

FILED  
U.S. DISTRICT COURT  
DISTRICT OF WYOMING

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

2016 MAY -9 AM 10:07  
STEPHAN HARRIS, CLERK  
CASPER

_____	)
ANDY JOHNSON,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES ENVIRONMENTAL	)
PROTECTION AGENCY, <i>et al.</i> ,	)
	)
Defendants.	)
_____	)

Civil Action No. 15-CV-147 SWS

**CONSENT DECREE**

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the claims raised in Mr. Johnson’s petition for review and the United States’ claims under the Clean Water Act (“CWA”) set forth in the Findings of Violation and Administrative Order for Compliance (“Administrative Order”) challenged in the petition for review, in connection with the construction of a dam and pond in Uinta County, Wyoming (the “Site”);

WHEREAS, Mr. Johnson and the United States agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the parties’ respective claims; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the parties’ claims in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law;

THEREFORE, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. § 1331.
2. Venue is proper in the District of Wyoming pursuant 28 U.S.C. § 1391(e)(1)(B), because the property that is the subject of this action is located in this District.
3. The Petition for Review states a claim upon which relief can be granted pursuant to the Administrative Procedure Act, 5 U.S.C. § 702.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Mr. Johnson and the United States, their agents, successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with Mr. Johnson or the United States whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree, the parties shall not raise as a defense the failure of any of their agents, successors or assigns or any person, firm or corporation acting in concert or participation with the parties, to take any actions necessary to comply with the provisions hereof.
5. The transfer of ownership or other interest in the Site shall not alter or relieve Mr. Johnson of his obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to the transfer of ownership or other interest in the Site, Mr. Johnson shall provide written notice and a true copy of this Consent Decree to his successors in interest and

shall simultaneously notify EPA and the United States Department of Justice at the addresses specified in Section VII below that such notice has been given. As a condition to any such transfer, Mr. Johnson shall reserve all rights necessary to comply with the terms of this Consent Decree.

### III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims between Mr. Johnson and the United States arising from Mr. Johnson's construction of a dam and pond in Uinta County, Wyoming referenced in the Administrative Order and the Petition for Review, through the date of lodging this Consent Decree. Mr. Johnson and the United States Environmental Protection Agency ("EPA") waive any right to seek termination or modification of this Consent Decree based upon future decisions of any court in any case unrelated to Mr. Johnson or this Consent Decree or the Site.

7. Mr. Johnson covenants not to sue and agrees not to assert any claims or causes of action against the United States, its departments or agencies, with respect to any matter asserted in the Petition for Review or in the Administrative Order.

8. The United States, its departments and agencies, covenant not to sue or take administrative action against Mr. Johnson under the Clean Water Act with respect to any matter asserted in the Petition for Review or in the Administrative Order.

9. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law.

10. With the exception of matters specifically addressed in this consent decree, which arise under federal law, this Consent Decree in no way affects or relieves Mr. Johnson of his responsibility to comply with any applicable federal, state, or local law, regulation or permit.

11. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

12. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and other applicable law.

13. Nothing in this Consent Decree shall constitute an admission of wrongdoing or the concession of any fact or question of law by any party.

#### IV. SPECIFIC PROVISIONS

##### RESTORATION, MITIGATION AND PRESERVATION

14. Mr. Johnson shall perform mitigation under the terms and conditions stated in Appendix A appended hereto and incorporated herein by reference.

#### V. NOTICES AND OTHER SUBMISSIONS

15. By May 15, 2016, Mr. Johnson shall provide the United States with written notice at the addresses specified in Section VII of this Consent Decree, confirming compliance with the terms of Section IV of this Consent Decree to be completed in the spring of 2016.

16. The notice shall specify the date when the work was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

17. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, Mr. Johnson shall certify such notices, documents and reports as follows: I

certify under penalty of law that the information submitted is, to the best of my knowledge and belief, true, accurate and complete.

**VI. DISPUTE RESOLUTION**

18. The Court shall resolve any dispute upon the motion of either party based on the terms of this Consent Decree. The filing of a motion asking the Court to resolve a dispute shall not extend, postpone, or set aside any obligation of Mr. Johnson or EPA under this Consent Decree.

