

FILED

AUG 14 2003

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

1 LESA L. DONNELLY and GINELLE)
 2 O'CONNOR, for themselves and)
 3 all others similarly situated,)

4 Plaintiffs,)

5 v.)

6 ANNE VENEMAN, Secretary, U.S.)
 Department of Agriculture,)

7 Defendant.)

No. C-95-4389 DLJ

ORDER

292k

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 9
 10 On July 18, 2003, the Court heard argument on Plaintiffs'
 11 Motion for Contempt and Appointment of a Special Master. Lisa
 12 Duarte and Jack W. Lee appeared on behalf of Plaintiffs; Marsha
 13 S. Edney and Henry A. Azar appeared for Defendant. Having
 14 considered the arguments of counsel, the papers submitted, the
 15 applicable law, and the record in this case, the Court hereby
 16 DENIES the Motion for Contempt and DENIES the Motion for a
 17 Special Master. The Court orders that the Settlement Agreement
 18 toll for a period of twelve months, increasing the length of
 19 the agreement until January 8, 2006. The Court also orders a
 20 phone status conference on December 5, 2003, to review
 21 compliance with the retaliation and database tracking
 22 provisions of the Settlement Agreement.

23 I. BACKGROUND

24 A. Factual Background and Procedural History

25 On February 6, 2001, the Court approved a consent decree
 26 entitled the Settlement Agreement. ("S.A.") The S.A. contains
 27 thirteen programs and initiatives designed to remedy sexual
 28 harassment and retaliation in Region 5 of the United States

Entered 8/18/03

1 Forest Service. These programs were to be created and
2 implemented in a three year period, from January 8, 2002 to
3 January 8, 2005. S.A. at 4. To monitor implementation, the
4 S.A. provided for a three person Monitoring Council. Id. at 9-
5 10. The three members include a Chair Person jointly selected
6 by the parties and approved by the Court, and two other
7 representatives chosen by the respective parties. Id.

8 On August 1, 2002, Plaintiffs filed a motion for
9 declaratory relief and a motion for contempt. Plaintiffs'
10 Motion, August 1, 2002. ("Pl. Mo. Aug. 1, 2002") Plaintiffs
11 argued that the Government should be held in contempt for
12 refusing to process the selection of Plaintiffs' Class
13 Representative. Id. Plaintiffs additionally requested the
14 three year time frame toll until a Class Representative was
15 appointed to the Council. Id.

16 In October 2002 Plaintiffs' selection for Class
17 Representative, Elaine Vercruysse, was processed by the
18 Government. Plaintiffs' Motion Declaration of Elaine
19 Vercruysse ¶B. ("Vercruysse Decl.") As a result, the motion
20 for declaratory relief and contempt was dismissed. The
21 remaining motion for tolling was continued to better determine
22 the effect of the delay in processing Vercruysse's appointment.

23 The S.A. requires that the Monitoring Council issue
24 reports at nine-month intervals on the state of compliance with
25 the Injunctive Relief Provisions ("IRPs") agreed to in the S.A.
26 The first of these reports, entitled the Monitoring Council
27 Report, ("MCR") not issued until March, 2003. Pl. Mo., Exh. 2.

1 The compliance report concluded that the Government had failed
2 to substantially comply with twelve of the thirteen IRPs.

3 Plaintiffs and the Government attempted to negotiate a
4 resolution in regard to the issue of Governmental compliance
5 with the S.A. When negotiations failed to resolve the issue,
6 Plaintiffs filed a motion to find the Government in contempt of
7 court and a motion to appoint a Special Master to monitor
8 implementation of the S.A.

9 In their opposition, the Government opposes the contempt
10 motion and appointment of a Special Master, but agrees to
11 tolling of the S.A. for twelve months. This motion is now
12 before the Court.

13 B. Legal Standard

14 1. Contempt of Court

15 The Court has many equitable remedial powers, including
16 the power to enforce consent decrees through contempt. Stone
17 v. City and County of San Francisco, 968 F.2d 850, 861 (9th
18 Cir. 1992) Cert denied, 506 U.S. 1081 (1993); see also Keith v.
19 Volpe, 784 F.2d 1457, 1460-61 (9th Cir. 1986), (court retains
20 wide discretion to enforce consent decree, including its
21 amendment).

