UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES of America,

Plaintiff, and

Miccosukee Tribe of Indians of Florida, Florida Keys Citizen Coalition, Florida Audubon Society, Florida Wildlife Federation, Environmental Defense Fund, Sierra Club, National Wildlife Federation, Wilderness Society, National Parks & Conservation Association, Defenders of Wildlife, & Treasure Coast Environmental Coalition.

Plaintiff-Intervenors,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, Florida Department of Environmental Regulation, Tilford Creel Executive Director, South Florida Water Management District, John R. Wodraska, Dale Twachtman,

Defendants, and

City of Belle Glade, City of Clewiston, Western Palm Beach County Farm Bureau, Inc., Roth Farms, Inc., K.W.B. Farms, Florida Fruit and Vegetable Association, & United States Sugar Corporation,

Defendant-Intervenors.

/

No. 88-1886-CIV-HOEVELER

FILED BY _____ D.C.
2001 APR 27 PM 4:18
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA - MIA

OMNIBUS ORDER

1623

THIS CAUSE comes before the Court on Remand for consideration in light of the Everglades Forever Act ("EFA"), Fla. Stat. § 373.4592 (Supp. 1994), and upon the Joint Motion of the United States of America, the South Florida Water Management District ("District"), and the Florida Department of Environmental Protection ("DEP") for the Approval of Modifications to the Settlement Agreement Entered as a Consent Decree. Also before the Court are the following motions: (I) Motion to Enforce the Settlement Agreement and Consent Decree and for the Appointment of a Special Master to Oversee Their Implementation, or, in the Alternative to Allow Tribe to Proceed with Federal Everglades Lawsuit Against State Defendants and Federal Government, filed March 16, 1995 by Plaintiff-Intervenor Miccosukee Tribe of Indians of Florida ("Tribe"); (II) Tribe's Motion to Enforce Terms of Settlement Agreement, filed February 13, 1996; and (III) Tribe's Supplemental Emergency Motion to Enforce Western Basin Provisions of Settlement Agreement, filed May 24, 1996.

The Court has reviewed the arguments and the pertinent law and concludes that the Settlement Agreement entered as a Consent Decree may be modified. The Court further concludes that the Modified Consent Decree does not conflict with any recent provisions of federal or state law, including and in particular, the EFA. Additionally, the Court has determined that the appointment of a Special Master might assist it in keeping track of the parties' progress toward reaching the goals outlined in the Agreement and mandated under the EFA. In light of these determinations, the Tribe's Motion(s) to Enforce the (original) Settlement Agreement are DENIED, without prejudice to request an order t show cause Court rules on the Motion to Appoint a Special Master.

I. Background

On February 24, 1992, this Court approved a Settlement Agreement between the United States, the District, and the Florida Department of Environmental Regulation (now DEP) that ended years of litigation initiated by the federal government to protect the remaining Everglades in the Loxahatchee National Wildlife Refuge and the Everglades National Park from the detrimental effects of nutrient-rich farm-water runoff released into those areas through structures operated by the District. See United States v. South Florida Water Mgmt. Dist., 847 F. Supp. 1567, 1572 (S.D. Fla. 1992), aff'd in part, rev'd in part, United States v. Southern Florida Water Mgmt. Dist., 28 F.3d 1563 (1994), cert. denied sub nom, Western Palm Beach County Farm Bureau, Inc. v. United States, 514 U.S. 1107 (1995).

Under the terms of the original Settlement Agreement adopted by this Court as a Consent Decree nearly ten years ago, the principal parties endorsed an ambitious strategy to restore and preserve the Everglades ecosystem. The Agreement was remarkable at the time in that it established interim and long-term phosphorus concentration limits, as well as specific remedial programs designed to help achieve those limits. For example, the original Settlement Agreement proposed specific projects including the construction of large flow-through marshes called Stormwater Treatment Areas ("STAs") and the adoption of special farming practices, or Best Management Practices ("BMPs"), for balancing water quality with agricultural productivity.

None of these remedial provisions, however, were deemed inconsistent with state law as the law existed at the time, in fact, both this Court and the Appellate Court found

the opposite to be true. See South Florida Water Mgmt. Dist., 847 F. Supp. at 1572 (expressly incorporating language that "requires the District and the DER to fulfill their obligations under existing state law"); Southern Florida Water Mgmt. Dist., 28 F.3d at 1570 (finding that "[t]he essence of the Agreement [was] to achieve compliance with [s]tate law," and, "[t]here [was] no suggestion . . . that the Consent Decree violates state law."). This great deference to the state procedures in the Consent Decree was due, in part, to the Court's legitimate concerns about federalism and due process.

In its Order entering the original Settlement Agreement as a Consent Decree, the Court went to great lengths to address the due process concerns of the intervening parties and assure them "that the agreement is not self-executing, but rather is subject to Florida's Administrative Procedure Act ("APA"), Fla. Stat. § 120.50 (1991) et seq." South Florida Water Mgmt. Dist., 847 F. Supp. at 1570. Therefore, while the original Settlement Agreement may have been more specific than the state laws as they existed at the time, the parties were assured that any provision of the Agreement that must be implemented through state administrative proceedings would be done so, as required by state law, and that in this way the intervenors would be able to challenge any provisions that directly affected their rights.

In practice, the implementation of the Agreement proved very challenging. Shortly after this Court entered the Consent Decree, and while it was on appeal, the flood of litigation surrounding the Everglades restoration spilled into the state courts where, as expected, the intervening parties voiced their challenges to the implementation of the Settlement Agreement. E.g., Florida Sugar Cane League, Inc. v. South Florida Water

Mgmt. Dist., 617 So.2d 1065 (Fla. 4th DCA 1993) (rejecting a challenge to the settlement agreement as premature); Sugar Cane Growers Coop. of Florida, et al. v. South Florida Water Mgmt. Dist., et al., Division of Administrative Hearings (DOAH) Case Nos. 92-3038,92-3039,92-3040 (challenging the implementation of the District's Surface Water Improvement and Management (SWIM) plan under the Florida Administrative Procedure Act).

Just when it was beginning to look like legal gridlock would hopelessly delay the implementation of any reform programs, several key parties,[1] signed a Statement of Principles. The Statement of Principles, signed in 1993, represented the culmination of the parties' mediation efforts and offered a ray of hope, however, alone it was not enough. Shortly thereafter, while the original Consent Decree was still being challenged on appeal and its implementation via the State's administrative process was still pending in the state courts, the Florida Legislature stepped into the fray and passed the Everglades Forever Act, Fla. Stat. § 373.4592 (1994). Former Governor Chiles, who himself had stepped into the fray earlier in the litigation,[2] quickly signed the bill on May 3, 1994.

