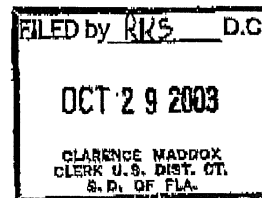


UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 88-1886-CIV-MORENO



UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTH FLORIDA WATER MANAGEMENT
DISTRICT, *et. al.*,

Defendants.

ORDER GRANTING MOTION FOR APPOINTMENT OF A SPECIAL MASTER

THIS CAUSE came before the Court upon the Miccosukee Tribe of Indians' Motion for Appointment of Special Master (D.E. No. 1794), filed on October 10, 2003.¹ The sole issue raised in this Motion is whether the Court should appoint a Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure to oversee the implementation and enforcement of the Consent Decree (D.E. No. 1205) entered on February 24, 1992. Because the Court finds that an "exceptional condition" warrants the appointment of a Special Master, the Motion is GRANTED.

I. BACKGROUND FACTS

This suit was instituted more than fifteen years ago, when the United States filed suit against the South Florida Water Management District ("SFWMD") and the Florida Department

¹ The Court notes that the Miccosukee Tribe of Indians originally submitted a Motion to Enforce Settlement Agreement and Consent Decree, and for the Appointment of a Special Master (D.E. No. 1313) on March 16, 1995. Additionally, the Miccosukee Tribe filed a Memorandum Regarding Appointment of a Special Master (D.E. No. 1661) on July 16, 2001, and a Memorandum Concerning Appointment of a Special Master (D.E. No. 1746) on June 5, 2003. These Motions are denied as moot with leave to refile if appropriate.

of Environmental Regulation ("FDER")², seeking to compel enforcement of the state water quality standards that protected Everglades National Park (the "Park") and the Arthur R. Marshall Loxahatchee National Wildlife Refuge (the "Refuge"). The United States alleged, in essence, that the State of Florida failed to regulate high levels of phosphorous in farm water runoff, thereby damaging the fragile ecosystems of the Park and the Refuge.

The Court will not engage in the unnecessary task of reviewing the long and complex procedural history of this case, which spawned more than 1,800 docket entries, and required the prior judge assigned to the case to hold dozens of hearings. Suffice it to say that the case was settled when the parties signed a settlement agreement in July 1991. The Settlement Agreement was subsequently approved by Judge William H. Hoeveler, and entered as a Consent Decree in February 2002.

The Settlement Agreement established "interim and long-term phosphorous concentration limits for the Park and the Refuge" and sets forth two remedial programs designed to achieve those limits. (Order Entering Settlement Agreement as Consent Decree, D.E. No. 1205, at 2.) The first remedial program provided for the construction of stormwater treatment areas ("STA's") on 35,000 acres of land in the Everglades Agricultural Area. *Id.* The STA's are flow-through water filtration marshes designed to remove phosphorous contamination from rainwater destined for the Park and Refuge. *Id.* The second remedial program required the SFWMD or the FDER to implement a regulatory permitting program. *Id.* Pursuant to that program, the State was required to regulate the water quality of agricultural discharges through a permitting scheme

² The Florida Department of Environmental Regulation ("FDER") is now known as the Florida Department of Environmental Protection ("FDEP").

which required applicants to comply with designated phosphorous load allocations." *Id.*

The Consent Decree was, undoubtedly, a monumental success, and marked the first major step in the Everglades cleanup effort. It did not, however, end the dispute between the parties to the suit.³ Beginning as early as 1995, the Miccosukee Tribe of Indians claimed that the SFWMD and the FDER were violating the terms of the Consent Decree. The Miccosukee Tribe urged the Court to appoint a Special Master to supervise the progress of the parties, to report technical and scientific disputes to the Court, and to ensure compliance with the modified Consent Decree.

Although the SFWMD and the FDER have made substantial progress in the Everglades cleanup since 1995, the Miccosukee Tribe has continually urged the Court to appoint a Special Master or Expert Witness to resolve technical disputes. Indeed, the Tribe recently filed a Motion for Appointment of a Special Master (D.E. No. 1794) which described several existing conditions that violate, or threaten to violate, the terms of the Consent Decree. (Miccosukee Tribe of Indian's Motion for Appointment of a Special Master, at 1.) The Miccosukee Tribe described these violations to "illustrate the complexity regarding which a Special Master could aid the Court." *Id.* at 2.

