Entry of the MWRD Decree: A Template for Other Utilities

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The Background

- MWRD was the CSO Granddaddy, with:
  - 1972, multi-billion dollar commitment to CSOs
  - 1975 construction start
  - 1995 approval of LTCP
  - Largest storage capacity in nation – by far
  - Billions of dollars of work already in the ground
  - Massive water quality benefits to date

So What Was So Challenging?

- A 54-year construction period
- Reliance on others (Corps/Quarries) to perform major portions of work – but no control over those parties
- Design predated modeling, so modeled performance could not be used as Performance Standard
- The eternal desire of enforcers for MORE

Adding to the Challenge . . .

- In addition to U.S. and State, we had active NGO demands for MORE
  - 135 pages of comments and 3,423 pages of attachments (109 page DOJ response, with 50-page brief)
  - Intervened in US case
  - 6 wild weeks of discovery (18,870 pages; 94 RFAs; two full-day 30(b)(6) depositions)
  - Briefs opposing entry totaled 100 pages with 87 exhibits

What Did the NGOs Argue?

- Decree merely adopts existing LTCP (demanded second look at whether Plan was approvable back in 1996)
- Construction duration too long
- Fails to evaluate alternatives (adding end of pipe treatment, for example)
- Inadequate use of GI
- Storage capacity too small – “CSOs may still occur”
- Detailed post-construction monitoring plans not included in Decree

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And What Did We Get?

- No second guessing of/changes to approved LTCP
- Fastest, achievable, and practicable completion schedule
- Recognition of necessary reliance on others
- Deferred development of post-construction monitoring plans approved
- Meaningful, workable GI commitment

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The Template For Success

Must a Judge Consider 3rd Party Concerns? Yes.

"A federal judge has the full powers of an equity judge. So if third parties complain to him that the decree will be inequitable because it will harm them unjustly, he cannot just brush their complaints aside."

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The Standard

"... [a] judge thus must, before signing an equity decree that either affects third parties or imposes continuing duties on him, satisfy himself that the decree is reasonable ('fair, reasonable and adequate,' in the usual formulation, but we think 'reasonable' sums it up fairly and adequately) ..."

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Court Agrees Not to Re-Write Decree

"The Court will either approve the consent decree as reasonable or reject the consent decree as unreasonable. It will not revise the consent decree that the parties have negotiated."

- Clarifies that issue before court is a binary, and there is no authority to alter terms

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Court Adopts Key Presumption

" . . .[h]ow deeply the judge must inquire, what factors he must take into account, and what weight he should give the settling parties' desires will vary with the circumstances . . . but it is safe to suggest that the limitations of judicial competence and the desirability of encouraging out of court settlements . . . create a presumption in favor of approving the settlement."

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Articulates Broad Interpretation of the "Public Interest"

- "The public . . . includes more than just the people who sail on Lake Michigan or kayak in the Chicago River"
- The public includes:
  - People concerned about flooding
  - Taxpayers, interested "in this project's being completed at a reasonable cost"
- Court considered all of these interests when assessing "reasonableness"

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Rejects "Do Over" Of 1996 State Approval of LTCP

"Intervenors do not explain why they have a private right of action to challenge IEPA's determinations with respect to planning activities and the Presumption Approach . . .[nor] why this Court would have jurisdiction to hear such a challenge."

"This Court will not hear intervenors' challenge to the IEPA's determinations . . .."

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Specific Findings

- *Duration too Long?*
  - ". . . the project is huge and, like Rome, cannot be built in a day."
  - "By the time TARP is finished, MWRD will have added an average of 323,000,000 gallons of storage capacity per year, which is an average of 885,000 gallons per day of additional storage capacity. That is impressive, not unreasonable."

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Specific Findings

- *Speed up rock sales by waiving royalty or underwriting discount on quarried rock?*
  - "The public, remember, is interested in getting this project done economically."
  - "Intervenors do not say how much their alternative solutions would cost."

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Specific Findings

- *Mining Delays Beyond the District's Control ("Contingency Events") Should be District's Responsibility?*
  - "All the contingency event provision means is that the MWRD will not be held accountable for things that are outside of its control. That is reasonable. Punishing someone for something out of his/her control has no deterrent effect."

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Specific Findings

- *Demand for End-of-Pipe treatment?*
  - "At any price, these end-of-pipe treatments strike the Court as fiscally irresponsible. In essence, the end-of-pipe treatments would duplicate the TARP system's task, which is to allow the treatment of all waste water before it is released."

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Specific Findings

- *Green Infrastructure program insufficient?*
  - "The green infrastructure projects are not mandated as part of the TARP plan and are not required by any law. The green infrastructure plan is icing on the TARP cake, a bonus."
  - "The intervenors have not convinced the Court that the inclusion of the green infrastructure plan renders the consent decree unreasonable."

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Specific Findings

- *Potential for CSO events after completion is a failure?*
  - "Intervenors' argument rests on a fundamental fallacy, which is that all CSOs violate the Clean Water Act. That is not correct. Discharges without a permit violate the Clean Water Act. CSOs that comply with a permit do not violate the Clean Water Act."

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Specific Findings

- *Absence of detailed post-construction monitoring plans is "agreement to agree?"*
  - "Given that the monitoring plans cannot be put into effect until the relevant reservoirs are complete and operational, the Court concludes that it is reasonable for the parties to work out the details of the monitoring plans after the consent decree is entered."
  - Also, later development of plans recognizes need to respond to then-current permits

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Opinion Establishes Precedent for Success in Your Case

- Embrace a “reasonableness” standard
- Eschew editing of parties’ agreement
- Adopt presumption in favor of approving settlement
- Take a broad view of the public interest
- Eliminate legally unsupportable arguments
- Apply reasonableness test to the rest

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Thank You!