One immediate effect of the EFA was to render the state court challenges to the District's SWIM plan moot. See EFA, § 373.4592(3) (2000) ("[T]he SWIM plan requirements of those sections shall not apply to the Everglades Protection Area and the

---

[1]The signing parties including the United States, the District, the DEP, and certain important agricultural industry representatives. The Tribe and the Conservationists were not made party to the agreement. See Statement of Principles, Def. Exhibit 16.

[2]On May 21, 1991, after the United States had given notice of taking more than ninety (90) depositions in the next five months, then Governor Chiles appeared in court in an attempt to end this massive lawsuit.

EAA during the term of the Everglades Program. . . ."). Building upon the Statement of Principles, the EFA also expressly recognized the detrimental impact of excessive phosphorus, § 373.4592(1)(c)—(d), and mandated many of the corrective programs outlined in original Settlement Agreement, including the construction of STAs and implementation of BMPs. See § 373.4592(4)(a) (requiring six STAs), § 373.4592(4)(f)(2) (requiring continued implementation and enforcement of BMPs). The EFA, however, substantially rewrote portions of the Marjorie Stoneman Douglas Everglades Protection Act, 1991 Fla. Laws ch.91-80, upon which much of the original Agreement had been based. Therefore, shortly after the enactment of the EFA, the Court of Appeals remanded the original Consent Decree for further consideration in light of the EFA. See Southern Florida Water Mgmt. Dist., 28 F.3d at 1574.

Now, nearly ten years after the original Settlement Agreement, much has changed although the litigation still remains. Since late 1994, pursuant to the remand, this Court has heard arguments on several occasions and reviewed the various "solutions" proposed by the parties–solutions that literally run the gamut from immediate enforcement, to modification, to vacating the consent decree, to even declaring the EFA unconstitutional.[3] Of the motions that remain, the Joint Motion for Approval of Modifications to the Settlement

---

[3]For example, after the remand the Tribe immediately sought enforcement of the Consent Decree, (See Docket Entry No. 1313), then later moved to strike down the EFA as an unconstitutional impairment of contract. (See Docket Entry No. 1354). The Farm Interests sought a stay pending Supreme Court action on their petition for certiorari, (See Docket Entry No. 1314), then later sought to vacate the Consent Decree. (See Docket Entry No.1336). And the United States, the District, and the DEP jointly sought approval of modifications to the Settlement Agreement entered as a consent decree. (See Docket Entry No. 1326).

Agreement deserves special scrutiny because to the extent that there may have been a conflict between the EFA and the original Consent Decree, the proposed modifications might resolve the problem. Similarly, any analysis about enforcing the original Consent Decree at this point in time–after many of the original deadlines have lapsed and after the enactment of state legislation that contains more permissive deadlines and, in some instances, more comprehensive relief–might be unnecessary if the Court retroactively accepts the Settling Parties' proposed extensions in the modified Settlement Agreement.

With this in mind, the Court conducted an extensive "fairness hearing" over a period of ten days in late 1995 to review the proposed modifications. During this time all parties were permitted to call and cross examine witnesses, present documentary evidence, and orally argue their respective positions. The Court accepted voluminous submissions addressing the numerous motions filed by the many parties in this case. After the hearings the parties were permitted to file supplemental materials, and the Court continued conduct status conferences and request status reports in an effort to slog through the materials. By examining each of the myriad documents and the complicated scientific analyses offered by the various experts, the Court has struggled to temper its examination of the law with its growing understanding of the complicated scientific arguments underlying many of the challenges. Ultimately, however, this Court's decision must be shaped by the scope of its authority to act pursuant to the applicable laws including the rules that govern the modification of consent decrees.

II. Analysis

A. Consent Decrees

The Supreme Court has recognized that consent decrees "'have attributes of both contracts and of judicial decrees,' a duel character that has resulted in different treatment for different purposes." Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 522 (1986) (quoting United States v. ITT Continental Baking Co., 420 U.S. 223, 235-237 & n.10 (1975). The underlying agreements are often the result of careful compromise and a desire to avoid the expenses and uncertainties of further litigation. This agreement (or consent) of the parties serves, in part, as the source of the court's authority to bind the parties prior to judgment and to impose broader obligations than the law might have required. Id. (citing United States v. Ward Baking Co., 376 U.S. 327 (1964); see also Id. at 525-26 (recognizing that a federal court may enter a consent decree that provides broader relief than the law requires, so long as the parties' agreement does not conflict with or violate the statute upon which the complaint was based).

Nonetheless, "[a] consent decree is, after all, a judgment and is entitled to a presumption of finality." Delaware Valley Citizens' Counsil for Clean Air v. Commonwealth of Pennsylvania, 674 F.2d 976, 981 (3d Cir.), cert. denied, 459 U.S. 905 (1982). Thus, despite the peculiar nature of the Consent Decree in the case sub judice, the Court must be careful to ensure that its review of the proposed modifications recognizes the appropriate level of deference to the presumed finality of its Order, without ignoring the inherent flexibility expressed by the original Settlement Agreement or the support for the modifications by the Settling Parties.

B. Modifying Consent Decrees

There can be little doubt that the Court possesses the inherent power to modify its

Consent Decree, even as a final judgment. See Fed. R. Civ. P. 60(b)(5); Agostini v. Felton, 521 U.S. 203 (1997); Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992); United States v. Swift & Co., 286 U.S. 106 (1932). The rules governing the exercise of such power, however, appear to vary somewhat with the circumstances. In one of the earliest Supreme Court decisions addressing the standard for modification, Justice Cardozo wrote that modification required "[n]othing less than a clear showing of grievous wrong evoked by new and unforseen conditions." Swift, 286 U.S. at 119.

Sixty years after the decision in Swift, the Supreme Court once again offered a clear pronouncement on the proper standard for modifying consent decrees. See Rufo, 502 U.S. at 383-84, 393. In Rufo, the Supreme Court, per Justice White, held that pursuant to Federal Rule of Civil Procedure 60(b)(5) a district court may grant a motion to modify a consent decree when the party seeking the modification establishes "a significant change in either factual conditions or in law," and the proposed modification is "suitably tailored to the changed circumstance." Id. In so holding, however, the Supreme Court in Rufo did not expressly overrule Swift. Instead, the majority drew upon the language in Swift to recognize consent decrees stemming from institutional reform litigation and the vindication of constitutional rights as exceptions to the grievous wrong standard. Id. at 379 (quoting Swift, 286 U.S. at 114-15, and distinguishing between "restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative."); see also id. at 383 n.7 ("The standard we set forth applies when a party seeks modification of a term of a consent decree that

arguably relates to the vindication of a constitutional right."). But see United States v. Western Electric Co., 46 F.3d 1198, 1203 (D.C. Cir. 1995) (suggesting that Rufo gave the "coup de grace" to Swift).