To support its contention that the Consent Decree has been or will be violated, the Miccosukee Tribe relies on excerpts from the SFWMD's Conceptual Plan for Achieving Long-Term Water Quality Goals, dated September 18, 2003 ("SFWMD Conceptual Plan"). In the Conceptual Plan, the SFWMD indicates that the largest storm water treatment area, known as

³ The original parties to the Settlement Agreement were plaintiff United States and defendants South Florida Water Management District and Florida Department of Environmental Regulation. There are, however, numerous other parties that entered the suit as intervenors. These parties include the Miccosukee Tribe of Indians, the Florida Audubon Society, the Sierra Club, the Florida Keys Citizen Coalition, the Environmental Defense Fund, the National Wildlife Federation, Roth Farms, Inc., Palm Beach County Farm Bureau, Inc., KWB Farms, Inc. and various others.

STA 3/4, will not be completed until March 2004. (SFWMD Conceptual Plan, at 2-26.) Notably, the Consent Decree originally required STA 3/4 to be operational by no later than 1997. (Settlement Agmt., App. C-5.) The operational deadline for STA 3/4 was subsequently extended to October 2003 in the Omnibus Order Modifying the Consent Decree. Thus, SFWMD's Conceptual Plan suggests that STA 3/4 will not be completed until a year after the modified deadline.

The Miccosukee Tribe contends that the delayed construction of STA 3/4 will lead to further violations of the Consent Decree. The modified Consent Decree provides for an 85% load reduction of phosphorous in the water delivered to the Water Conservation Area by October 1, 2003. The Miccosukee Tribe claims that it will be impossible to achieve these load reductions in light of the fact that STA 3/4 will not be completed until October 2004.⁴

The Miccosukee Tribe further alleges that the SFWMD has failed to comply with phosphorous concentration limits set forth in the Consent Decree for Loxahatchee National Park. Two experts retained by the United States Department of Interior seem to confirm the accuracy of this claim. In a recent report, Dr. William Walker and Dr. Robert Kadlec conclude that "interim levels have been exceeded one or more times in each of the four years since they went into effect. There has been no substantial evidence that the exceedances were due to error or extraordinary natural phenomena." (Compliance of Marsh Phosphorous Concentration in A.R.M. Loxahatchee National Wildlife Refuge with Interim Levels Required Under the Consent Decree, at 1.)

⁴ This contention seems plausible in light of the fact that STA 3/4 is designed to cover 16, 660 acres, or approximately 41%, of the total STA acreage. (Miccosukee Tribe of Indian's Motion for Appointment of a Special Master, at 2-3).

Finally, the Miccosukee Tribe objects to the SFWMD's unilateral decision to switch data reporting methods, from standard "arithmetic methods" to "geometric means." The Miccosukee Tribe contends that the geometric computations yield lower phosphorous concentration figures than the standard arithmetic method, thereby allowing the SFWMD to minimize the number of reported violations of the Consent Decree. In essence, the Miccosukee Tribe contends that the new geometric reporting methodology is being used to feign compliance with the Consent Decree.

The Miccosukee Tribe believes that a Special Master could minimize such violations by supervising the parties, monitoring compliance with the Consent Decree, and reporting necessary information to the Court. Indeed, the Miccosukee Tribe contends that a Special Master is necessary "due to the complexity of the issues, the sheer volume of data to be reviewed, the special expertise necessary to understand water quality issues, the time required to give the parties the attention they deserve, and the proven necessity to monitor all aspects of the implementation of the modified Consent Decree." (Miccosukee Tribe of Indian's Motion for Appointment of a Special Master, at 2.)

The United States, the FDEP, the SFMD, and defendant-intervenors (Roth Farms, Inc., Western Palm Beach County Farm Bureau, Inc., KWB Farms, Inc.)⁵ have vigorously objected to the appointment of a special master.⁶ The Objectors claim that a Special Master would

⁵ For purposes of brevity, the Court will refer to these parties as "the Objectors" for the remainder of this Order.

⁶ See Consolidated Opposition of the United States, the Florida Department of Environmental Protection, and the South Florida Water Management District to Miccosukee Tribe's Motion for Appointment of a Special Master (D.E. 1798), filed on October 15, 2003 ("Consolidated Opposition"); United States Sugar Corporation's Memorandum of Law in Opposition to Appointment of Special Master or Expert Witness (D.E. No. 1796), filed on October 15, 2003; and Defendant-Intervenors Western Palm Beach County Farm Bureau, Inc., Roth Farms, Inc.,

