the parties. Helene Smookler monitored the housing program. Finally, the court appointed George Crawford as special counsel to help resolve housing implementation issues in the early 1990s.

Interestingly, almost no one involved in the litigation understood the role of the monitors. Joe Montoya thought that the decisions to appoint monitors were 'spur of the moment decisions.'[281] He did not understand what any of the monitors were supposed to be doing. As he put it, the position of the monitors was "useless".[282]

All of the parties agreed that there was a need for someone who had authority over the parties, but the decree did not address this type of position. Because none of the special masters/monitors had any power, they had very little authority over the parties to help resolve serious conflicts.[283] Jerry Baxter said that without any definitive power, the monitors played a minimal role; this defeated the entire purpose of having someone monitor the process.[284]

278. *See* Widener, *supra* note 175.
279. *Id.*
280. *See* Best, *supra* note 120.
281. *See* Montoya, *supra* note 130.
282. *Id.*
283. *Id.*
284. *See* Baxter, *supra* note 131.

The fact that the consent decree did not contemplate a position with supervisory powers highlighted that there was "no effective institutional mechanism to implement the [the consent decree]."[285] Without a structure for conflict resolution, it was difficult to resolve them without having to go see Judge Pregerson when the inevitable conflicts arose. "The effect of that was to slow things down. Whenever someone wanted something they would have to go back to court, and they would get thrown into one of these negotiating sessions."[286]

Many of the parties expressed frustration with the Judge Pregerson's approach to conflict resolution. The court was reluctant to appoint a special master. Instead, the court dictated that when in dispute, the parties should sit together to negotiate a resolution. This type of conflict resolution often led to gridlock. All of the interviewees said there was a need for somebody with central control and for someone who had enforcement powers to move the process along. Instead, the consent decree created a situation where authority and responsibility were separated.[287] Judge Pregerson defended his decision not to appoint a special master by noting that he already had a courtroom deputy, who he felt could effectively handle the needs of the parties.[288]

The need for a special master or monitor with specified powers was particularly important given the fractious nature of the involvement between CalTrans, HCD and the plaintiffs' attorneys. Most parties thought the decree needed a people person and manipulator to help move the process along and to help remedy personality conflicts between the various parties.[289]

John Phillips agreed that a special master was needed to help administer a project as large as the Century Freeway, stating "we needed a forceful, smart, pragmatic person. Judge Pregerson just wanted us to talk, talk, talk."[290] Helene Smookler argued that the absence of a special master meant that the plaintiffs had a more difficult time getting their claims and goals enforced through the consent decree.[291] When asked whether there was a need for a special master, she replied, "absolutely. A special master with an iron hand who understood the issues."[292] There was a need for someone who could make honest reports to the judge instead of having the parties come in front of the court sounding like

285. *See* Best, *supra* note 120.
286. *See* Baxter, *supra* note 131.
287. *See* Best, *supra* note 120.
288. *See* Pregerson, *supra* note 208.
289. *See* Best, *supra* note 120.
290. *See* Phillips, *supra* note 182.
291. *See* Smookler, *supra* note 188.
292. *Id.*

complainers.[293]

Sierra Club vs. MTC

The *Sierra Club vs. MTC* litigation involved a highly technical analysis of modeling procedures used by the defendant MTC to determine whether certain transportation projects would conform to relevant provisions of the Clean Air Act. Because of the highly technical nature of analyzing conformity modeling methods and the Clean Air Act, a special master was employed to help the court understand the issues presented. Special masters can have a variety of different responsibilities and powers, but the special master used in this case had a very limited focus with no set powers. Professor Martin Wachs served as an advisor to federal District Court Judge Thelton Henderson (who would not consent to an interview) and offered his opinion and evaluation of information and models submitted by the parties to the court.

According to both the plaintiffs' and defendant's attorneys, Judge Henderson asked each side to submit a list of five possible people who could serve as a special master to help evaluate the issues.[294] Martin Wachs was one of the few people who both sides had offered as a special master. Wachs also believed that he was selected because he was not from the Bay Area at that time, and his selection minimized allegations of bias from local press reports. In addition, he was one of the few possible masters who lived on the West Coast and was a more cost-effective person to hire, due to lower transportation costs, than someone located on the East Coast.[295]

Whatever the motivations were, both sides and the judge recognized the need for a special master; the appointment of Martin Wachs was not controversial, but rather, an appointment that both parties desired.[296]

Reflecting the consensual nature of the choice of Martin Wachs as special master, Francis Chin stated "the court appreciated, and the parties all perceived that there was a need in the court to get some assistance." This need was perceived not only because the issues were very technical, but because both parties in the litigation did not want an excessively long trial. Employing a special master to help the court understand many of the technical issues helped move the process of litigation.[297] David Cooke believed that from the defendant's point of view, a special master was absolutely needed because the issues litigated in the case had not

293. *Id.*

294. *See* Chin, *supra* note 258; *See* Waltner, *supra* note 263.

295. Interview with Martin Wachs, Professor of City and Regional Planning, U.C. Berkeley, in Berkeley, Cal. (Mar. 17, 1999).

296. *See* Chin, *supra* note 258; *See* Waltner, *supra* note 263.