While the Consent Decree now before the Court does not involve institutional reform or the vindication of a constitutional right per se, it does appear to fall into the provisional and tentative category of decrees that involve the supervision of changing conduct or conditions as distinguished in both Swift and Rufo. It too was "designed to remain in place for an extended period of time," thus increasing "the likelihood of significant changes." Rufo, 502 U.S. at 380. Similarly, like institutional reform litigation decrees that "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions," the decree sub judice reaches out to the public's right to the sound and efficient management of its environment. Id. at 381.

The fact that the holding in Rufo was limited to institutional reform does not invalidate the reasoning set forth therein and automatically disqualify other types of consent decrees from this more liberal standard. See e.g. Western Electric Co., 46 F.3d at 1203 (extending the flexible Rufo standard to an antitrust consent decree, reasoning that "the Supreme Court's summary of what might render a modification 'equitable' relates to all types of injunctive relief.");[4] In re Hendrix, 986 F.2d 195, 198 (7th Cir. 1993) (extending the Rufo standard to the modification of a bankruptcy discharge); see also Agostini, 521 U.S. at 215 ("We held that it is appropriate to grant a Rule 60(b)(5) motion

[4]This is especially significant because, Swift, was also an antitrust case.

when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.'"); Bellevue Manor Assocs. v. United States, 165 F.3d 1249, 1256 (9th Cir. 1999) (observing that the Agostini decision described Rufo without limiting it to "institutional reform" cases or to "those that significantly affect the public.").

Even prior to the Supreme Court's holding in Rufo, the case law in the Eleventh Circuit has recognized that when a consent decree involves the supervision of changing conditions, the stringent standard announced in Swift may be lessened. See e.g., Newman v. Graddick, 740 F.2d 1513, 1520 (11th Cir. 1984) (examining institutional reform of a prison system and involving a constitutional right); Hodge v. HUD et al., 862 F.2d 859 (11th Cir. 1989) (finding housing injunction provisional in nature); Cook v. Birmingham News, 618 F.2d 1149 (5th Cir. 1980) (distinguishing between Swift and Rule 60(b), with the latter "to be construed liberally to prevent injustice.").[5] Exactly how much this standard should be lessened, however, is a matter of some concern because the Settling Parties argue for a modification standard even more lenient than the one outlined in Rufo.

The Consent Decree in this case, however, is something of a rare avis. It did not completely bind the parties to a particular outcome or require the agencies to adopt the terms of the Agreement over a hearing officer's findings of fact at a section 120.57 trial-type hearing. See South Florida Water Mgmt. Dist., 847 F. Supp. at 1571. It imposed "a process rather than a result, in effect recognizing an administrative framework while

[5]The Eleventh Circuit has adopted as binding precedent all decisions of the Fifth Circuit handed down prior to October 1, 1981. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

preserving this Court's ultimate jurisdiction." Id. at 1572. While the Decree did bind the defendant agencies to "propose" the measures outlined in the Settlement Agreement, see South Florida Water Mgmt. Dist., 847 F. Supp. at 1571, the Court also recognized that the state agencies' authority to act was circumscribed by their obligation to observe state law and to defer to the State's administrative process. In short, the original Consent Decree relied upon the provisions and requirements of state administrative law to preserve challenges to the shape and scope of its proposed remedies, see id., and in that sense, "the [original] Agreement [did] not dictate how the dispute must be resolved." Id. at 1572. This, however, is not to say that the terms of the original Settlement Agreement were without any weight or binding force. The United States, and by implication other parties entitled to enforce the Consent Decree including the Tribe, retained the right to invoke this Court's jurisdiction "if the settling parties are unable to agree to a modification of the Agreement after resort to dispute resolution." Id. at 1571-72.

This Court's prior reference to modifications in the Consent Decree along with the dispute resolution process contained in the original Settlement Agreement itself, (see Settlement Agreement, ¶ 19), provide a sufficiently clear indication that this Court and the parties envisioned future modifications reflecting refinements in state law as part of the natural course of the proceedings sub judice. Given that "[t]he essence[6] of the Agreement [was] to achieve compliance with [s]tate law," Southern Florida Water Mgmt. Dist., 28 F.3d

[6]The Court recognizes that consent decrees may not properly be said to have purposes, but rather the parties have purposes, see United States v. Armour, 402 U.S. 673, 681-82 (1971). Here, however, the Plaintiff's purpose in bringing this action involved ensuring state compliance with state law. See Amended Complaint, counts I & II (filed Dec. 23, 1988).

at 1570, and given that the implementation of some of the proposals in the original Settlement Agreement had not yet been challenged under state law, it was certainly foreseeable by all of the parties to this litigation that the Consent Decree might need to be modified.

The Settling Parties, however, extend this reasoning one step further and conclude that because the Consent Decree was interlocutory, "this Court has the inherent authority to reconsider, vacate, revise, or modify in any fashion [the Consent Decree] in the interests of justice or equity." District & DEP's Consolidated Reply in Support of Motion for Approval of Modifications, at 26 (citing John Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 88-91 (1922); Marconi Wireless Tel. Co. v. United States, 320 U.S. 1, 47-48 (1943); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 862 (5th Cir. 1970); Gallimore v. Missouri Pacific R.R., 635 F.2d 1165, 1171 (5th Cir. 1981); Fed. R. Civ. P. 54(b); Fed. R. Civ. P. 60(b), advisory committee's note).

The United States, District, and DEP (hereinafter collectively referred to as "the Settling Parties") contend that the Consent Decree was "an interlocutory order granting an injunction, not a final judgment or order." See Joint Motion for Approval of Modifications to the Settlement Agreement Entered as a Consent Decree (hereinafter "Motion to Modify") at 14 n.6 (citing the jurisdictional paragraph of the appellate review of the Consent Decree). In at least one respect, they are correct. The Appellate Court did base its jurisdiction on 28 U.S.C.A. § 1292(a)(1) and treated this Court's Consent Decree as an interlocutory order. See Southern Florida Water Mgmt. Dist., 28 F.3d at 1566-67. However, in the same sentence the Appellate Court recognized that the Consent Decree

disposed of all claims. Id. ("Although interlocutory in nature, the Consent Decree is effectively dispositive of all claims below."). Therefore, it is not immediately clear from the Settling Parties' pleadings how classifying a consent decree as interlocutory for appellate review purposes, necessarily means that this Court should be given wide latitude to modify it over the objections of the intervening Plaintiffs.[7]

For example, the Court finds the fact that the Consent Decree was "interlocutory" for appellate review purposes is not necessarily determinative of the standard for modifying that order. Federal appellate courts may exercise their jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), yet still apply the standards for modification set forth by the Supreme Court. E.g., United States v. State of Michigan, 940 F.2d 143, 150 (6th Cir.1991) (basing jurisdiction on § 1292(a)(1) yet observing that "[t]he standard for justifying the modification of a consent decree is a strict one and 'a consent decree is, after all, a judgment and entitled to a presumption of finality'"). One circuit court even applied the Rufo standard to what it labeled "a preliminary injunction." Favia v. Indiana University of Pennsylvania, 7 F.3d 332, 338, 341 (3d Cir. 1993) ("In order to prevail on a motion to modify, the movant must establish a change in circumstances that would make the original preliminary injunction inequitable. . . . Nevertheless, because this case involves institutional reform, Rufo controls and its more flexible standard of inequity applies.").