22 In enforcing consent decrees, courts should "exercise the
23 least possible power adequate to the end proposed." Stone, 968
24 F.2d at 861 (quoting Spallone v. United States, 493 U.S. 265,
25 276 (1990)). "The remedy should begin with what is absolutely
26 necessary." Stone, 968 F.2d at 863 (quoting Ruiz v. Estelle,
27 679 F.2d 1115, 1145 (5th Cir. 1982)). The movant has the

1 burden of proving by clear and convincing evidence that the
2 defendants violated a "specific and definite order of the
3 court." Id. at 856 (citing Balla v. Idaho St. Bd. of
4 Corrections, 869 F.2d 461, 466 (9th Cir. 1989)); Touissant v.
5 McCarthy, 597 F.Supp. 1427, 1430 (N.D. Cal. 1984). If the
6 movant meets that burden, the burden then shifts to the
7 defendants to demonstrate circumstances preventing compliance,
8 and that they took every reasonable step to comply. Stone, 968
9 F.2d at 856; Sekaquaptewa v. MacDonald, 544 F.2d 396, 406 (9th
10 Cir. 1976), cert. denied, 430 U.S. 931 (1977).

11 A defendant's good faith efforts to comply with a consent
12 decree alone do not excuse noncompliance. See Stone, 968 F.2d
13 850; see also Emma C. v. Eastin, 2001 U.S. Dist. LEXIS 16099
14 (N.D. Cal. Oct. 4, 2001); McComb v. Jacksonville Paper Co., 336
15 U.S. 187 (1949). However, substantial compliance with an order
16 is a defense to an action for civil contempt. Id.; General
17 Signal v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986).
18 Additionally, if a defendant acts based on a "good faith and
19 reasonable interpretation" of the consent decree, contempt is
20 inappropriate. Go-Video, Inc. v. Motion Picture Ass'n, 10 F.3d
21 693, 695 (9th Cir. 1993) (quoting Vertex Distrib. v. Falcon
22 Foam Plastics, Inc., 689 F.2d 885, 889 (9th Cir. 1982)).
23 Technical or inadvertent violations of a consent decree also do
24 not rise to the level of civil contempt. General Signal, 787
25 F.2d at 1379; Vertex Distrib., 689 F.2d at 891.

26 Consent decrees are treated as contracts which bind the
27 consenting parties. Gilmore v. California, 220 F.3d 987, 1001
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(9th Cir. 2000); EEOC v. Local 580, 925 F.2d 588, 592 (2d Cir. 1991); United States v. ITT Banking Co., 420 U.S. 223, 236 (1975). When making modifications to a consent decree, courts "should consider the original expectations of the parties." Keith, 784 F.2d at 1462. The "scope of the consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." Vertex Distrib., 689 F.2d at 893 (quoting United States v. Armour & Co., 402 U.S. 673, 681 (1971)). Where a decree is silent, courts are reluctant to impose additional burdens, respecting that the parties could have "bargained for and included an absent provision if they had so desired." Keith, 784 F.2d at 1460 (citing Armour & Co., 402 U.S. at 680)). Courts are therefore reluctant to prematurely find contempt because of the respect for the contractual nature of consent decrees. Thompson v. Enomoto, 542 F.Supp. 768, 770 (N.D. Cal. 1982) (denied finding contempt, preferring to allow the parties to negotiate modifications to the decree).

Courts typically find contempt where there have been repeated failures to comply. See Stone, 968 F.2d at 857; Balla, 869 F.2d at 472; Touissant, 597 F.Supp. at 1430.