297. *See* Chin, *supra* note 258.

been litigated in many courts.[298] Additionally, Cooke thought that a federal judge who had a full docket could not realistically evaluate the technical issues presented, "it was very clear that this case was ripe for a special master because of the technicality of the issues."[299] Plaintiff's counsel, Alan Waltner agreed that the issues were so complicated that a special master was needed.[300] Francis Chin noted that, "Martin Wachs was invaluable; we couldn't have gotten through [the litigation] without him." Chin went on to say, "we would have hired three Martin Wachses in terms of resolving the case."[301]

The defendant MTC paid the costs of hiring Martin Wachs. Under provisions of the Clean Air Act, the defendant organization has to bear the costs of employing a special master. While the MTC did not like paying the expenses of a special master, both Cooke and Chin thought that ultimately it was cost effective. Martin Wachs's technical expertise helped speed up the process of the trial and helped resolve all of the issues more quickly.[302]

Wachs's primary purpose was to help the court evaluate the technical questions presented by the case. He pointed out that the court never granted him any authority over the parties or the ultimate resolution of the case, "I was an advisor to the court and the court clerk. I was there to listen, to read, to inform myself, and to respond to their questions."[303] Wachs also self-circumscribed his role because he felt it was not appropriate at anytime to interject his own concerns or opinions unless specifically asked to do so. His primary role was to help both Judge Henderson and his clerk Karen Kramer draft opinions. He spent most of his time commenting on drafts of opinions and helped them re-draft the language where appropriate.[304]

Wachs believed that he helped the judge and his clerk have confidence in the opinions they were writing. This was important because what they were writing would have future implications for planning agencies throughout the country, "I offered a second reading and an assurance." Wachs mentioned that he was actually very surprised at the high level of technical understanding both the judge and clerk already had of the issues. There were very few times when Wachs sensed a need to make any substantial changes to the draft opinions. Instead, he thought that he moved the process of the litigation along by helping the court

298. *See* Cooke, *supra* note 259.
299. *Id.*
300. *See* Waltner, *supra* note 263.
301. *See* Chin, *supra* note 258.
302. *Id.*; *See also* Waltner, *supra* note 263.
303. *See* Wachs, *supra* note 295.
304. *Id.*

make sure that the issues were analyzed correctly.[305]

All parties welcomed the addition of Wachs to the trial process. Alan Waltner said that Wachs added background, viewpoints, and his opinion of what would be a good result.[306] According to Wachs, all the parties treated him with enormous deference. He sensed that all the parties had respect for the process, the judge and the role that he served in the trial. He mentioned that at all times, the various parties seemed patient with him, even when he expressed some confusion or misunderstanding regarding the trial proceedings and had to have the issues explained to him in a non-legal way. He never once heard any complaints about the fees that he charged for being a special master.

Although all the parties, including the judge, treated Wachs with great deference, he did not believe that at any time the judge abdicated his duties.[307] A judge may be so overwhelmed with work and so impressed with the qualities and abilities of the special master that the judge may abdicate his central role in the trial process and defer to the special master's suggestions. David Cooke pointed out that:

> [a] special master is in a unique position to have private, off the record, technical discussions with the judge. [T]he risk inherent in the special master is that a busy judge with no time to delve into the issues leads to situations where the special master, while seemingly presenting an apparently neutral position, can actually advance his own interests and views.[308]

Alan Waltner noted that there is always a risk that the biases of the special master are going to prejudice your case in some way.[309] He also pointed out that there is not an easy way to rebut the opinions of a special master in front of the judge.[310]

Martin Wachs said that judicial abdication was not a problem in *Sierra Club vs. MTC.* His role was to assist the judge in making a better decision, but,

> Judge Henderson did not imply that I was responsible for making such judgments in any way, shape, or form, other than to help him clarify issues . . . . Judge Henderson was in charge. There's no question about it. My role was to interpret for him, advise him, answer his questions, but at no point did he imply that I had any authority over his decision.[311]

Martin Wachs felt a tremendous burden on his shoulders.[312] While

305. *Id.*
306. *See* Waltner, *supra* note 263.
307. *See* Wachs, *supra* note 295.
308. *See* Cooke, *supra* note 259. .
309. *See* Waltner, *supra* note 263.
310. *Id.*
311. *See* Wachs, *supra* note 295.
312. *Id.*

he had long been involved in academic and policy disputes over transportation policy, he thought his recommendations and involvement would have an immediate and substantial effect on transportation planning.[313] He felt somewhat ill-prepared to make such important and broad recommendations.[314]

When asked about his own view of how he was able to help the process, Martin Wachs admitted that when he first became involved, he thought that his own role might be somewhat superfluous.[315] However, as the process went along, he believed that he was able to improve both the judge's and the clerk's confidence in what they were writing.[316] Wachs also thought that he provided them with confidence regarding policy ramifications that would result from the resolution of this case.[317] "I thought it made a difference on the small portion of the opinion that I helped advise."[318]

CalTrans and the Cypress Freeway

Given the experience of the Century Freeway consent decree and the 710 Freeway injunction, I wanted to find out what lessons CalTrans learned from prior litigation, not only in terms of approaching the rebuilding of the Cypress Freeway but also in terms of a change in the institutional attitude. Rebuilding the Cypress Freeway in West Oakland presented an opportunity to learn more about CalTrans.

I spoke with people involved in the Cypress Freeway rebuilding including Ed Blakeley, the former professor of City and Regional Planning at UC Berkeley; Warren Widener, the former County Supervisor from Alameda County who represented the West Oakland area; and Paul Cobb, founder and co-leader of Cypress Emergency Response Team (CERT) a group formed to lead the community in negotiating rebuilding the freeway with CalTrans. I also interviewed Robert Best, who was the head of CalTrans during the rebuilding.