Relegating the Supreme Court's decisions in Rufo and Swift to a footnote, the

---

[7]Despite their earlier pleadings, Farm Interests expressed their support for the proposed modifications, second only to their preference for vacating the Settlement Agreement altogether. The Court has already ruled against vacating the Agreement. See Order Denying Motion to Vacate, (entered Oct. 13, 1998).

Settling Parties muddy the waters in this controversial area of law by creating a distinction between Consent Decrees "that involve the supervision of changing conduct or conditions and are thus provisional and tentative," as discussed in Swift and quoted in Rufo, and mere "interlocutory Consent Decrees," which according to them, may be modified "in any fashion in the interests of justice or equity." Reply to Motion to Modify, at 26. By seemingly suggesting a liberal "ratification" standard, the Settling Parties suggest that the Consent Decree sub judice may be changed even more easily than it was entered, despite the objections of the intervening Plaintiffs and the apparent infringement on the Tribe's right to enforce the agreement. Compare In re Smith, 926 F.2d 1027, 1028-29 (11th Cir. 1991) ("In determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties.").

In response to the "ratification" standard proposed by the Settling Parties, the Tribe argues, "[a] consent decree is by its very nature, a final judgment." See Tribe's Response, at 27 (filed July 12, 1995). In essence, the Tribe's theory presumes that all consent decrees are final and unless they are institutional reform consent decrees, they should be subjected to the Swift standard. See id. at 27-31. Whereas, the Conservation Intervenors agree that the Consent Decree sub judice was "interlocutory," however, they vigorously object to the "ratification" standard. See Conservation Intervenor's Response, at 24 (filed July 17, 1995). They suggest that the Court need not reach the issue of whether Swift applies, because the Settling Parties have not met their burden under Rufo. See id. at 16.

Upon reflection, the Court does not feel compelled to set foot in the quagmire

created by the semantic reasoning proffered by the Settling Parties. It does not wish to recognize a new subspecies of consent decree, nor does it seek to disturb the Appellate Court's express conclusion that the Consent Decree in the case sub judice was an interlocutory order. See Favia, 7 F.3d at 341 n.16 ("We believe the application of different standards to litigated decrees, consent decrees, decrees dealing with institutional reform, etc. could generate an undesirable complexity and uncertainty about the standard that an appellate court should apply in reviewing an order to grant or deny modification of an equitable decree.").

The mere fact that the Conservationists and the Tribe are intervenors does not preclude them from challenging the modifications. See e.g., Vanguards of Cleveland v. City of Cleveland, 23 F.3d 1013 (6th Cir. 1994) (applying the Rufo standard to a proposed modification objected to only by the intervenors). Nonetheless, the intervenors' role in this matter is limited to the extent that their participation in the original litigation was limited,[8] which, broadly speaking, means the degree to which their rights are affected by the Consent Decree. See United States v. City of Hialeah, 140 F.3d 968, 975 (11th Cir. 1998) ("Our holdings in United States v. City of Miami, 664 F.2d 435 (former 5th Cir. 1981) (en banc), and White v. Alabama, 74 F.3d 1058 (11th Cir. 1996), make it clear that a consent decree requires the consent of all parties whose legal rights would be adversely affected by the decree.");see also Gautreaux v. Pierce, 743 F.2d 526, 530, 533-35 (7th Cir. 1984)

---

[8]For example, the Farm Interests were granted participation in this litigation "solely to the extent that [this Court's] resolution of this case might actually [translate narrative water quality standards into numeric limits]." United States v. South Florida Water Mgmt. Dist., 922 F.2d 704, 706 (11th Cir.), cert. denied, 502 U.S. 953 (1991); See also Southern Florida Water Mgmt Dist., 28 F.3d at 1567 (re-emphasizing the holding).

(recognizing intervenors' rights to object to consent decree limited by scope of their intervention).

Therefore, this Court must approach the task of reviewing the proposed modifications guardedly so as to ensure the adequate protection of the intervening parties' legitimate rights and expectations, while simultaneously recognizing the limited role of their intervention and not handling things in such a way as to discourage future parties from adopting settlement agreements in lieu of litigation. It should also be pointed out that even the Rufo standard recognized that when the changes were minor, and did not affect constitutional rights, "[o]rdinarily, the parties should consent to modifying a decree to allow such a change." Rufo, 502 U.S. at 383 n.7.

This suggests what may be the key to resolving some of the confusion surrounding the proposed modification standards in this case. When the proposed modifications to a "provisional and tentative," consent decree are legitimately opposed, Rufo applies. When the proposed modifications are not opposed, the Court may exercise a more liberal, equitable review to ensure that the agreement, as modified, remains "fair, adequate, and reasonable," and is not the product of collusion between the parties, or in conflict with the statute upon which the complaint was based, or otherwise against public interest. In re Smith, 926 F.2d at 1028-29 (articulating "fair, adequate, and reasonable" standard for reviewing settlement agreements); Local 93, Int'l Ass'n of Firefighters, 478 U.S. at 525-26 (expressing the limits of the trial court's power to enter a consent decree); see also Rufo, 502 U.S. at 375-76 (documenting how prior to the district court's denial under the Swift standard, the district court had approved a modification where all parties consented);

United States v. Baroid Corp., 130 F.Supp.2d 101, 104-05 (D.C. 2001) ("If all parties to the agreement consent to the modification [of an antitrust consent decree], a court need only review the modification to ensure that it is in the 'public interest.') (citing United States v. Western Elec. Co., 900 F.2d 283 (D.C. Cir. 1990); United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983)).

For all the reasons set forth above, this Court shall apply the Rufo standard of review urged by the objectors[9] if it appears that the challenged modification affects their legal rights. In those instances, where a proposed modification fails to warrant such a stringent review, either because the parties agree, or the parties who do not agree do not have a protected interest, the Settling Parties may assume that this Court is exercising the broader equitable powers appropriate when all of the affected parties agree. Here, the settling parties have proposed forty-nine (49) modifications, see Appendix A, the vast majority of these fall into the latter category, and therefore, the Court will not belabor this Order any further by addressing their merits individually.