2. Appointment of a Special Master

Courts also have equitable powers to appoint a Special Master to aid in enforcement of a consent decree. United States v. Suquamish Indian Tribe, 901 F.2d 772, 774 (9th Cir. 1990); Nat'l Org. for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 543 (9th Cir. 1987). Appointment of a Special

1 Master may be warranted in actions tried without a jury "only
2 upon a showing that some exceptional condition requires it."
3 Fed. R. Civ. P. 26(b). "A reference to a master shall be the
4 exception and not the rule." Id. A Special Master is
5 appropriate when there exists a "complexity of litigation and
6 problems associated with compliance with the district court
7 order." Suquamish Indian Tribe, 901 F.2d at 775, citing
8 Hoptowit v. Ray, 682 F.2d 1237 (9th Ci. 1982) affirmed on
9 appeal, 753 F.2d 779 (9th Cir. 1985); Hook v. Arizona, 120 F.3d
10 921, 926 (9th Cir. 1997). A record of non-compliance by the
11 defendant, complex and detailed monitoring required combined by
12 the Court's lack of resources, defendant's failure to present
13 acceptable modifications of the consent decree, and the failure
14 of the parties to resolve disputes on their own may warrant
15 appointment of a Special Master. Thompson v. Enomoto, 815 F.2d
16 1323, 1325-26 (9th Cir. 1987).

17 II. ARGUMENTS

18 A. Motion for Contempt

19 Plaintiffs argue that the Government should be held in
20 contempt for failing to sufficiently implement twelve of the
21 thirteen IRPs agreed to in the S.A. "The Region has failed to
22 implement some of the required Injunctive Relief Programs,
23 [and] has failed to successfully implement or run some of the
24 programs that do exist[]." MCR at xi. Plaintiffs state that
25 eight of the thirteen programs listed in the S.A. were already
26 in place prior to the S.A., and the Government should not be
27 seen as being in reasonable compliance based on the existence
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1 of these programs. Plaintiffs' Reply, Declaration of Lesa
2 Donnelly at 2. ("Donnelly Decl."). The eight programs already
3 in existence include: (1) the Early Intervention Program; (2)
4 Performance Evaluations; (3) Exit Interviews; (4) Misconduct
5 Investigations Procedures; (5) Sexual Harassment Training; (6)
6 Informal EEO Process; (7) Adverse Action Digest; (8) Work
7 Details. Id. at 2.

8 Plaintiffs argue that the Government should also be held
9 in contempt for repeatedly refusing to implement Monitoring
10 Council recommendations. Plaintiffs' Motion Declaration of
11 Judith A. Rosenberg at 2. ("Rosenberg Decl.") Plaintiffs
12 contend that the Government has made no efforts to reduce or
13 address complaints of retaliation against women for complaints
14 of sexual harassment.

15 Plaintiffs argue that the Government's assertions of
16 future compliance with the S.A. should not be credited, as the
17 Government has repeatedly promised actions that were not
18 carried out. For example, after discussions with the
19 Monitoring Council, Region 5 agreed to hire one outside vendor
20 with numerous teams for training all employees during the
21 initial part of their employment on sexual harassment.
22 Plaintiff's Reply, Declaration of Judith A. Rosenberg at 3.
23 ("Rosenberg Decl. July 7, 2003") Although half of the
24 employees from the Tahoe National Forest, Tahoe Basin National
25 Forest, and Inyo National Forest were new, they did not receive
26 sexual harassment training during the initial part of their
27 employment. It further appears that any such training would
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1 not be available until the Fall, when "many of these employees
2 would have left employment," because, "[m]any employees only
3 work seasonally." Rosenberg Decl. July 7, 2003 at 3.

4 In response, the Government argues that they should not be
5 held in contempt. The Government argues that there is no
6 specific time line in the S.A. for when the thirteen IRPs are
7 to be established, so long as they are established by the end
8 of the monitoring period. The Government disagrees that only
9 one of the thirteen IRPs has been implemented; the Government
10 states that it has complied with six IRPs, is currently
11 implementing three IRPs, and has not yet implemented four IRPs.
12 The Government argues that the three Monitoring Council
13 recommendations it was given were refused with cause according
14 to the narrow exceptions in the S.A. Rosenberg Decl. at 4, 6-
15 7.

16 1. Compliance with the S.A.