undermine the efficacy of the dispute resolution procedures currently set forth in the Consent Decree. The Objectors emphasize that the Consent Decree established a Technical Oversight Committee⁷ ("TOC") to "make technically based recommendations by consensus approach" and to "plan, review and recommend all research, monitoring, and compliance, conducted pursuant to the terms of [the settlement] agreement." (Consent Decree ¶18). Moreover, the Consent Decree provides that parties shall submit technical disputes to a mediator when the TOC cannot reach a consensus. (Consent Decree ¶¶ 18, 19). The Objectors believe that these dispute resolution procedures are sufficient to resolve the technical difficulties identified by the Miccosukee Tribe. In fact, the Objectors contend that a Special Master would actually undermine the efficacy of the dispute resolution procedures by creating yet another forum in which the parties could litigate technical issues.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide that "the court in which any action is pending may appoint a special master therein." Fed. R. Civ. P. 53(a). Rule 53 makes it clear, however, that district courts do not have unbridled discretion to appoint a Special Master in every case. Indeed, Rule 53 dictates that "a reference to a master shall be the exception and not the rule." Fed. R. Civ. P. 53(b). Rule 53 further provides that "in actions to be tried without a jury . . . a reference [to a special master] shall be made only upon a showing that some *exceptional condition* requires it." *Id.* (emphasis added).

and KWE Farms' Memorandum of Law in Opposition to Appointment of Special Master or Expert Witness (D.E. No. 1797), filed on October 15, 2003.

⁷ The TOC is cooperative group, composed of representatives from the DER, the Park, the Refuge, the SFWMD, and U.S. Army Corps of Engineers.

While Rule 53 provides express statutory authority for the appointment of a special master, it is well-established that the federal courts also have independent equitable authority to appoint an agent to supervise the implementation of its decrees. *See Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982) ("rule 53 does not terminate or modify the district court's inherent equitable power to appoint a person, whatever be his title, to assist in administering a remedy"); *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In Re Peterson*, 253 U.S. 300, 311 (1920)) ("Beyond the provisions of (Fed. R. Civ. P. 53) for appointing and making references to masters, a Federal District Court has the 'inherent power to supply itself with this instrument for the administration of justice when deemed essential'"); *Veneri v. Draper*, 22 F.2d 33, 35 (1927) ("the power is inherent in the federal courts independently of any statute"). Thus, the federal courts have statutory authority, as well as inherent equitable authority, to appoint a special master in appropriate circumstances.

III. DISCUSSION

The Court has reviewed the transcripts of the evidentiary hearings held before Judge Hoeveler on September 16 and 17, 2003, as well as the hearing on May 2, 2003. Based on the evidence at those hearings and the pleadings filed, the Court finds that an "exceptional condition" requires the appointment of a Special Master who will monitor the parties' compliance with the Consent Decree. It is well-established that a federal court may appoint a special master where, as here, there is a prospect of non-compliance with a consent decree, or where the complexity of the consent decree makes it difficult to determine compliance. *See Ruiz v. Estelle*, 679 F.2d 1115, 1162 (5th Cir. 1982) ("The scope and the complexity of the decree and the importance and the difficulty of ensuring compliance gave the court adequate reason to invoke its implied authority as

a court of equity” to appoint a special master); *National Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 542 (9th Cir. 1987) (holding that “the prospect of non-compliance is an ‘exceptional condition’ that justifies reference to a master” and that “no circuit authority . . . requires a determination of intentional disregard before a special master may be appointed under Rule 53(b)"); *Hoptowit v. Ray*, 682 F.2d 1237, 1263 (9th Cir. 1981) (“Because of the complexity of the litigation and of compliance with the court’s orders, we conclude the district judge did not err in deciding that the requirement that masters be appointed only to exceptional cases had been met”); *Gary W. v. Louisiana*, 601 F.2d 240, 245 (5th Cir. 1979) (holding that reference to a special master pursuant to Rule 53 was proper where there was “evidence of non-compliance with the [the District Judge’s] final order and the need for daily supervision of the bureaucratic tangle” between the parties bound by the injunction); *In Re Pearson*, 990 F.2d 653, 660 (1st Cir. 1993) (holding that there was “arguably . . . an exceptional condition” under Rule 53 where district court was “still mired in litigation” after “two decades of intimate involvement,” and where district judge “appointed a master to survey the legislative landscape, investigate the incidence and impact of changed circumstances, assess the current relevance of decrees, and report results to the court”); *New York State Assoc. for Retarded Children v. Carey*, 706 F.2d 956, 962-63 (2nd Cir. 1983) (holding that an “exceptional condition” justified appointment of Special Master to monitor complex consent judgment that required “balancing of the interests of parties with third-party employees, school authorities, and community groups”); *Williams v. Lane*, 851 F.2d 867, 884 (7th Cir. 1988) (holding that “exceptional condition” existed, justifying appointment of special master to effectuate full compliance with court order, where prison officials repeatedly disobeyed order in the past).