Under the Rufo standard the parties seeking modification must satisfy a two-prong standard. "The first prong requires the party seeking modification to 'establish that a significant change in facts or law warrants revision of the decree.'" Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1563 (11th Cir. 1994) (citing Rufo, 112 S.Ct. at 765), reh'g en banc denied, 60 F.3d 717 (1994). "If the moving party satisfies this requirement, then the second prong requires the court to make modifications that are 'suitably tailored' to

---

[9]The Court recognizes that the Tribe urges the Swift standard, however, for the reasons already discussed in this Order, the Court declines to apply the standard set forth in United States v. Swift & Co., 286 U.S. 106 (1932), in light of Rufo, *supra*.

address the new factual or legal environment." Id. If this standard seems harsh in light of the provisions of the Consent Decree sub judice, it should be remembered that this Court and the Settling Parties deliberately created a "process" that left much to subsequent state proceedings but was very specific about the form of the relief and the appropriate time frame for correcting the problem. Moreover, the Settling Parties should consider how they would want this Court to resolve this dispute if they could not agree with one another. In short, this Court is not prepared to abandon its previous decree so easily. The need for an enduring document and the availability of this forum remain just as important today as they were ten years ago.

III. Findings

A. New Legislation

Apart from the EFA, there is no new legislation that significantly affects the terms of the original Settlement Agreement entered as a Consent Decree. The federal Water Resources Development Act of 2000 (WRDA 2000), Pub. L. No. 106-541, 114 Stat 2572 (December 11, 2000), does contain a provision, title VI, which approves of the Comprehensive Everglades Restoration Plan (CERP) prepared by the United States Army Corps of Engineers in conjunction with other federal and state agencies, including some of the parties to this suit. The WRDA 2000, also jointly sponsors the first set of projects in the CERP at a cost of well over a billion dollars. See title VI, § 601(b)(1)(B). Similarly, the Florida Legislature has approved participation in the CERP, see Fla. Stat. 373.470, and authorizes state funding to assist the District in meeting its financial responsibilities.

as the local sponsor of the CERP.

Nonetheless, Congress has been clear, both in the WRDA 2000 and its predecessor, the WRDA 1996, that the CERP should be integrated with the Everglades Construction Project and that the provisions of the federal-state cost sharing do not change the cost-sharing agreements in the Everglades Construction Project. See Pub. L. No. 104-303, § 528(c)(1)(D), (e)(2)(B)(ii), 110 Stat. 3770 (Oct. 12, 1996); WRDA 2000, § 600(b)(1)(B) ("Unless specifically provided herein, nothing in this section shall be construed to modify any existing cost share or responsibility for projects as listed in subsection (c) or (e) of section 528 of the Water Resources Development Act of 1996."). In fact, not only does the WRDA not interfere, there is some interdependence.

The reforms planned in the CERP are premised on the assumption that the parties to this suit will accomplish the matters addressed in the Settlement Agreement entered as a Consent Decree and now mandated by the EFA. See The Army Corps of Engineers' April 1, 1999, Final Integrated Feasibility Report and Programmatic Environmental Impact Statement for the CERP, vol. 1, at 4-11, 4-17 (A "fundamental underlying assumption . . . is the full implementation of the State of Florida's Everglades Program . . . ."). In short, while extraordinary in scope, all of the parties agree that these projects will only supplement the measures addressed in the Settlement Agreement(s) and the EFA. See Joint Status Report, at 2-3 (filed Dec. 5, 2000).

B. Modification of the Deadlines

1. Compliance with Long-Term Phosphorus Levels and Limits

Under the terms of the original Settlement Agreement, the parties were to have

achieved compliance with long-term phosphorus levels by July 1, 2002, see (original) Settlement Agreement, ¶ 1(I), whereas the EFA authorizes a deadline of December 31, 2006. See § 373.4592(10). The Settling Parties request that the deadline set forth in the Settlement Agreement be modified to permit the more realistic deadline required by the EFA. Neither the Tribe nor the Farm Interests presently object to the extension of the deadlines, see Joint Status Report, at 4 (filed Dec. 5, 2000), although, the Farm Interests would prefer to delete any reference to long-term limits and levels altogether. Id., see also West Palm Beach Farm Bureau, et al.'s Post Hearing Memorandum and Proposed Findings of Fact, at 21-41 (filed January 30, 1996).

The Conservation Intervenors, however, do object to an extension, largely on the grounds that the continued contamination of the Everglades with phosphorus-rich water constitutes irreparable harm and the need for the extension has not been proven to their satisfaction. E.g. Status Report of Florida Audubon Society, at 8-10, 17 (filed Sept. 14, 1998). For instance, the Conservation Intervenors point out that all of the STAs called for by the EFA (with the exception of STA 3/4) are set for completion prior to July 1, 2002. Therefore, according to the Conservationists, if the government could complete the construction of STA 3/4 earlier than the planned October 2003 deadline set in the EFA, it could comply with the Settlement Agreement. Id.

After hearing testimony at the various status conferences about the current progress of the construction of the STAs and having reviewed the 2001 annual peer-reviewed report regarding research and monitoring programs required by § 373.4592(4)(d)(6) of the EFA, this Court disagrees with the Conservationists' optimistic assessment of what might be

done to expedite compliance with the long-term phosphorus levels. The Court does not find that construction of STA 3/4 could be expedited without jeopardizing the already tight construction scheduled adopted by the Settling Parties in light of the EFA.

For example, the Original Settlement Agreement Required four (4) Storm Water Treatment Areas and set the following acquisition deadlines:

STA - 1	acquisition date	Oct 1, 1991	treatment acres 11, 800
STA - 2	" "	Aug 1, 1992	3,700
STA - 3	" "	Aug 1, 1992	4,950
STA - 4	" "	Aug 1, 1992	12,150
Total			**32,600**

Original Settlement Agreement, ¶ 10)(C) (Table1). The EFA changes this to six (6) STAs and set construction deadlines which, the Court is very pleased to see, have been met so far. Compare:

STA 1 became STA 1W	**operational since Aug 1994**	treatment acres	6,670
STA 1E was added	Not due until July 1, 2002		5,350
STA 2	**operational since June 1999**		6,430
STA 3 became STA 3/4	Not due until Oct 1, 2003		16,660
STA 5 was added	**operational since Jan 1999**		4,530
STA 4 became STA 6	**operational since Oct 1997**		812
Total			**40,452**

See EFA, § 373.4592(4) (addressing requirements); Modified Settlement Agreement, 10(c), table 1 (addressing conversions); 2001 Consolidated Report, ch.6 (addressing progress).

The schedule in the 1992 Consent Decree depended, in part, upon the opportunity for all of the affected parties to assert their due process rights. As all of the parties familiar with this litigation are aware, the state court challenges and other processes that led to the

enactment of the EFA made compliance with the time frame set forth in the original consent decree substantially more "onerous," than previously envisioned. See Rufo, 502 U.S. at 384 ("Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous."). While it is true, the burden for basing change upon such conditions is heavier when the parties could have anticipated the changes, see id. at 385, the Court finds that not all of these changes could be anticipated and is satisfied with the District's good faith and reasonable efforts to comply with the decree up until the time the EFA was enacted.