17 a. Reprisal Sections 2.14, 3.1.23, 3.4

18 Plaintiffs argue that the Government has failed to meet
19 the Retaliation provisions set forth in Sections 2.14, 3.123,
20 and 3.4 of the S.A. Plaintiffs argue that the Government has
21 not been quick to resolve and address reprisal complaints,
22 publically inform employees that it will not tolerate
23 retaliation, and has not disciplined employees and managers for
24 retaliatory activities.

25 The Government does not respond to this contention in
26 their opposition.

1 b. Section 4 Monitoring Order

2 Plaintiffs argue that the Government's opposition of their
3 nominee for Class Representative resulted in the Monitoring
4 Council having no Class Representative from June 2002 to
5 October 2002. Plaintiffs argue that this is a violation of
6 Section 4 of the S.A., which provides that the three party
7 Monitoring Council work together to monitor and enforce the
8 S.A.

9 The Government does not respond to this contention in
10 their opposition.

11 c. Section 4.11 Monitoring Council Recommendations

12 Plaintiffs also point to the Government's refusal to
13 accept formal recommendations as an example of noncompliance.
14 Under Section 4.11 of the S.A., the Monitoring Council can make
15 recommendations to the Government to modify or adjust programs.
16 These recommendations must be adopted unless implementation (1)
17 would have a significant adverse impact on the Agency's
18 mission; (2) is unrelated to the implementation of the Relief
19 Provisions of the Agreement; (3) is contrary to the law as set
20 forth by statute or regulation; or (4) is unduly expensive.
21 S.A. at 14. Between December 2002 and March 2003, the
22 Government refused to adopt three recommendations. Rosenberg
23 Decl. at 4, 6-7. The three recommendations the Government
24 refused were: issuing a supplemental annual summary of reports
25 it was producing on a six-month basis, providing an internet
26 website for access to Monitoring Council activities, and
27 providing separate training on the issue of Prevention of
28

1 Workplace Bullying and Workplace Violence. Rosenberg Decl. at
2 4-7. Although Plaintiffs say the recommendations were refused
3 "without the justification required," the Government maintains
4 that its response stated that the proposed recommendations were
5 "unrelated to the implementation" of the IRPs. Id. at 4, 6-7.
6 The Government explained that issuing an annual summary was
7 unnecessary as they were already issuing six-month summaries.
8 Id. at 4. The Government also explained that providing an
9 internet site to the Monitoring Council was inappropriate as it
10 would involve posting of employee-specific information on a
11 website accessible to all members of the public. Id. at 5.
12 Additionally, the Government declined separate training on the
13 issue of Prevention of Workplace Bullying and Workplace
14 Violence, because the S.A. only requires them to hold annual
15 training on sexual harassment and retaliation and specialized
16 training to supervisors or employees found to have engaged in
17 sexual harassment or retaliation. Id. at 6-7. The Government
18 is now reviewing all denied Monitoring Council requests from
19 December 2002 to March 2003. Defendant's Opposition,
20 Declaration of Vicki Jackson ¶10. ("Jackson Decl.") On this
21 record, it appears that the Government has worked within the
22 framework of the S.A. when refusing to implement these
23 Monitoring Council recommendations and that a violation of the
24 S.A. has not been shown.

25 d. Section 6 Early Intervention Program

26 Plaintiffs argue that the Government has failed to improve
27 the Early Intervention Program ("EIP"). Plaintiffs argue that
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1 the Government has not implemented an appropriate tracking and
2 record keeping procedure for the program. Plaintiffs also
3 argue that the EIP manager position has not been staffed
4 adequately.

5 In response, the Government argues that in June, 2003, all
6 Region 5 employees received information on the EIP. Jackson
7 Decl. ¶12. The Government also argues that they updated all
8 EIP materials, posters, brochures, and the Region's website.
9 Id.

10 e. Section 7 Performance Evaluations

11 Plaintiffs argue that the Government has not fully
12 complied with Section 7 of the S.A., requiring performance
13 evaluations. Plaintiffs argue that the Government has failed
14 to implement performance evaluation clarifications and
15 standards developed by the Performance Evaluation Task Force.