Ed Blakeley became involved in the rebuilding because CalTrans asked him to consult during the planning process.[319] Before the earthquake, he did consulting and gave presentations to CalTrans's middle managers about working with inner-city community groups.[320] He believed that CalTrans was trying to react more responsive to community

313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *See* Blakely, *supra* note 176.
320. *Id.*

concerns and believed that CalTrans had changed its attitude about working with communities because they invited him to make presentations at CalTrans meetings.[321] Shortly after the earthquake, CalTrans approached him to help orchestrate the rebuilding of the freeway and to help choose a new alignment for the freeway.[322]

According to Blakeley, CalTrans' main interest was to build the freeway as quickly as possible.[323] He believed that CalTrans did not want to delay the project because it was concerned that environmental groups might build up a momentum to stop the rebuilding of the freeway altogether.[324] CalTrans thought that if it quickly began planning for the new freeway, the momentum to stop the freeway would not develop.[325] Because of the impetus to do the process quickly, Blakeley thought that CalTrans wanted to rebuild the freeway back in the original alignment that bisected the community because it was the quickest and cheapest way to rebuild it.[326]

Warren Widener echoed a similar observation about how CalTrans initially approached the community and the rebuilding process.[327] According to Widener, CalTrans's initial approach was bureaucratic and somewhat imperial. He said that CalTrans was approaching the West Oakland community as if it were a community without economic or political power. Widener worked with CERT to develop alternative proposals for rebuilding the freeway in its original path. Their suggestion was to reroute the freeway so that it would not divide the heart of the West Oakland community. Instead, the new route would parallel railroad tracks that were on the very edge of the residential community, but also close to the Port of Oakland.[328] As Ed Blakeley put it, "a momentum started that a solution was possible."[329]

Warren Widener said that once CalTrans realized there was strong community support for realigning the freeway, it quickly gave-in to community demands. He thought that CalTrans underestimated the level of community opposition to rebuilding the freeway in the same location.[330]

Both Widener and Blakeley stated that it was important that there were pre-established organizations such as CERT, the West Oakland Chamber of Commerce, and community groups formed to help revitalize

321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *See* Widener, *supra* note 175.
328. *Id.*
329. *See* Blakeley, *supra* note 176.
330. *See* Widener, *supra* note 175.

West Oakland. These groups were able to come up with alternatives and resist the bureaucratic momentum that was building towards simply rebuilding the freeway back in the original path.[331] There were a number of initial steps that CalTrans took that signaled to both Blakeley and Widener that it was taking a new and different approach.[332] Robert Best, the head of CalTrans at the time, came down to the community in West Oakland to look at the site. Best's visit sent a strong message to West Oakland that CalTrans was actively involved in working with the community. "CalTrans became human in Oakland. They worked with people."[333] Additionally, CalTrans appointed African-American, Preston Kelley as the Director of District Four, which encompassed the West Oakland site. "When they chose Preston Kelley, that said to me 'if there is any way that [CalTrans] can not only avoid litigation but avoid a big public battle, that is our first choice," said Widener.[334] He said that the choice of Preston Kelley said to the West Oakland community, "we are giving you one of your own."[335] Best, Widener, Blakeley and Cobb all had strong words of praise for Preston Kelley, especially about his approach to working with the community, his open-mindedness and his determination against redividing the community.[336] According to Widener, the need for political organizing by the community decreased significantly once CalTrans appointed Preston Kelley.[337]

In an interview, Preston Kelley said that initially CalTrans did just want to put the road back up where it had stood.[338] Once CalTrans realized that it needed to go through environmental processes, Kelley and other leaders within CalTrans saw an opportunity to "do this development right."[339]

Ed Blakeley argued that the leadership of Robert Best also signaled a real change in direction from past practices of CalTrans.[340] Best acknowledged that he wanted to approach the rebuilding of the Cypress Freeway differently than CalTrans had done in other inner-city areas. In fact, his approach was part of an overall strategy. Best wanted to avoid another prolonged battle like the 710 Freeway and believed that, like in

331. *See* Blakeley, *supra* note 176; Widener, *supra* note 175.

332. *Id.*

333. *See* Blakeley, *supra* note 176.

334. *See* Widener, *supra* note 175.

335. *See* Widener, *supra* note 175.

336. *See* Blakeley, *supra* note 176; Widener, *supra* note 175; Interview with Paul Cobb, Co-Founder of Cypress Emergency Response Team, phone interview (Mar. 12, 1999).

337. *See* Widener, *supra* note 175.

338. Telephone interview with Preston Kelley, Former Director of District Four of CalTrans (Apr. 5, 1999).

339. *Id.*

340. *See* Blakeley, *supra* note 176.

South Pasadena, there could always be permanent opposition to a project. The best way to develop support for a project is to "divide and conquer" community groups. He argued that it is important is to get a variety of interest groups involved and then the groups who are served by what is proposed counter-balance those groups who are not served. That was Best's strategy in approaching the community to rebuild the Cypress Freeway.[341]

Best also mentioned another important incentive CalTrans had to build the freeway quickly: after the earthquake Congress allocated special emergency funds to rebuild the freeway, but the money had to be used within a four-year time limit.[342] Therefore, according to Best, CalTrans had to get the rebuilding process moving in order to utilize the funds. Best said that the time constraint on the federal money gave the West Oakland community leverage over CalTrans. "I figured that if CalTrans was going to get the project done in time to get those federal funds, they were going to have to go with a project that was acceptable to the community."[343]

