UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

Case No. 08-10106-CIV-MARTINEZ/BROWN

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
DAVID W. DREIFORT and	)
DENISE DREIFORT,	)
	)
Defendants.	)
	)

CONSENT DECREE

This Consent Decree is entered into between the United States, on behalf of the Secretary of the United States Department of Commerce and the National Oceanic and Atmospheric Administration ("NOAA"), and Defendants David W. Dreifort and Denise Dreifort.

INTRODUCTION

A. Plaintiff United States filed a complaint on December 5, 2008, against Defendant David W. Dreifort, and an amended complaint on March 20, 2009, against Defendants David W. Dreifort and Denise Dreifort, under the National Marine Sanctuaries Act ("NMSA"), 16 U.S.C. §§ 1431 *et seq.*, seeking damages and response costs relating to the destruction of natural resources by Defendants in the Florida Keys National Marine Sanctuary ("FKNMS") between January 1, 1990 and the present. In pursuing this claim, NOAA is acting in its capacity as a trustee for resources within the Sanctuary, pursuant to 40 C.F.R. § 300.600(b)(1) and Department of Commerce Organization Order 25-6.

B. The complaint seeks damages against Defendants for all response costs and damages incurred, or to be incurred, by the United States as a result of the placement of artificial lobster habitats, or casitas, by Defendants in the FKNMS between January 1, 1990, and the present.

C. By entry into this Consent Decree, Defendants do not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaint.

D. The United States has reviewed the financial information submitted by Defendants and has determined that Defendants are unable to pay the total amount of Damages and Response Costs sought by the United States under the Complaint except to the extent of the proceeds from the sale of two of the three real property parcels owned by the Defendants. This settlement is based on the Defendants' limited ability to pay.

E. The Parties agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter and entry of this Decree without further litigation is the most appropriate means for resolving the matters covered herein, and that the Consent Decree is fair, reasonable and in the public interest.

NOW, THEREFORE, with the consent of the Parties to this Decree, it is hereby ORDERED, ADJUDGED AND DECREED:

JURISDICTION

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 16 U.S.C. §§ 1437(j) and 1443(c)(2). Venue is proper within the Southern District of Florida pursuant to 28 U.S.C. §1391(b) because it is the judicial district in which the events upon which the claims are based occurred.

BINDING EFFECT

2. This Consent Decree applies to and is binding upon the United States and upon Defendants and their heirs and assigns.

DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree, including Response Costs and Damages, shall have the meanings ascribed to them in the NMSA, 16 U.S.C. §§ 1431, et seq. The following definitions also apply to terms used in this Consent Decree:

A. "The Act" or "NMSA" means the National Marine Sanctuaries Act, 16 U.S.C. § 1431, et seq.;

B. "Casita" means illegally-placed artificial habitat used for fishing of lobster and other resources, the placement and presence of which cause ongoing injury to Sanctuary resources;

C. "Cudjoe Key Property" means that real property located at 22944 Lookdown Lane, Cudjoe Key, FL, located in Monroe County, legal description Lots 29-30, Block 11, Amended Plat Cudjoe Ocean Shores Two-A, according to the Plat thereof as recorded in Plat Book 6, Page 76, Public Records of Monroe County, Florida;

D. "Damages" means (a) the cost of replacing, restoring, or acquiring the equivalent of a sanctuary resource; (b) the value of lost use of the sanctuary resources pending their restoration or replacement or the acquisition of equivalent resources; (c) the value of a sanctuary resource if it cannot be restored or placed; (d) the costs of damage assessment activities, studies,

and analyses; and (e) the reasonable cost of monitoring appropriate to the injured, restored, or replaced resources;

E. "Defendants" means David W. Dreifort and Denise Dreifort, or either of them;

F. "Effective Date" shall mean the date on which this Consent Decree is entered by the Court.

G. "Entry" means the date on which the Court signs this Consent Decree;

H. "Fair Market Value" means, except in the event of a foreclosure or transfer by deed or other assignment in lieu of foreclosure, the prices at which the Properties would change hands between a willing buyer and a willing seller under actual market conditions, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. As of the date of entry of this Consent Decree, the Fair Market Value of the Properties is $400,000 for the Little Torch Key Property and $900,000 for the Cudjoe Key Property, as established by appraisals done by Andy Ceberio Appraisal Services on February 9, 2009, and said Fair Market Values shall be applicable until such time as a subsequent appraisal(s) conducted by a certified appraiser agreed to by all parties is completed, at which time the Fair Market Value shall be the appraised values determined by those appraisals. In the event of a transfer by foreclosure, "Fair Market Value" shall mean the amount obtained at the foreclosure sale. In the event of a transfer by a deed or other assignment in lieu of foreclosure, "Fair Market Value" shall mean the balance of Defendants' mortgage on the Properties at the time of the transfer.