For example, it cannot be said that the District failed to draft the proposed SWIM plan as required by the original Settlement Agreement, or that it should be blamed for all of the delays that resulted from the challenges in the state courts. Likewise, prior to the EFA the District was without eminent domain authority to acquire the lands needed for the STAs during the pendency of the state litigation. See Reply in Support of Motion for Approval of Modifications, at 6, 16 (filed Aug. 11, 1995). Furthermore, after the enactment of the EFA, the Settling Parties did promptly move for modifications to the Settlement Agreement, and therefore, the fact that it has taken this Court until today to address them, should not be held against the Settling Parties.

In short, the administrative delays caused by the subsequent challenges coupled with the resolution of those challenges as reflected in the EFA constitute sufficient changes in both fact and law to warrant modification of the long-term compliance deadlines even under Rufo. As for the requirement that those changes be suitably tailored, the Court further finds that to condition the extension on the attainment of arbitrary interim levels of

compliance, or otherwise alter the process that has been in place for nearly seven years, may very well cause more harm than good. It would force the Settling Parties to set aside years of planning and shift their resources in an attempt to meet newly determined demands--demands which due to the EFA are more comprehensive than the reforms proposed nearly ten years ago.

Moreover, the Court is pleased to note that the operational STAs appear to be functioning even better than anticipated in the original Settlement Agreement, removing phosphorus to concentrations less than one half of 50 parts per billion (ppb). See 2001 Consolidated Report, Executive Summary, at 2; Settlement Agreement(s) at ¶ 10(B) ("The design sizes and configurations of STAs are based on the need to achieve an interim outflow concentration of approximately 50 ppb at each STA outflow point."); Id. app. C-3 (same). On the other hand, the Court also notes that portions of the most recent report indicate some reservations about the remaining construction being completed on time. E.g. Executive Summary, 2001 Everglades Consolidated Report, at 4 ("Remaining uncertainties, however, may inhibit efforts to achieve mandated compliance with all water quality standards by 2006."). Similarly, at the most recent status conference, counsel for the United States indicated that the Army Corps of Engineers construction of STA 1E may be seven months late.

Notwithstanding the above, the Court will address any alleged breach of the modified deadlines if and when it happens. However, by endorsing this extended schedule, the Court fully expects that the parties will achieve compliance as mandated by the Modified Consent Decree and the EFA. Furthermore, the Settling Parties are

reminded that "failure to aggressively pursue the implementation of the Everglades Construction Project" in accordance with the new time table also violates the EFA. § 373.4592(4)(a) ("The district shall take all reasonable measures to complete timely performance of the schedule in this section in order to finish the Everglades Construction Project.").

2. Permit Application Dates

The Settling Parties propose to modify paragraph thirteen (13) of the Settlement Agreement entered as a Consent Decree by extending the deadline by which the District must amend its state permits to assure compliance with final water quality standards from 1996 as contemplated in the original Settlement Agreement, see ¶ 13(A)(4), to December 31, 2003, the maximum time set forth under the EFA. See § 373.4592(10). The farm interest do not oppose the Settling Parties on this issue. See Joint Status Report, at 5 (filed Dec. 5, 2000). The Conservation Intervenors, however, object to all but the most minimal extension.

Nonetheless, even the Conservation Intervenors, who object to the proposed "2004" deadline, recognize the need for a realistic deadline. For example, in the Joint Status Report, filed December 5, 2000, the Conservationists objected to any extension beyond January 1, 2001. Id. In their pleadings and appearances the Conservation Intervenors characterized the permit renewal process as a "trigger" that will set off another round of administrative challenges and potentially bog down the restoration of the Everglades just three years before long-term compliance should be accomplished (Dec. 31, 2006).

Inasmuch as the Conservation Intervenors are supportive of some extension, their challenge under Rufo might be characterized as an assault on the second prong, or "suitably tailored" requirement. See Rufo, 502 U.S. at 383-84, 393. However, by suggesting that this Court arbitrarily impose an accelerated deadline to build in a buffer for litigation, without the consent of the Settling Parties, they are asking this Court to abandon its role as the neutral arbiter of a dispute based to a large degree on the enforcement of state law. Essentially they ask this Court to force the Settling Parties to stick to a schedule that this Court has already acknowledged must be changed or impose one stricter than state law now requires over the objections of the parties that presumably consented to it. The Court declines this invitation. See Officers for Justice v. Civil Service Comm'n of San Francisco, 688 F.2d 615, 630 (9th Cir. 1982) ("We may not delete, modify, or substitute certain provisions of the consent decree."), cert. denied, 459 U.S. 1217 (1983).

The Court finds the proposed extension to be suitably tailored even under Rufo. For instance, given the new construction schedule, which this Order has already addressed, the last STA will not even be completed until October 1, 2003, just two months prior to the proposed permitting deadline. The issuance of permits that recommend changes necessary to achieve long-term compliance seems premature. Therefore, this Court finds that the changes in fact and law that require the modification of the Settlement Agreement to reflect the new construction requirements and proposed construction dates also justify a similar postponement of the permit modification date in order to provide an adequate time for the District to assess the effectiveness of its programs and the needs

of the situation. Furthermore, given the two month gap between the completion of the last STA and the proposed permitting deadline, the Court also finds this modification to be suitably tailored to the changed circumstances. Thus, even under the Rufo standard, the Court is satisfied that the permit application deadlines in the Consent Decree may be modified.

3. Dates for Final Phosphorus Research Report

Under the terms of the original Settlement Agreement, the Technical Oversight Committee ("TOC") established in paragraph eighteen (18) of the Agreement was to complete the final report regarding research on the numerical interpretation of Class III water quality criterion by July 1, 1997, see Original Settlement Agreement, at D-1, whereas the Settling Parties request an extension until December 2001, pursuant to the research deadline in the EFA. E.g. § 373.4592(4)(d)(4). The Conservationists object to this extension essentially on the grounds that there has not been a sufficient showing for the delay, e.g. Status Report of Florida Audubon Soc'y, at 3-8 (filed Sept. 14, 1998), and the Farm Interests object to the inclusion of any TOC-related provisions altogether. E.g., Def. Intervenor Western Palm Beach Farm Bureau, et al. Post-Hearing Memo & Proposed Findings of Fact, at 56-59 (filed Jan. 30, 1996).

Upon reflection, the Court observes that like the previous modification addressed in this Order, this proposal presents the Court with a situation where the original deadline has lapsed. Therefore the Court appears to have a choice between enforcing the original deadline, or adopting the new one. In other words, the Court once again declines to accept an invitation to rewrite the consent decree and impose its own deadline. In

determining whether an Order to Show Cause would be appropriate, however, the Court must consider several factors, including the Farm Intervenors' objections.

For example, the Farm Interests argue that under the terms of the original Settlement Agreement there was no requirement or order as to fixed numeric limits regarding phosphorus, rather the setting of the limits would be left up to the state agencies. E.g., Farm Intervenor's Memorandum of Law with Proposed Findings of Fact, at 43-44. In response to the Farm Intervenors, however, the District stresses that the numeric limitations suggested by the report are not the requirements of Florida law, rather they are simply "contractual commitments." See District & DEP's Joint Consolidated Reply Memo in Support of Motion for Approval of Modifications, at 21-22 (filed Aug. 11, 1995). The Court agrees with the District. The initiation of rule-making remains where it has always been, with the State.