16 In response, the Government argues that the MCR recognized
17 that they have partially complied with Section 7, as they have
18 incorporated the performance evaluation standards into
19 performance plans for management and supervisory employees.
20 The Government does acknowledge, however, that they have not
21 yet implemented these standards for bargaining unit employees.

22 f. Section 8 Exit Interviews

23 Plaintiffs argue that the Government has failed to fully
24 comply with Section 8 of the S.A., requiring Region 5 to offer
25 exit interviews to all employees, review results of interviews
26 for allegations of sexual harassment, and perform follow-up
27 analysis and reports on the interviews. While Plaintiffs
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1 recognize that the Government has set up the program, they
2 argue that the Government has not sufficiently implemented a
3 method for tracking behavior patterns and identifying problem
4 employees. Plaintiffs also argue that the Government has not
5 assessed manager responses or evaluated sources of conflicts.

6 In response, the Government acknowledges that Section 8 is
7 not in compliance with the S.A. The Government states that it
8 has partially complied with and is beginning to implement this
9 provision by sending out a directive informing Region 5
10 employees about the requirements for completing an exit
11 interview and designating the specific form to be used.

12 g. Section 9 Misconduct Investigation Procedures

13 Plaintiffs argue that the Government has failed to comply
14 with Section 9 of the S.A., in which they are required to
15 maintain an investigation procedure for employee misconduct
16 that specifically treats sexual harassment as misconduct.

17 In response, the Government recognizes that they have not
18 yet implemented this process. However, the Government has set
19 forth an implementation plan for complying with Section 9 of
20 the S.A. Jackson Decl. Exh. A. Implementation Plan at 21-26.
21 ("Implement. Plan")

22 h. Section 10 Training

23 Plaintiffs argue that the Government has not fully
24 complied with Section 10 of the S.A., requiring them to provide
25 annual mandatory sexual harassment training and specialized
26 training to individuals who have been found to have engaged in
27

1 sexual harassment or retaliation. Plaintiffs argue that there
2 was no consistency in the type of training that was given.

3 In response, the Government argues that the MCR recognized
4 that some type of training was given, and although the training
5 was not standardized, Region 5 has now hired an outside vendor
6 to conduct sexual harassment training.

7 I. Section 11 Informal EEO Process

8 Plaintiffs argue that the Government has failed to improve
9 the Informal EEO process so that EEO complainants could resolve
10 complaints through mediation as required by Section 11 of the
11 S.A. Plaintiffs argue that the Government has refused
12 mediation when it has been requested.

13 In response, the Government agrees that Section 11 has not
14 been effectively implemented. The Government states that it
15 has an amended contract pending to improve the EEO survey
16 response system, and the new tracking system to process
17 informal complaints was put in place in May 2003. The
18 Government also responds that in May 2003, the Region revised
19 its policy so that Alternative Dispute Resolution would now be
20 offered to all informal complainants who do not elect
21 traditional counseling.

22 j. Section 12 Mentoring Program

23 Plaintiffs argue that the Government has not complied with
24 Section 12 of the S.A., in which they are required to establish
25 a mentoring program to women.

26 In response, the Government argues that the S.A. only
27 requires them to establish a task force to make recommendations
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1 regarding mentoring proposals to the Monitoring Council. Thus,
2 they are in full compliance with the S.A. although the
3 mentoring program implementation is being delayed.

4 The S.A. Section 12 states: "The Agency shall create a
5 task force to examine Region 5 mentoring program. The task
6 force shall recommend to the Council proposals designed to
7 assure that class members are provided appropriate mentoring,
8 including assistance with respect to issues relating to sexual
9 harassment." S.A. at 23-24. Therefore, the Government is
10 required to establish a mentoring program to "assure that class
11 members are provided appropriate mentoring." Id. at 23-24.
12 The Government appears to acknowledge the requirement of a
13 mentoring program, as they are now proceeding with
14 implementation of a mentoring program for the fourth quarter of
15 2003. Defendant's Semi-Annual Report at 5. ("D. Report") The
16 Government is not in full compliance with Section 12 of the
17 S.A.