The Court is not concluding at this time that the Consent Decree has been violated, or will be violated in the future. In fact, the Court accepts the representations of the parties to the settlement that they will abide by their own agreement. The Court notes, however, that the Miccosukee Tribe has provided credible documentary evidence to prove that such violations are plausible. Indeed, the SFWMD's Conceptual Plan for Achieving Long-Term Water Quality Goals, dated September 18, 2003, indicates that STA 3/4 will not be completed until March 2004. Furthermore, the United States' experts have indicated that "interim [phosphorous] levels at [Loxahatchee National Wildlife Refuge] have been exceeded one or more times in each of the four years since they went into effect." Consequently, the Court can invoke its equitable and statutory authority to appoint a Special Master who will supervise the parties, monitor their compliance with the Consent Decree, and report relevant findings to the Court now. To delay action would be irresponsible and would benefit the party that would breach the agreement.

Notwithstanding the foregoing precedent, the Objectors argue that a Special Master is not appropriate in this particular case. The Objectors emphasize, for example, that a case is not "exceptional" within the meaning of Rule 53 merely because it involves technical scientific principles, or unusually complex issues of fact and law. See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957); *Sierra Club v. Clifford*, 257 F.3d 444 (5th Cir. 2001). Moreover, the Objectors emphasize that neither the projected length of the dispute, nor the general congestion of the Court's docket, constitute "exceptional" circumstances that justify referral pursuant to Rule 53. *La Buy*, 352 U.S. at 259. The Court is, of course, cognizant of these firmly-established legal principles. Nonetheless, they do not undermine the Court's conclusion that a Special Master is warranted in this case. The Court is not appointing a Special Master merely because the case

involves complex scientific data, or because the case will remain on the docket through the year 2006. Rather, a Special Master is being appointed to ensure that the parties achieve the interim and long-term goals of the Consent Decree.

The Objectors also argue that a Special Master will obviate or undermine the dispute resolution procedures spelled out in the Consent Decree, and produce additional litigation by creating yet another forum where the plaintiff-intervenors can raise technical disputes. These arguments are misguided. The Court will strictly enforce each provision of the Consent Decree, including the dispute resolution procedures. Consequently, the parties will be required to submit all technical disputes to the TOC in the first instance, and then submit the matter to mediation if the TOC cannot produce a consensus recommendation. The Special Master will not undermine these well-designed procedures, which have proven to be effective over the last eleven years.

In fact, the Special Master will work in close concert with the TOC, thereby enhancing the dispute resolution process. The Court will instruct the Special Master to examine the scientific data utilized by the TOC, critique the TOC's periodic compliance reports, monitor the progress of STA construction, and evaluate interim phosphorous concentration limits. The Special Master will report significant factual and scientific findings to the Court which will, in turn, use this data to supervise the parties and monitor their compliance with the Consent Decree.

The Court firmly believes that a Special Master will benefit not only the Miccosukee Tribe, but also the United States, the SFWMD, the FDEP, and other interested parties. While these parties have quarreled over various technical matters, they are united in their dedication to the Everglades clean-up effort. Indeed, Raquel Rodriguez, general counsel for Florida Governor Jeb Bush, recently confirmed that "the Governor's commitment to the restoration of the Everglades is

unwavering". A Special Master, who is well-versed in environmental law, will offer additional assurance that the Everglades cleanup will proceed in a timely and efficient fashion. Thus, a Special Master advances the interests of all parties to the suit.

As a final matter, the Court notes that it will issue within ten days a separate Order identifying the person it chooses to serve as Special Master, describing his qualifications, and the manner of compensation.

IV. CONCLUSION

THIS CAUSE came before the Court upon Miccosukee Tribe of Indians' Motion for Appointment of Special Master (D.E. No. 1794), filed on October 10, 2003.

THE COURT has considered the motion, the responses and the pertinent portions of the record, and being otherwise fully advised in the premises and in open court, it is

ADJUDGED that the motion is GRANTED. Accordingly, the Court will appoint a Special Master to supervise the parties, monitor their compliance with the Consent Decree, report technical and scientific disputes to the Court.

DONE AND ORDERED in Chambers at Miami, Florida, this 29th day of October, 2003.


FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

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