Best and Kelley both mentioned that even within CalTrans they had to battle against engineering groupthink. Many staff members thought the best solution was to follow the cheapest and the quickest route, which was to rebuild the freeway in the original spot.[344] One reason Best appointed Preston Kelley as District Four Director was so CalTrans could take a new approach in terms of working with the community.[345]

The process of negotiating the rebuilding went much more smoothly than all the parties had expected. While it was not a conflict-free process, the parties were surprised at how quickly CalTrans agreed to rebuild the freeway in the new location. While there was some opposition from environmentalists and some artists who lived near the railroad tracks to rebuilding the freeway at all, broad community support and bureaucratic momentum of CalTrans overcame these forms of opposition. Ultimately the community got what it wanted out of the rebuilding, which was not the expected outcome.[346]

CalTrans's Progressive Motivations

Both Blakeley and Widener mentioned that CalTrans was probably drawing upon prior experience when working with the West Oakland community. "They didn't bring up the Century Freeway, but it was obvi-

341. *See* Best, *supra* note 120.
342. *Id.*
343. *Id.*
344. *See* Best, *supra* note 120; Kelley, *supra* note 338.
345. *See* Best, *supra* note 120.
346. *See* Blakeley, *supra* note 176; Widener, *supra* note 175.

ous that they were anxious about not being able to build a freeway."[347] Both Blakeley and Widener were somewhat familiar with the Century Freeway and 710 Freeway controversies. They thought that underlying all the Cypress negotiations was CalTrans' fear that it would get stuck with either a very lengthy injunction or a very complicated consent decree again.[348] "CalTrans learned a lesson from the Century Freeway that it is better to make a concession and try to work things out than to stand on the letter of the law."[349]

Preston Kelley acknowledged that CalTrans wanted to avoid court, "CalTrans doesn't want to ever have to get in front of a judge. They better work with the community to get the process done."[350]

Blakeley also saw a new attitude in CalTrans's leadership, especially the chairmanship of Robert Best. Without the leadership of Robert Best, the mid-level engineers would have pushed for a simple rebuilding of the freeway along the original path. Blakeley said that CalTrans's leadership by Best proved that the situation could turn into a win-win situation. According to Blakeley, "CalTrans needed some victories after the 710 Freeway had been stalled and the Century Freeway consent decree process."[351] To get the job done, CalTrans had to accept the politics of the situation. Francis Chin, who had a minor involvement in the rebuilding as general counsel for the MTC, saw the Cypress Freeway from the point of view of CalTrans as "an issue of what they could do politically versus legally."[352]

Although there were some minor threats of litigation, ultimately there was no litigation that affected the Cypress Freeway rebuilding process. Warren Widener said that there was never any serious talk of litigation. According to him, "CalTrans really learned from that mess in [the Century Freeway]."[353]

Since the freeway was opened in 1998, Paul Cobb, reflecting back on the entire experience said, "CalTrans is great in terms of what you can expect. I saw them as a bureaucracy, but they became my biggest ally. They did what we wanted them to."[354]

Cobb's highly positive views may have reflected what Joseph Montoya thought happened during the rebuilding of the Cypress Freeway. During that time he was head of the legal division of CalTrans, itdid not

347. *See* Blakeley, *supra* note 176.
348. *See* Blakeley, *supra* note 176; Widener, *supra* note 175.
349. *See* Blakeley, *supra* note 176.
350. *See* Kelley, *supra* note 338.
351. *Id.*
352. *See* Chin, *supra* note 258.
353. *See* Widener, *supra* note 175.
354. *See* Cobb, *supra* note 336.

become very involved because there was little legal controversy. However, he believed that CalTrans "gave away the store" in terms of working with the West Oakland community. He said that this was due to CalTrans's experience with the Century Freeway consent decree and their desire to avoid another decree, "they'll give almost anything to avoid that ugly, ugly mess again."[355] Preston Kelly noted that CalTrans's approach to the rebuilding became "we will do everything we can to get this thing back up, aside from going to court."[356]

As previously mentioned in the section on injunctions, Warren Widener believed that the possibility of delay motivated CalTrans to work with the community.[357] Given the funding deadlines CalTrans faced and the desire to avoid protracted litigation, delay threats were probably a very powerful incentive for CalTrans.

Lessons for Government Agencies

All the interviewees agreed that CalTrans has become much more sensitive to community demands and the importance of public relations. As Jerry Baxter put it, "I don't think you can do things now without a lot of agreement."[358] In addition to working better with communities, CalTrans' overall mission has shifted. Judge Pregerson stated, "the leadership of CalTrans is more sensitive to the effects that their projects have on the neighborhoods that bear the brunt of their work."[359] According to Baxter, CalTrans's primary role in terms of working in urban areas is to tweak the system instead of building freeways from scratch.[360] The 710 Freeway is an example of what CalTrans views as "tweaking the system" or "filling in gaps." Robert Best believes that CalTrans now works on overall transportation instead of just building freeways. "As far as highways are concerned, we've probably seen the last."[361]

Many of the interviewees said that there is still enormous difficulty in trying to reform a big institution like CalTrans. Adriana Gianturco pointed out that although litigation can have a strong impact on an institution, especially at the higher levels, "there are very strong forces running in the other direction. The organizational culture [of CalTrans] is not attuned to the judicial processes. It can exert a powerful counter force."[362] Both Blakeley and Smookler mentioned that the engineers

355. *See* Montoya, *supra* note 130.
356. *See* Kelley, *supra* note 338.
357. *See* Widener, *supra* note 175.
358. *See* Baxter, *supra* note 131.
359. *See* Pregerson, *supra* note 185.
360. *See* Baxter, *supra* note 131.
361. *See* Best, *supra* note 120.
362. *See* Gianturco, *supra* note 180.