18 k. Section 13 Scholarships

19 Plaintiffs argue that the Government poorly implemented
20 Section 13 of the S.A., in which they are required to establish
21 a Scholarship Program for Region 5 employees. Plaintiffs argue
22 that the Region shortened the time to respond to and apply for
23 scholarships, which resulted in employees being unable to apply
24 for fiscal year 2003 money.

25 In response, the Government argues that it fully complied
26 with Section 13. The Government argues that it set aside the
27 \$100,000 required in the S.A. for scholarships and awarded
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1 women in fiscal years 2002 and 2003. The Government also is
2 making improvements in the Scholarship program for fiscal year
3 2004, and has voluntarily agreed to extend the program out to
4 fiscal year 2005.

5 The S.A. only requires the Government to set aside funds
6 for scholarships and for the Monitoring Council to "review
7 Region 5's current scholarship program." S.A. at 24. Although
8 Plaintiffs argue that improvement is needed in giving out
9 information on scholarships, the program was implemented.
10 Additionally, the Government showed a 62% increase in the
11 number of applicants for fiscal year 2004, with a 60% increase
12 in female applicants. D. Report at 5.

13 1. Section 14 Adverse Action Digest

14 Plaintiffs argue that the Government has not correctly
15 implemented Section 14 of the S.A., requiring the Government to
16 report details of any adverse action taken against an employee,
17 including their position and gender.

18 In response, the Government argues that they have complied
19 fully with Section 14. The Government states that they
20 originally issued a digest in incorrect format, but corrected
21 the format to meet the terms of the S.A. and distributed it
22 April 2003.

23 m. Section 15 Women's Conference

24 Section 15 of the S.A. requires Region 5 to sponsor an
25 annual Women's Conference. S.A. at 25. Plaintiffs refer to
26 the MCR, in which minor improvements are suggested to improve
27 future conferences. MCR at ix. Additionally, the MCR states
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1 that there are some concerns that the 2003 conference will not
2 be as successful as the 2002 conference, because a new planning
3 team is organizing the 2003 conference.

4 The Government argues that they are in full compliance
5 with Section 15 and highlights the MCR which states the Women's
6 Conference "exceeded expectations." The MCR states that,
7 "[t]he Region has complied with the provision requiring it to
8 sponsor a Women's Conference. S.A. at 83.

9 n. Section 16 Advance Publicity of Work Details

10 Plaintiffs argue that the Government failed to comply with
11 Section 16 of the S.A. until July 15, 2002, which requires the
12 Region to advertise all work details of 90 days or more.

13 In response, the Government acknowledges that they have
14 not yet complied with Section 16 of the S.A. However, the
15 Government states that they have implemented a new program
16 whereby all work details will be announced within 48 hours and
17 processed in a centralized location at the regional office.
18 Jackson Decl. ¶15.

19 o. Section 17 Positive Incentives and Civil Rights
20 Performance

21 Plaintiffs argue that the Government has failed to comply
22 with Section 17 of the S.A., which requires the Government to
23 establish a task force to develop positive incentives to
24 employees who perform civil rights duties and to consider
25 promotion of employees with good civil rights records.

26 In response, the Government argues that they have
27 established a task force, which the MCR acknowledges, and
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1 although they have not yet implemented the task force's
2 recommendations, they have an implementation plan prepared.
3 See Implement. Plan at 51-53.

4 p. Section 18 Record Keeping

5 Plaintiffs argue that the Government is not in compliance
6 with Section 18 of the S.A. Section 18 requires the Region to
7 maintain and provide the Monitoring Council with semi-annual
8 reports on the effectiveness of eight of the IRPs. S.A. at 26.
9 The MCR states that the Government has failed to keep records
10 and provide analysis of the eight programs. MCR at 91.

11 In response, the Government argues that they have
12 evaluated the EIP tracking system, analyzed the Exit Interview
13 automation process, and revised the tracking method for
14 informal EEO complaints. The Government states that expanded
15 record-keeping methods are being developed.

16 q. Section 19 Federal Woman's Program Manager
17 Position

18 Plaintiffs argue that the Government is not in compliance
19 with Section 19 of the S.A. Section 19 requires Region 5 to
20 establish a full-time Federal Women's Program Manager position.
21 S.A. at 26. Plaintiffs argue that the Government has created
22 the position but has not provided information to the Monitoring
23 Council on the Manager's work.