I. "Financial Information" shall mean the information provided in the Financial Statement of Debtor forms signed by each defendant on March 16, 2009.

J. "Little Torch Key Property" means that real property located at 751 State Road 4a, Little Torch Key, FL, located in Monroe County, legal description Lot14, Block 4, Mates Beach Plat #6 Little Torch Key, according to the Plat thereof as recorded in Plat Book 5, Page 12, Public Records of Monroe County, Florida;

K. "Net Sales Proceeds" means the total value of all consideration for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Properties) less (i) closing costs limited to those reasonably incurred and actually paid by Defendants associated with the Transfer of the Properties, (ii) federal and state taxes owed on the proceeds, and (iii) any amounts necessary to satisfy any bona fide liens on the Properties that are superior in priority to the interests of the United States created by this Consent Decree. "Closing costs" may include brokerage commissions, realty transfer fees and reasonable attorneys' fees, and other usual and customary closing costs, e.g., real estate taxes, recording fees, and other municipal and/or governmental impositions.

L. "Parties" means the United States and Defendants David W. Dreifort and Denise Dreifort;

M. "Placement" means depositing/original placement, tending, relocating, fishing, and all other activities related to the use of casitas in the FKNMS by the Defendant between January 1, 1990, and the present;

N. "Properties" means the Cudjoe Key Property and/or the Little Torch Key Property, and "Property" means either of the Properties;

O. "Public Auction" shall mean an auction of the Property or Properties to the highest bidder, open to the public and conducted by a disinterested party with no affiliation with or

relation to the Defendants, and licensed in the State of Florida to conduct such an auction. If a party who has an affiliation with or relation to any Party to this Consent Decree wishes to bid on the Property or Properties, the minimum permissible bid from such a party shall be the Fair Market Value.

P. "Response Costs" means the costs of actions taken or authorized by the Secretary to minimize the destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risks of such destruction, loss or injury;

Q. "Restoration Plan" means the plan to restore Sanctuary resources and/or injured services, outlined the Dreifort Casita Injury Report;

R. "The Sanctuary" or "Sanctuary" means the Florida Keys National Marine Sanctuary (FKNMS); and

S. "Sites" means current locations of Dreifort casitas in the Sanctuary, where resources have been damaged or injured by the use and ongoing presence of the casitas;

T. "Successor in Interest or Assignee" shall mean any person who meets all of the following criteria: 1) acquires an interest in either of the Properties, or any portion thereof, 2) signs a supplement to this Consent Decree as Successor in Interest or Assignee, and 3) meets all conditions set out in the Consent Decree as Successor in Interest or Assignee.

U. "Transfer" shall mean each sale, assignment or transfer by the Defendants of the Properties, or any portion thereof, or of the entity which owns the Properties, where title to the Properties or any portion or interest thereof (or the entity owning the Properties): (i) is transferred in exchange for consideration, or (ii) is transferred involuntarily by operation of law, including foreclosure and its equivalents following default on the indebtedness secured, in whole or in part,

by the Properties, including, but not limited to, a deed or other assignment in lieu of foreclosure. A Transfer does not include a transfer pursuant to an inheritance or a bequest.

PAYMENT

4. Payment of Proceeds from Sale of the Property. The Defendants shall use Best Efforts to Transfer the Properties. For purposes of this Consent Decree, "Best Efforts" shall include, but shall not be limited to: (1) listing the Properties with a broker, dealer or agent who usually deals with the type of property in question; (2) advertising the Properties as being for sale on at least a monthly basis in national computer networks, commercial referral services, direct marketing and mailing programs, real estate publications, trade or other publications suitable for the Properties, or a newspaper of general circulation (defined as one with a circulation of over 10,000) covering Monroe County, Florida; (3) responding to the reasonable inquiries of prospective buyers; (4) maintaining the Properties in a condition suitable for exhibition to prospective buyers; and (5) allowing the Properties to be shown at all reasonable times.