that form the backbone of CalTrans are not attuned to some of the community relations issues. Blakeley believed that as one moves up the ladder within an organization like CalTrans, one finds that the leadership has a broader view of the world than the engineers who workon the ground. Transferring this broader view of the world to the engineers is a significant challenge that can lead to conflicts within the organization.[363]

Preston Kelley had been an engineer within the organization since 1958, before he became District Director for CalTrans. . He believed that CalTrans has learned to respect and comply with the environmental processes. "The engineers don't like the process, but they respect it."[364]

Another point made by some interviewees is that CalTrans is not necessarily supposed to be an organization engaging in social programs. Almost all the interviewees involved in the Century Freeway decree recognized that there were real limitations in asking CalTrans to become involved with implementing social programs. "That is not their business."[365] These types of attitudes pose serious challenges to those who seek to institutionalize new values into agencies. This raises the larger question (not addressed in this paper) of what is the proper scope of government agencies' roles in today's society.

Recommendations for the Use of Equitable Tools

Public policy and planning pose problems that are not easily amenable through traditional litigation. Public policy disputes often cannot be resolved by simply declaring a winner and a loser. Instead of seeking money in public policy disputes, the plaintiffs often seek to either stop or alter a project, or to alter the practices of an institutional actor. Courts frequently use equitable tools to manage litigation and help resolve the disputes because these types of remedies are unusual.

The use of equitable tools in each case study reveal lessons learned by the parties and offer recommendations for future transportation disputes.

Lessons for the Use of Consent Decrees

Although consent decrees represent an agreement reached between two parties, a decree does not mean that the parties will avoid all future conflicts. In the case of the Century Freeway, many conflicts arose between CalTrans and other state agencies, between CalTrans and the plaintiffs, and difficulties emerged from the changes in political administrations.

363. *See* Blakeley, *supra* note 176; Smookler, *supra* note 188.
364. *See* Kelley, *supra* note 338.
365. *See* Baxter, *supra* note 131.

Consent decrees can be most effective when developed by and with the aid of experts who are familiar with the affected bureaucracies and who understand their organizational cultures.[366] "[I]n litigating proposed reforms, defendant agencies often have deep and entrenched organizational cultures, which are not easily rocked by the fiats of the judiciary . . . ."[367]

If one of the litigants regards the consent decree agreement as an imposition, this belief will likely hamper effective decree implementation. Without equal participation, the "effort to compel different units, divisions and administrative agencies to operate in obtaining a common goal may encounter significant resistance."[368] The Century Freeway consent decree was especially complicated because it involved numerous state agencies and new administrative bodies.

Special circumstances may exist where a court-determined final resolution is the best way to resolve a dispute. While consent decrees force adversarial parties to cooperate over a significant period of time, the final resolution of a dispute through a court-entered judgment may provide certainty and finality. Consent decrees that involve parties strongly opposed to each other may not work as effectively as a judgment because the parties never reach common ground. Without parties who feel committed to the consent decree process, implementation will be difficult.[369]

Specific Recommendations

1) Plaintiff groups need to have a realistic understanding of the organizational culture of the institution they seek to challenge.

Although ideally, a consent decree is a voluntary agreement between the parties, frequently, parties may feel forced into accepting an agreement in order to avoid further litigation. In the case of the Century Freeway consent decree, many CalTrans employees viewed the decree as a political decision imposed from above. The overall bureaucracy was resistant to comply with the terms of the demanding decree because most within CalTrans felt that they really did not have a choice but to enter the decree.

Plaintiff groups should realize that although the leaders of a government agency may have authority to bind the agency, they do not represent the rank and file civil servant. If the various factions within a large government institution such as CalTrans feel they have input in drafting the consent decree, the institution as a whole is more likely to

366. *See* DiMento and Hestermann, *supra* note 9, at 330.
367. *Id.* at 335.
368. *Id.* at 336.
369. *See id.* at 337.

comply with the decree. It is important to make sure that all parties involved feel that they received a piece of the pie. Otherwise, an arranged marriage between two adversarial parties will be difficult.

A consent decree should be developed with input from all the parties involved in the litigation. If CalTrans' administrators and engineers had regarded the decree as one with meritorious legal or engineering principles, instead of as a politically motivated decree, the institutional culture might have accepted it more easily.

There are a myriad of ways an institution can resist the dictates of a court-monitored agreement. It is in the interests of the plaintiffs to draft an agreement that may not satisfy all of their demands, but is likely to be fully complied with by the defendant institution. This is a better alternative than having an agreement that the plaintiffs feel vindicates their rights, but is one that the government institution can easily thwart.

An institution will change overnight merely because a court approves and announces enforcement of a consent decree. Implementing the dictates of a decree can take years, especially if one is dealing with a large and diffuse bureaucracy such as CalTrans.

If improvements were implemented in training planners and engineer institutions like CalTrans, the institutions would better understand the principles behind environmental laws, community relations, and proper respect for procedure. The legal community and community development specialists should work with institutions to help them understand their broader mission in today's complex culture. CalTrans attempted to do this when it hired Ed Blakeley for his consultation.

2) Do not try to accomplish too much in the design of a decree.

The more complex a consent decree is, the more ways a defendant government institution can thwart the spirit and purpose of the decree. A decree that creates layers of new bureaucracies may create resentment and competition in and between the preexisting bureaucracies. Additionally, if it can be avoided, a consent decree should not mandate a new body or agency to reinvent the wheel. It is best to work with preexisting institutional knowledge and utilize it in a cooperative manner.