24 The Government does not respond to this contention in
25 their opposition.
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1 r. Section 30 Effect of Master Labor Agreement

2 Plaintiffs argue that the Government has not complied with
3 Sections 30 of the S.A. Section 30 requires Region 5 to
4 provide the union the opportunity to bargain over changes in
5 conditions of employment and to meet to discuss any union
6 objections. S.A. at 38-39. Plaintiffs argue that the
7 Government has not given parties opportunities to discuss
8 objections. MCR at 25. Additionally, Plaintiffs argue that
9 the Monitoring Council was not informed that the Government had
10 entered an agreement with the union. Id.

11 The Government does not respond to this contention in
12 their opposition.

13 2. Contempt

14 In determining whether or not the Government should be
15 held in contempt for its conduct in carrying out its
16 responsibilities under the S.A., the Court intends to look at
17 the conduct as a whole rather than IRP by IRP or decision by
18 decision. For one reason, there is a level of disagreement by
19 the parties as to when the IRPs are required to be implemented.
20 The Plaintiffs maintain that "a three year term was agreed upon
21 based upon the idea that the first year would be the time frame
22 in which initial implementation of the provisions occurred."
23 The Government responds that there is no such declaration in
24 the S.A. and that the only requirement for implementation is
25 that it occur within the three year term. The Government is
26 correct that there is no written provision in the S.A. on the
27 issue. That does not mean, however, that a good faith

1 implementation of the IRPs could wait until the 35th month.
2 The Government does not take that position but it does maintain
3 that, in considering whether or not its implementation conduct
4 is untimely, there is no temporal bright line in the S.A.

5 As already noted, there were eight programs already in
6 existence that matched the programs contemplated by the IRPs
7 defined in the S.A. As to these programs, compliance with the
8 S.A. is a matter of reasonable implementation efforts rather
9 than initiation. The history shows that the efforts have been
10 uneven. In some instances the efforts are considerable and in
11 other instances they fall short. The Court is particularly
12 concerned about efforts to date with Reprisal Sections 2.14,
13 3.1.23, and 3.4 which deal with the issue of retaliation
14 against those complaining of sexual harassment. The Court is
15 also concerned that efforts to establish a functioning,
16 comprehensive database to permit recording, tracking, and
17 analysis of the relevant events necessary to fully implement
18 each of the IRPs. See for example, Sections 2.14, 3.1.23, 3.4,
19 Reprisal Section 6 - EIP, Section 9 - Misconduct Investigation
20 Procedures, and Section 11 - Informal EEO complaints.

21 On the overall issue of reasonably sufficient
22 implementation, the Court is not satisfied that there is clear
23 and convincing evidence of a violation by the Government of its
24 obligation to implement the IRPs covered by the eight existing
25 programs. As to the designated areas of concern - deemed by
26 the Court to be core requirements of full compliance - the
27 Court will schedule a status conference to monitor the

1 Government's efforts on each issue. The status conference will
2 be held by phone at 1:30 p.m. Pacific Time on December 5, 2003.
3 Ten day before the conference the Government is to provide the
4 Court and Plaintiffs' counsel with a report on the existing
5 status of its efforts on these issues.

6 In considering the overall context of the question of
7 Governmental compliance with its obligations under the S.A.,
8 the Court notes three further circumstances.

9 One, it appears that the Government has in fact
10 initiated three new IRP programs: Section 12 -
11 Mentoring, Section 13 - Scholarships, and Section 15
12 - Women's Conference. The MCR, however, does report
13 that, except fo the Women's Conference, these
14 programs have problems of reasonably sufficient
15 implementation.

16 Two, as already described, the Government's refusal
17 to act as to the questioned Monitoring Council
18 recommendations under Section 4.11 was done with
19 cause under the terms of the S.A. The Government
20 also points out that, in other instances, they have
21 fully responded to 72 information requests, fully
22 approved 11 recommendations and partially approved 3
23 recommendations. Declaration of Sadie Aragon at pp.
24 3-6.