Furthermore, the Court finds that an eight month delay would have virtually no impact on the development of Phase II technologies because "the District has been using the Everglades Forever Act default of 10ppb for evaluating Advanced [Phase II] Treatment Technologies," 2001 Consolidated Report, Executive Summary, at 19, and "[p]reliminary efforts by the Department to determine an appropriate upper limit suggest an annual geometric mean in the 10 to 11 μg/L range." 2001 Executive Summary, ch. 3, at 3-15.[10]

Given the negligible impact this modification appears to have on the rights of the Intervening Parties, the Court questions whether the Rufo standard would even be

---

[10]Parts per billion (ppb) are equivalent to one microgram per liter. See 2001 Consolidated Report, Executive Summary, glossary at 34.

appropriate. Especially because the Settling Parties have agreed that the numeric content of the report would represent "contract commitments," in a contract to which the Conservation Intervenors are not a party. Inasmuch as the Settling Parties have agreed to modify their obligations to one another, and have clarified that this particular obligation is not dependant upon state law, the Court finds that the proposed eight month delay of the final research report to be does not violate public policy, nor does it conflict with or violate the law which gave rise to the Settlement Agreement.

C. Western Basins & Enforcement

Both the Conservation Intervenors and the Tribe ask for additional provisions in the Consent Decree to bring basin discharges into compliance with state water quality standards. E.g., Joint Status Report, at 5 (filed Dec. 5, 2000). As previously noted, however, the intervenors' rights to object, or in this case, to modify the Settlement Agreement are limited by the scope of their intervention. See Gautreaux, 743 F.2d at 530, 533-35. Similarly, "[a] court may not replace the terms of a consent decree with its own, no matter how much of an improvement it would make in effectuating the decree's goals." United States v. International Bhd. of Teamsters, 998 F.2d 1101, 1107 (2d Cir. 1993) (citing United States v. O'Rourke, 943 F.2d 180, 189 (2d Cir. 1991)).

Here, it seems patently inequitable to permit parties who are not bound by the terms of the Agreement, to insert items into the Agreement that have obviously not been agreed on by the Settling Parties. Moreover, the Tribe is reminded that this Court granted it limited intervention with the express understanding that the Tribe would "not seek to litigate any issues in this case nor to alter the terms of the Settlement Agreement or

otherwise delay its implementation." Order Granting Tribe Limited Intervention, at 4 (Docket Entry No. 1193) (emphasis added). Thus, the Court declines to add any additional modifications.

As for the enforcement of the provisions concerning the Western Basin, the Court recognizes that Appendix C, of the original (and modified) Settlement Agreement states "The District will also design and implement control programs for other watersheds outside of the EAA discharging into the EPA, including L3, S140, L281." Original Settlement Agreement, Appendix C, at C-5. The Court also notes with some concern that inflow phosphorus concentrations in Water Conservation Area 3 (WCA-3), appears worse today than the historical base period. See 2001 Consolidated Report, ch. 4, at 4-34, table 4-34 (showing an increase from 53 μg/L in Water Year 1999, to 67 μg/L in Water Year 2000, although still only a 4 μg/L increase from the inflow phosphorus concentrations for the 1978-1998 historical period).[11]

Nonetheless, the Western Basin Provision remains a part of the proposed Modified Settlement Agreement, and therefore, this issue really does not pertain to the Motion for Approval of Modifications to the Settlement Agreement Entered as a Consent Decree. In any event, "the proper method of enforcing a consent decree is not a 'motion to enforce' or similar plea for the court to 'do something' about a violation of the decree." Thomason v. Russell Corp., 132 F.3d 632, 634 n.4 (11th Cir. 1998) (emphasis in original). At this time,

[11]WCA 3 is also the largest WCA in the Everglades Protection Area. Enclosing more than 900 square miles, it is more than twice as large as WCA 1 (Loxahatchee National Wildlife Refuge) and WCA 2 combined. See 2001 Consolidated Report, ch.1, at 1-3, 1-4.

therefore, the Tribe's Motions to Enforce the Settlement Agreement are DENIED, without prejudice to seek relief by filing a motion requesting that the Court issue an Order to Show Cause, after the Court rules on the Pending Motion to Appoint a Special Master.

D. Force Majeure & Enforcement Provisions

The Settling Parties argue that the addition of "except as provided by law," to the cost provision of the force majeure clause, see Modified Settlement Agreement, ¶ 23, does nothing more than recognize the limits of state agency authority. Likewise they propose to qualify the obligations to undertake action "legally required," as opposed to "necessary," in order to eliminate "unlawful" sources of pollution, instead of pollution in general. See Modified Settlement Agreement, ¶ 14(B). If they are correct, these changes do nothing more than state the obvious. The Tribe and the Conservation Intervenors, however, see things differently.

At the most recent status conference, held on March 30, 2001, the Tribe spent a significant portion of its allotted time complaining about these modifications in particular. According to counsel for the Tribe, these revisions create loopholes. For example, counsel for the Tribe claimed that these changes would allow the legislature to classify some sources of pollution as "lawful" and thereby avoid the requirements of the modified consent decree. While this is an alarming prospect, it must not be forgotten that this lawsuit and the consent decree that resulted from it are based, in large part, on state law.

Should the United States, or the Tribe for that matter, wish to challenge the validity of any new state laws that might be enacted after these proposed modifications, they may.

It remains their prerogative. At this time, however, the Court finds no infringement on the rights of the intervening Plaintiffs, and therefore no basis for subjecting these modifications to the Rufo standard. Under the Court's broader equitable powers to modify the Consent Agreement where all the parties agree, the Court finds no violation of state law, collusion, or harm to public interest. The Settling Parties, who are bound by the Agreement, have agreed to these changes, and the Court finds that they are fair, adequate, and reasonable, and do not adversely impact public interest.

E. Load Reduction

The Tribe has requested that the Court clarify paragraph 8(a)of the Settlement Agreement provision addressing phosphorus reduction and rule that it applies to all phosphorus inflows to the Everglades Protection Area regardless of the source. See e.g., Tribe's Status Report on Pending Motions, at 9-11. The Tribe, joined by the Conservation Intervenors, have also requested that this Court issue an order enforcing this provision to prohibit an increase in water flows to the Everglades Protection Area until those flows meet certain water quality standards. See e.g. Consolidated Suggested Orders of Conservation Intervenors, at 3 (filed Jan. 9. 1998); Tribe's Status Report on Pending Motions, at 9-11 (filed Sept. 15, 1998).