If parties keep the decree simple and focused, fewer opportunities arise for dispute, and any need for the supervising court to get involved is diminished. Both federal and state courts have serious time pressures. When consent decree parties seek the intervention of the court, this delays the decree process. Having clear, specific principles to guide the parties in the implementation of the decree can lead to efforts that are more cooperative, and to joint understandings of terms and priorities.

3) Try to strike a balance between specificity and flexibility.

One of the criticisms of the Century Freeway consent decree was that it left too many terms and issues to be decided by the parties at a later date. When the parties needed to make a decision during implementation, they frequently disagreed over the proper interpretation of the decree and therefore had to seek court involvement. Parties can avoid the mediating efforts of the supervising court if the decree memorializing their agreement is clear.

The flexibility of a complicated decree has its virtues. If it is complex, issues could arise during implementation that the parties could not have anticipated in the original design of the decree. Flexibility in the implementation of the decree allows the process to proceed differently than had been originally planned, which often benefits the plaintiffs and defendants. Additionally, as Murray Brown pointed out, flexibility or vagueness in the terms of the consent decree is sometimes necessary in order to get both parties to agree.

It is preferable to avoid procrastinating on determining difficult issues. If the parties cannot agree on certain elements of the decree while they are drafting it, they will unlikely agree once the issue becomes relevant to the implementation.

4) A consent decree should account for the possibility of political change in the agencies.

Consent decrees often take several years to implement. This makes them vulnerable to changes in political and administrative bodies. Both the Reagan and Deukmeijian administrations resented the restrictions the consent decree placed on both the federal and state governments' ability to execute policy. This conflict reflects one of the weaknesses of the consent decree process. A consent decree may engender hostility in agency officials who inherit a decree negotiated by his or her predecessor. For the original plaintiffs, this rigidity can be an advantage because of its predictability and ability to withstand political pressures.[370]

Consent decrees should be designed to avoid political fluctuations. One way to avoid political fluctuation is to design a decree with a set goal or sunset clause that guarantees a milestone for operations to return to normal. The implementation of the Century Freeway decree lasted through three presidents and three governors. Every new administration brought its own set of guiding principles and philosophies; a politically motivated consent decree is subject to upheaval each time a changing of the guard occurs in Washington D.C. or Sacramento.

370. *See* DiMento and Hestermann, *supra* note 9, at 305-06.

Consent decrees should not be political documents, but instead should be practical, result-oriented guiding documents. The perception among CalTrans staff that the decree was created by outsiders led to a belief that the decree was not an "engineer's decree" but a "political decree."

5) A consent decree should be designed to avoid unnecessary expenses and delays.

The Century Freeway was delayed for over ten years. Its ultimate cost was roughly four times the original estimate due to the delay. Courts that implement decrees may need to appoint a special master to provide the parties a means and forum to settle their intractable disputes. This could help expedite implementation of a decree.

6) Avoid creating/involving new entities.

Competent existing state agencies should implement decrees, unless circumstances indicate that the defendant cannot be trusted. One of the most expensive and problematic aspects of the Century Freeway consent decree was the responsibility of HCD for the housing program. Instead of giving housing responsibility to an inexperienced agency, the decree should have allowed CalTrans or an experienced non-profit housing developer to take charge of the housing program. CalTrans rank-and-file resented the involvement of outside parties. This tension combined with the inexperience of HCD, led to serious housing problems.

If outsiders must be involved, they should be entities that are experienced and preferably have worked with the defendant agency before. The court and the plaintiffs eventually transferred housing responsibility to the non-profit Century Housing Fund, and since then, the housing program has seen dramatic efficiency improvements.

7) Consent decrees need an intermediary force, like a special master or monitor, to monitor and enforce compliance.

I will discuss this recommendation further in the section on special masters and monitors.

Lessons for the Use of Special Masters or Monitors

Forms of a special master or monitor can range from a special master with broad authority and disciplinary power to effectively run a defendant institution, to a person appointed by the court solely to monitor the agency's compliance with a court order or a consent decree. These are the two extremes. In between these two extremes lay a variety of options that courts can employ to expedite dispute resolution. The permutations

are often driven by the particular necessities facing the court. A special master, who has some authority to discipline the parties and to report findings to the judge, can help move the litigation along and save the judge's energy for truly pressing issues presented by a case.

Judge Pregerson appointed Murray Brown to monitor the parties, but he had no decision-making authority. Because of his powerless position, my interviewees thought his role in the implementation process was superfluous. Additionally, the court did not communicate the meaning and purpose of Brown's role to the parties, thereby ensuring that the parties would effectively ignore Brown because he had no authority over them.

The role of a technical advisor can be especially useful in the special master context. The role of Martin Wachs seems an ideal example of when a special master can be useful for all the parties involved in a case. The process used by the court to appoint Wachs provides an example of how a court can ensure a consensual choice among the parties to select a particular master.

The dangers in using a special master are that the individual may become a surrogate for the judge. This violates the rights of the parties to have their dispute heard by an official with Article III attributes. Courts should not use special masters to expedite court dockets, unless the matter is sufficiently complicated as to warrant outside aid. . Appellate courts need to be responsive to parties who claim their right to a hearing before a federal judge is being violated by the special master's authority in their dispute.

Specific Recommendations

1) A court should clearly delineate the responsibility, role and powers the special master will have.

When the respective parties do not understand what the role of the special master is, there is little chance that they will see the master as an effective tool of the court.