25 Three, the Government hired Vicki Jackson, Acting
26 Regional Forester for the Pacific Southwest Region
27 of the USDA, Forest Service in Vallejo, CA on March
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1 23, 2003. Jackson Decl. at ¶1. Jackson's duties
2 include implementation of the IRPs of the S.A. Id.
3 Since Jackson's assignment to this position, a S.A.
4 Implementation Plan was developed, and new positions
5 were created to improve compliance with the S.A.
6 Id. at ¶¶5-9.

7 On the basis of the record, presented to the Court at this
8 time, the Court finds that the evidence is not sufficient to
9 support a finding of Governmental contempt of the orders of the
10 Court requiring implementation of the S.A.

11 B. Appointment of a Special Master

12 Plaintiffs argue that a Special Master is appropriate
13 because of continued noncompliance by the Government, and the
14 failure of the parties to resolve disputed issues on their own.
15 Pl. Mo. at 7, (citing Thompson, 815 F.2d at 1325-26.)
16 Plaintiffs argue that because the Government must "make a
17 myriad of daily administrative, organizational, and tactical
18 decisions," there is sufficient complexity to warrant
19 appointment of a Special Master. Id. at 7.

20 In response, the Government points out that "a reference
21 to a master shall be the exception and not the rule," and a
22 Special Master is only warranted "upon a showing that some
23 exceptional condition requires it." Fed. R. Civ. P. 26(b).
24 The Government also argues that the duties of a Special Master
25 in this case would be duplicative of those of the Monitoring
26 Council.

1 There do not appear to be "exceptional condition[s]" to
2 require a Special Master in this case. See Fed. R. Civ. P.
3 26(b). To begin, as already discussed, the history of
4 Governmental activities relevant to compliance with its
5 responsibilities under the S.A. does not support a finding of
6 contempt. There is clearly room for improvement and, at the
7 same time, the present efforts and present leadership gives
8 reason for an expectation that improvements will be made.

9 Moreover, it does not appear to the Court that there is a
10 breakdown in the relationship of the parties. there have been
11 instances where problems have been solved, and implementation
12 of specific IRPs advanced, by the parties working together.
13 There is nothing that would lead the Court to believe that good
14 faith mutual efforts will not be successful in the future.

15 Finally, the essential work expected of a Special Master
16 is already being carried out by the Monitoring Council. It
17 appears to the Court that the Monitoring Council is now fully
18 functioning and doing a good job in carrying out the
19 responsibilities contemplated by the S.A. There appears to be
20 no need to create a redundant competing authority.

21 For all these reasons the Court declines the Plaintiffs'
22 request to appoint a Special Master.

23 C. Extension of the monitoring period

24 Plaintiffs have asked the Court to toll the monitoring
25 period for the S.A. to account for the hiatus when no Class
26 Representative was a member of the Monitoring Council, and to
27 provide sufficient time to assure full Governmental compliance

1 with the S.A. The Court agrees and the Government concedes
2 that an additional year is warranted. For these reasons the
3 Court orders that the time period of the S.A. will be extended
4 one year to a termination date of January 8, 2006.

5 The MCR referred to in the order was also delayed for much
6 of the same reasons that required this tolling order. In order
7 to reestablish a schedule of such reports in the future, the
8 Court directs that the next Monitoring Council Report should
9 cover the nine month period which directly follows the time
10 period covered by the first MCR. Subsequent reports should
11 cover each succeeding nine month period.

12 III. CONCLUSION

13 For the foregoing reasons, the Court DENIES Plaintiffs'
14 Motion to hold the Government in Contempt and DENIES the
15 Government's Motion for Appointment of a Special Master. The
16 Court orders the Settlement Agreement toll twelve months,
17 allowing the Settlement Agreement to run until January 8, 2006.
18 The Court orders the parties to participate in a phone status
19 conference on December 5, 2003, to review Governmental
20 compliance with retaliation and database requirements of the
21 Settlement Agreement.

22
23 IT IS SO ORDERED

24 Dated: August 14, 2003



25 D. Lowell Jensen
26 United States District Judge
27
28