5. Within 60 days after the Effective Date, the Defendants shall submit to NOAA, in accordance with Paragraph 21 (Notices and Submissions), information documenting their Best Efforts to Transfer the Properties. The Defendants shall thereafter submit an update documenting their continuing Best Efforts to Transfer the Property every 90 days, with the first update due 150 days from the Effective Date.

6. The Defendants shall consult with NOAA regarding all principal terms and conditions of the Defendants' listing of the Properties with a broker, dealer or agent and the Defendants' advertising the Properties as being for sale. Such consultation shall occur not later than ten days before listing or advertising the Properties. The Properties must be listed at an

asking price that takes into account the current appraised values, those being $400,000 for the Little Torch Key Property and $900,000 for the Cudjoe Key Property, as established by appraisals done by Andy Ceberio Appraisal Services on February 9, 2009, and the listing price must be approved by NOAA. The Transfer of the Properties shall be subject to, and conditioned upon, NOAA's prior written approval. All consultations with NOAA required pursuant to this Paragraph shall be through the NOAA contact identified in Paragraph 21 of this Consent Decree (Notices and Submissions).

7. The Defendants shall notify NOAA in writing, in accordance with Paragraph 21 (Notices and Submissions), within 3 business days of receipt of any offer to purchase the Properties. The Defendants shall at that time provide NOAA with a copy of the offer. The Defendants shall address offers to purchase the Properties as follows: 1) if the offer is below the Fair Market Value, the Defendants may not accept the offer and sell the Property without NOAA's prior written consent; 2) if the offer is equal to or greater than the Fair Market Value, and does not contain unreasonable contingencies or terms, the Defendants may accept the offer and sell the Properties without further consent from NOAA; 3) if however the offer was made by a party who has an affiliation with or relation to any Party to this Consent Decree, the Defendants may not accept the offer and sell the Property without NOAA's prior written consent, regardless of the offer amount.

8. At least 30 days prior to any Transfer of the Properties, the Defendants shall notify NOAA of the proposed Transfer, which notice shall include a description of the Property to be sold, the identity of the purchaser, the terms of the Transfer, the consideration to be paid, and a copy of the Transfer agreement.

9. The Defendants shall notify NOAA of the completion of any Transfer within 10 days of the date of closing and shall include with such notification a copy of the relevant closing documents, including final executed documentation for the conveyance. The Defendants shall also provide NOAA with documentation sufficient to show the total value of all consideration for each Transfer at the time of each Transfer, the amount of the proceeds of the Transfer, and (i) the amount of closing costs reasonably incurred and actually paid by Defendants associated with the Transfer of the Properties, (ii) federal and state taxes owed on the proceeds, and (iii) any amounts necessary to satisfy any bona fide liens on the Properties that are superior in priority to the interests of the United States created by this Consent Decree. A material representation made by the Defendants as a condition precedent to this Consent Decree is that the only existing lien or encumbrance of any kind on the Properties as of the date of entry of this Consent Decree is a mortgage on the Cudjoe Key Property in a maximum amount of $440,000.

10. The Defendants shall pay to NOAA all of the Net Sales Proceeds of the Transfer of the Properties, plus any amount paid to satisfy the mortgage on the Cudjoe Key Property in excess of $220,000, up to the sum of $1,100,000. The payments required under this Paragraph shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures. The payments shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the U.S. Attorney's Office in the Southern District of Florida following entry of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day. At the time of payment, the Defendants shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall

state that the payment is for damages and response costs owed pursuant to the Consent Decree in United States v. David Dreifort and Denise Dreifort, and shall reference the civil action number of this case and DOJ case number 90-5-1-1-09568, to the United States in accordance with Paragraph 21 of this Decree (Notices and Submissions). Payment shall be made within 15 days of the effective date of the Transfer of any Property. The amounts paid pursuant to this Paragraph shall be deposited in the NOAA DARRF--Dreifort Account.

11. Unless requested by NOAA at other times, if a contract of Transfer of both of the Properties has not been executed within nine (9) months of the date of listing, the Defendants shall adjust the asking price for the unsold Property or Properties as approved by NOAA, and continue such adjustment of the asking price every nine (9) months thereafter with the prior approval of NOAA until such time as a Transfer occurs.

12. If no Transfer has occurred with respect to a Property within nine (9) months of the most recent appraisal, NOAA may demand a subsequent appraisal.