2) While technical masters can be of significance in resolving litigation, they also can present threat of judicial abdication.

A special master may become such an invaluable source of technical information and advisor to the court that he effectively resolves the central issues of the case. The court may improperly defer critical aspects of the dispute to the master instead of utilizing his knowledge for the advisory position it was intended. This is especially true in complicated and time-consuming cases.

A special master with technical expertise may so impress a judge

with his knowledge that the judge will defer to the master's opinion without exercising judicial deliberation. This denies the litigants the right to have their dispute heard by a judge. The public may be able to read a published opinion, but the real author of the opinion may have been the special master and not the judge whose name is on the opinion.

Judges should not let the special master decide technical issues, but instead judges should evaluate the opinions of the special master, along with other evidence. While a special master can relieve some of the pressures on a court in a technical trial, the judge should still make an effort to educate himself about the core issues presented. The judge will then be able to evaluate the findings and opinions of the special master without handing the trial over to the master.

3) It is best to allow the opposing sides to select a special master by consensus.

If one party feels that the other is forcing a special master upon them, it is likely to resist cooperating. Instead of framing the special master selection process as a win/lose proposition for each of the parties, the court should help the parties agree on a mutual choice. The selection process used to hire Martin Wachs exemplifies this kind of process.

Neither party may want to involve a special master. If the judge still feels a need to appoint a master, he should make every effort to choose a special master with no real or perceived biases against any of the parties.

4) A special master may need disciplinary authority to help the court resolve highly complicated cases and consent decrees.

Both the plaintiffs and defendants involved in the Century Freeway consent decree said that a special master with disciplinary authority would have helped move along the process. Because of so many intractable disagreements, Judge Pregerson frequently had to mediate between the parties. Most of the Century Freeway interviewees believed that if a special master with prescribed authority (instead of a monitor with no authority) was appointed he would have provided finality to on-going controversies and encouraged the parties to cooperate.

A federal judge cannot supervise the parties in a multi-year consent decree with much regularity. A special master who is dually selected by the parties can act as a proxy for the judge. This role could entail making decisions of minor preliminary matters that may not be worthy of the judge's limited attention. The master can have this limited form of authority and still allow the judge to decide the major points of law and evaluate the major differences between the parties.

5) An order of reference for a special master should be narrowly tailored.

If a special master is the de facto administrator of an agency, or the de facto judge judging the case, the parties are likely to view the master with little credibility. This leads to coerced cooperation and perverts the role of federal judges in our system of government.

It is important that the plaintiffs and defendants feel that ultimately a non-elected official, not subject to political pressures, ruled upon their case. If the special master ends up calling most of the shots, the parties may walk away from the litigation feeling frustrated and as if they were not heard by the court.

Lessons for the Use of Injunctions

Injunctions have become increasingly common in federal courts as plaintiffs bring non-traditional legal claims and seek non-traditional legal remedies. The use of injunctions has increased because of environmental laws such as NEPA and CEQA. These laws allow plaintiffs to seek injunctions because of the irreparable harm that many projects can inflict upon the environment.

As Benjamin Salvaty pointed out, the environmental law injunctions of the early 1970s initially caught agencies such as CalTrans off-guard. As agencies have gained more experience, they are more likely to avoid having an injunction issued against them.

The willingness of courts to issue injunctions has caused agencies to be much more cautious in terms of procedure and practice. Government institutions are much less sloppy with environmental work and are more sensitive to the concerns of affected communities.

The increased use of injunctions is also an indication that courts are more willing to recognize harms that are not accurately compensated by traditional monetary damages. One harm, which emanates from the construction of a freeway, is diminished property values. However, there are also intangible harms that cannot be easily converted into a dollar amount.

Injunctions may either kill a project or delay a project for many years. Most of the interviewees were amazed that the original 1973 injunction blocking the 710 Freeway was lifted 1998. This length of time represented to some of them a prime example of the wrong way to use an injunction.

Warren Widener's comment about an injunction's use as a delay tactic revealed a political reality. Injunctions can stop a project for so long that it kills the project's initial support. Killing a project may or may not be an intended consequence of obtaining an injunction. As Robert Best

pointed out, most injunctions are granted not because the project is substantively wrong, but because of procedural error. Injunctions frequently lead to a project's demise because of the government agency's inability to improve upon procedure or because opponents are able to generate some form of political opposition to the project while the proponent is under the injunction.

Specific Recommendations

1) Injunctions should be granted with predictability by the federal judiciary.

Jerry Baxter and Robert Best both argued that whether or not a court issues an injunction frequently depends on the predilections of the judge rather than the merits of the case. Injunctions should be granted with some form of predictability, rather than be dependent on the particular federal judge who is assigned to the case.

Courts should require plaintiffs to prove likely irreparable harm and the inability of a court to return the aggrieved parties to their pre-project state through traditional legal remedies. Additionally, courts should draw upon prior precedent to analogize facts and issues presented in a case to past injunction decisions with similar fact patterns.

The inconsistencies accompanying the decision of whether or not to issue an injunction is part of the nature of our discretionary judicial system, much like sentencing under criminal law. Almost all courts act consistently in deciding whether to grant an injunction. The minority of cases present problems for courts and create seemingly inconsistent results for litigants.

2) An injunction should try to accommodate the needs of all parties.