In response the Settling Parties claim this modification goes beyond clarification and changes the agreement in ways not envisioned by them. The Farm Interests, on the other hand, request that this provision be struck altogether. See United States Sugar Corps.' Memorandum in Opposition to Motion for Approval of Modifications to Settlement Agreement, at 4-6 (filed July 12, 1995). Upon review, the Court finds that this clarification

is not warranted by any of the standards discussed above and, therefore, it will not make such a determination at this time, nor will it strike the provision in question, as the Farm Interests have suggested.

VII. The EFA and the (Modified) Settlement Agreement

The EFA does not conflict with the Modified Settlement Agreement. In fact, the EFA expressly mentions this Court's Consent Decree and requires that "the method for measuring compliance with the phosphorous criterion [for the Park and Refuge] shall be in a manner consistent with Appendices A and B, respectively, of the settlement agreement dated July 26, 1991, entered in case No. 88-1886-Civ-Hoeveler, United States District Court for the Southern District of Florida, that recognizes and provides for incorporation of relevant research." Everglades Forever Act, Fla. Stat. § 373.4592(4)(e)(3). This language would seemingly suggest that the legislature was not only aware of the Consent Decree, but also that it consciously chose to accommodate at least these specific requirements of the decree.

On the other hand, after even a cursory reading it becomes apparent that the EFA seemingly adopts and expands upon some of the remedies already provided for in the original Settlement Agreement. For example, the EFA, like the Settlement Agreement, also calls for the construction of STAs and the implementation of BMPs. Compare Fla. Stat. § 373.4592(4)(a) (detailing the construction schedule for six STAs), with Settlement Agreement, ¶ 10(a)–(d) (detailing the District's commitment to "purchase, design, and construct [four] STAs as set forth in Appendix C."); compare Fla. Stat. § 373.4592(4)(f)

(requiring the continued monitoring and enforcement of BMPs), with, Settlement Agreement, ¶ 12(b) (requiring applicants for permits "to institute a BMP Program designed to meet the applicable interim and long-term phosphorus basin load allocation."). In short, it is now abundantly clear that the Modified Settlement Agreement substantially tracks the provisions of the EFA, and in doing so it fulfills the Settling Parties' purpose of achieving compliance with state law, while at the same time preserving the due process rights of the affected parties.

IV. Appointment of a Special Master

As an issue entirely separate from the Court's discussion of the proposed modifications to the Settlement Agreement, the Tribe has requested that this Court appoint a Special Master. See Supplemental Status Report and Filing of Exhibit by Miccosukee Tribe, at 1 (filed Mar. 29, 2001). The Conservation Intervenors also support the motion. See Conservation Intervenors' Response in Opposition to Federal and State Parties' Motion to Modify Consent Decree, at 1-2 (filed July 17, 1995). The Settling Parties and Farm Interests, however, oppose it. See Joint Status Report, at 7 (filed Dec. 5, 2000).

Upon reflection the Court agrees with the intervening Plaintiffs. A Special Master may assist the Court by observing and reporting on the progress that the Settling Parties are making toward the new deadlines approved today. The Court recognizes that the Settlement Agreement itself contains dispute resolution provisions, and the Court is especially eager to avoid interfering with those processes. Nonetheless, due to the "highly technical and esoteric" nature of the scientific data that will need to be analyzed to assure

compliance with the modified terms, the Court finds that this proposal has merit. See Fed. R. Civ. P. 53;Comment, Masters and Magistrates in the Federal Courts, 88 Harv.L.Rev. 779, 795 (1975) (explaining how appointment is usually proper in "highly technical and esoteric" cases).

Therefore, at this time, the Court considers it prudent to begin reviewing the credentials of prospective special masters for this case, should the parties be unable to resolve their differences using the dispute resolution mechanisms in the (Modified) Settlement Agreement entered as a Consent Decree. While it would be best if all Parties could agree on an ideal candidate, the consent of the parties is not required. See e.g., SEC v. First New Jersey Secs., Inc., 101 F.3d 1450, cert. denied, 522 U.S. 812 (1997). The appointment of a special master is a matter within the Court's discretion when the matter involves a bench trial. See Active Prods. Corp. v. A.H. Choitz & Co., 163 F.R.D. 274 (D. Ind. 1995). Under Rule 53 of the Federal Rules of Civil Procedure, "[t]he court in which any action is pending may appoint a special master therein." Fed. R. Civ. P. 53(a).

After examining the many appendices and reports that this case has generated and after reviewing the testimony of the many expert witnesses called in this case, the Court finds that this case might qualify. See Cronin v. Browner, 90 F.Supp.2d 364 (D.C.N.Y. 2000) (involving a consent judgment that required the EPA to produce a complex, technical regulation and finding that the appointment of a special master under Rule 53(b) would be warranted if the parties were unable to agree on a schedule for final action). Consequently, the Court will entertain suggestions from the parties with regard to the candidate, method of financing, and degree of involvement for a special master, should

the Court choose to appoint one.

V. Conclusion

Attached to this Order is a copy of the forty-nine (49) proposed modifications labeled Appendix A. For the reasons set forth above, the Settling Parties' Motion to Modify the Settlement Agreement is GRANTED. For those modifications that have not been directly addressed in this Order, it may be assumed that the Court did not find a sufficient infringement on the rights of the objecting parties to merit a separate consideration beyond the Court's equitable powers to approve agreed modifications that are not against public interest and do not violate the statute upon which the cause of action is based.

It is therefore

ORDERED AND ADJUDGED AS FOLLOWS:

(1) The Joint Motion of the United States of America, the South Florida Water Management District ("District"), and the Florida Department of Environmental Protection ("DEP") for the Approval of Modifications to the Settlement Agreement Entered as a Consent Decree is **GRANTED.**

(2) The Tribes' Motion to Enforce the [original] Settlement Agreement and Consent Decree and for the Appointment of a Special Master to Oversee Their Implementation, or, in the Alternative to Allow Tribe to Proceed with Federal Everglades Lawsuit Against State Defendants and Federal Government, filed March 16, 1995, is **DENIED** with respect to the Motions to Enforce [the original Settlement Agreement] or Proceed with a Federal Lawsuit. The Motion to Appoint a Special Master is **TAKEN UNDER ADVISEMENT.** The parties may submit the names and credentials of two (2) persons whom they feel would be

qualified for this position, as well as an estimate of the expenses required to retain such a person and a recommendation of how those expenses shall be borne.

(3) The Tribe's Motion to Enforce Terms of the [original] Settlement Agreement, filed February 13, 1996, is **DENIED**, without prejudice to renew after the Court has resolved the issue of whether it should appoint a special master.

(4) Tribe's Supplemental Emergency Motion to Enforce Settlement Agreement, filed May 28, 1996, is also **DENIED** for the reasons discussed in paragraph three (3) above.

DONE AND ORDERED, in Chambers in Miami, this 27th day of April 2001.

William M. Hoeveler
Senior United States District Judge

Copies:
(see attached list)