13. NOAA may, in its sole discretion, direct the Defendants to submit any unsold Property for sale by Public Auction if such Property has not been Transferred within one year of the date of Entry of this Consent Decree.

14. The Defendants shall not sell, assign or transfer the Properties except by means of a Transfer.

15. In the event of any Transfer of the Properties or any portion thereof pursuant to this Section, the Defendants shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Consent Decree.

16. In the event that any payments required by Paragraph 10 are not received when due, interest shall accrue on the unpaid balance through the date of payment at the post-judgment interest rate prescribed pursuant to 28 U.S.C. § 1961.

COMPLIANCE PROGRAM

17. For a period of five years from the Date of Entry of this Decree, Defendants shall not operate a vessel within or engage in or participate in any commercial or recreational fishery within the boundaries of the Sanctuary, as defined by 15 C.F.R. § 922.161 and Appendix I to 15 C.F.R. Part 922 Subpart P. This includes but is not limited to the harvest or sale of any fish, lobster or shellfish pursuant to any state or federal permits or licenses, or Florida salt water products license and includes working under another person's state or federal permits or licenses as a crew member within the boundaries of the Sanctuary. Nothing in this paragraph prevents Defendants from holding or applying for state or federal permits or licenses pertaining to commercial or recreational fisheries, or fishing outside the Sanctuary.

EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

18. In consideration of the compensation provided by Defendants in accordance with this Consent Decree and the actions required under this Consent Decree, and except as specifically provided in the following Paragraph, the United States covenants not to sue or to take any other civil or administrative action against Defendants under the NMSA to recover Response Costs or Damages related to the placement of casitas by the Defendants in the FKNMS as alleged in the Amended Complaint. These covenants not to sue are not effective until, and are conditioned upon, complete and satisfactory performance by each Defendant of his or her obligations under this Consent Decree, including but not limited to Paragraph 10. This covenant

not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to the United States by Defendants. If the Financial Information is subsequently determined by the United States to be false or, in any material respect, inaccurate, Defendants shall forfeit all payments made pursuant to this Agreement and the covenant not to sue shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from the Defendants' unlawful activities or submission of materially inaccurate information. This covenant not to sue extends only to the Defendants and does not extend to any other person.

19. Plaintiff reserves, and this Consent Decree is without prejudice to, all rights of the United States against Defendants with respect to all matters other than those expressly specified in the preceding Paragraph.

20. Defendants hereby covenant not to sue and agree not to assert any claims or causes of action, including but not limited to claims under the Constitution of the United States of America, against the Plaintiff, its employees, agents, experts, or contractors, with respect to actions taken by Plaintiff relating to the placement of casitas by the Defendants in the FKNMS and with respect to the allegations contained in the Complaint.

NOTICES AND SUBMISSIONS

21. Any notices or correspondence required to implement this Consent Decree shall be in writing and shall be deemed to have been made when sent by certified mail or its equivalent, including overnight courier, to the persons specified below. Notices or correspondence shall refer to DJ No. 90-5-1-1-09568 and the title and civil action number of this case, and shall be sent to:

As to the United States:

United States Department of Justice
Chief, Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20005

and

M. E. Rolle
Office of General Counsel
National Oceanic & Atmospheric Administration
263 13th Avenue South, Suite 177
St. Petersburg, FL 33701
(727) 824-5388

As to Defendants:

Denise and David Dreifort
22944 Lookdown Ln
Cudjoe Key, FL 33042
E-mail: bigdreif28@aol.com

and

Dena and Justin Pfenning
539 Queensbridge Drive
Lake Mary, FL 32746
Cell: (305) 923-1593
Home: (321) 363-3576
Email: kwkermie@gmail.com

RETENTION OF JURISDICTION

22. The Court shall retain jurisdiction over both the subject matter of, and the Parties to, this action for the purposes of enforcing the Parties' rights and obligations under this Consent Decree until such time as Defendants have fulfilled all obligations under this Consent Decree.

SIGNATORIES

23. Each undersigned representative certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document. This Consent Decree may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.

ENTIRE AGREEMENT

24. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree and supersedes all prior agreements and understandings, whether oral or written. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

FINAL JUDGMENT

25. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States and Defendants.

DONE AND ORDERED in Chambers in Miami, Florida, this 15 day of June, 2009.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Brown
All Counsel of Record