If a court enters an injunction for the plaintiffs, the injunction does not have to result in a total loss for the defendant. The court should try to design an injunction that accommodates the wishes and needs of the plaintiffs, while also trying to serve the needs of the defendant agency. For example, Benjamin Salvaty mentioned that when CalTrans was enjoined in 1973, the court designed an injunction that allowed CalTrans to purchase and/or demolish some properties in the pathway of the freeway. While the injunction stopped the construction of the freeway, it did not stop CalTrans from doing preparatory work.

3) An injunction that allows the defendant agency to continue preparatory work may lead to increased bureaucratic momentum in favor of the project.

Government agencies have the advantage of being permanent institutions that withstand the pressures of an injunction. The 710 Freeway injunction allowed CalTrans's staff to continue planning the freeway, which gave CalTrans the hope that eventually they would be able to build the freeway. If CalTrans were enjoined from working on the freeway until the merits of the lawsuit were resolved, it might have given the institution an opportunity to re-evaluate the merits of the project.

4) Courts should not issue an injunction whose primary purpose is to delay a project.

Plaintiffs should not be allowed to rely on a manufactured defect to obtain an injunction. Courts should beware of plaintiffs whose true purpose is to stop a project through political means. It is in no one's interest to have a project be up in the air for a period of many years. The uncertainty affects the lives of people within the area, people within the agencies and the attorneys associated with the case. By using an injunction as a delay tactic, some attorneys may only prolong the inevitable or end up causing the project to be canceled.

Plaintiffs may seek an injunction for legitimate and delay reasons. If an injunction that is granted on a merit-based claim also delays the project for a long period, this is a side benefit to the plaintiffs. The defendant agencies need to realize this possibility. The distinct possibility of a prolonged delay has motivated many government agencies to be much more careful in the way in which they go about building large public works projects.

5) There needs to be a way for courts and parties to ensure that injunctions do not exceed the legitimacy of a project's original environmental assessment.

It is exasperating for all parties involved in an environmental lawsuit to have all the procedural deficiencies remedied by the final action, only to find that the original environmental assessment is out of date. Courts should consider placing reasonable time limits on defendant agencies to remedy the situation. If the defendant agency is unable to meet this deadline, the court could cancel a project. (Of course, the ability of a court to do this would probably require statutory authorization in environmental statutes.) This will encourage the agency to address the situation as soon as possible. It would help resolve the issues sooner and remove uncertainty for the parties involved.

Rarely does anyone like uncertainty. A court-mandated deadline gives both the plaintiffs and the defendants a benchmark when the issues will be resolved.

Conclusion

Courts have long used equitable tools to decide disputes. Although equitable tools have their roots in the courts of equity, generalist judges now use them frequently to help manage both busy calendars and complex factual and legal patterns.

The environmental regulation movements of the late 1960s and early 1970s resulted in a variety of new environmental laws. These new laws recognized injuries that did not fit within the traditional mold of common-law jurisprudence. Perhaps the strongest weapon of these environmental laws is the possibility of an injunction to stop a government institution from constructing a potentially harmful project. The use of injunctions in the environmental setting recognizes the irreparable and non-compensatory nature of some government actions. Because these environmental laws pose new types of injuries and require new types of analyses, courts have found the use of equitable tools helpful in trying to resolve environmental cases.

Consent decrees have become a powerful tool for both plaintiffs and judges seeking to reform government agencies. A court can supervise the practices of a government agency over a long period by implementing a consent decree. This extended period of judicial supervision helps to institutionalize values that both the court and the plaintiffs see as positive in a defendant institution. Without consent decrees, courts can only resolve a case or controversy immediately presented to them. While plaintiffs might win a particular case against a government agency based on specific injuries, without consent decrees there is little guarantee that further injuries will not occur. Many plaintiffs seek not only specific redress for their individual injuries, but also demand a defendant agency to change its practices and policies in the future.

As society has become more complex and technical, many of the issues now presented in lawsuits require considerable expertise on the part of the judge and the parties involved. This increased complexity of subject matters and lawsuits has arisen at the same time our federal courts have become crowded. It is difficult for a federal judge with a very busy docket to fully analyze the issues presented in environmental cases. Environmental cases present ideal opportunities for special masters to advise the court on technical issues. In the context of consent decrees, special masters can help the court monitor an institution. Special masters, with appropriately circumscribed duties, can monitor the defendant

institution and report to the court their findings. In this way special masters can operate as chaperones, keeping an eye on the institution, while the parent court can rest assured that it will only have to decide broad matters of policy and legal issues. It is not efficient for a court to monitor the day-to-day operations of an institution.

Some of the most significant court battles surrounding transportation projects took place, or at least started in the 1970s. This was a time when government agencies had to cope with a variety of new environmental regulations and increased pressures from communities. While transportation agencies had to cope with these changing factors, there has been an overall decrease in the number of transportation projects built in the country. In part this is due to the lessened need for large public works projects and to the concern over increasingly high costs. These high costs are attributable to the challenges presented in compliance with environmental laws, litigation and efforts to work with communities.

The foregoing analyses demonstrate how courts have responded to many of the unique injuries and legal issues posed by large transportation projects. By using equitable tools such as consent decrees, special masters and injunctions, courts have been able to respond creatively to these novel issues. These analyses provide recommendations for plaintiffs, defendants and courts to help them create better judicial remedies. The use of these tools presents a variety of potential problems but also has advantages.

The future of large public works projects remains doubtful, especially in a heavily urbanized state like California. However, government agencies trying to plan for the future should recognize the standards placed upon them by environmental laws and should work with communities to avoid litigation. The approach of CalTrans in rebuilding the Cypress Freeway is an encouraging sign for both government agencies and communities.