**VII. ADDRESSES**

19. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

**A. TO EPA:**

Director, Water Technical Enforcement Program  
United States Environmental Protection Agency  
Region 8 (8ENF-W)  
1595 Wynkoop St.  
Denver, CO 80202

**B. TO THE UNITED STATES DEPARTMENT OF JUSTICE**

Alan Greenberg  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
999 18<sup>th</sup> Street, Suite 370  
Denver, CO 80202

**D. TO MR. JOHNSON:**

Andrew Johnson  
686 County Road 260  
Fort Bridger, WY 82933

Ray and Susan Kagel  
Kagel Environmental, LLC  
P.O. 597  
177 E. Main St.  
Rigby, ID 83442

VIII. COSTS OF SUIT

20. Each party to this Consent Decree shall bear its own costs, attorneys' fees and expenses in this action.

IX. PUBLIC COMMENT

21. After the lodging and before the entry of this Consent Decree, the United States will give an opportunity for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. Mr. Johnson agrees not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified Mr. Johnson in writing that it no longer supports entry of the Consent Decree.

X. CONTINUING JURISDICTION OF THE COURT

22. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

**XI. MODIFICATION**

23. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and Mr. Johnson and approved by the Court.

**XII. TERMINATION**

24. Except for Paragraphs 7 and 8, which shall survive the termination of this Consent Decree, this Consent Decree may be terminated by either of the following:

A. Mr. Johnson and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

B. Mr. Johnson may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Mr. Johnson has maintained compliance with all provisions of this Consent Decree through September 30, 2017;


2. Mr. Johnson has certified compliance to the Court and all Parties; and

3. Within forty-five (45) days of receiving such certification from Mr. Johnson, EPA has not contested in writing that such compliance has been achieved. If EPA disputes Mr. Johnson's full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

C. Any motion to terminate shall be accompanied by a motion by Mr. Johnson to dismiss his petition for review with prejudice, if the motion to terminate is granted.

IT IS SO ORDERED.

Dated and entered this 9<sup>th</sup> day of May, 2016.

  
United States District Judge  
15-CV-147-Consent Decree



ON BEHALF OF THE UNITED STATES:

JOHN C. CRUDEN  
Assistant Attorney General  
Environment and Natural Resources Division

/s/ Alan D. Greenberg  
Alan D. Greenberg, Attorney  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
999 18<sup>th</sup> Street, Suite 370  
Denver, CO 80202

Dated: May 5, 2016

CHRISTOPHER A. CROFTS  
United States Attorney

/s/ Nicholas Vassallo  
NICHOLAS VASSALLO  
Assistant United States Attorney  
2120 Capitol Avenue, Room 4002  
Cheyenne, WY 82001  
Tel: (307) 772-2124  
Fax: (307) 772-2123

Dated: May 5, 2016

ON BEHALF OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY:



Suzanne J. Bohan  
Assistant Regional Administrator  
Office of Enforcement, Compliance and Environmental Justice  
United States Environmental Protection Agency  
Region 8  
1595 Wynkoop St.  
Denver, CO 80202

Dated:

3/21/16

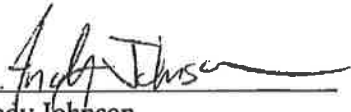


Susan Shinkman, Director  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Dated:

3/18/16

ON BEHALF OF ANDY JOHNSON

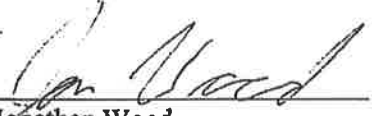
  
Andy Johnson  
686 County Road 260  
Fort Bridger, WY 82933

Dated: 03/10/16

Karen Budd-Falen  
Budd-Falen Law Offices, L.L.C.  
P.O. Box 346  
Cheyenne, Wyoming 82003

Daniel B. Frank  
Frank Law Office, P.C.  
519 East 18th St.  
Cheyenne, Wyoming 82001

Maegan L. Woita  
Mountain States Legal Foundation  
2596 South Lewis Way  
Lakewood, Colorado 80227

  
Jonathan Wood  
M. Reed Hopper  
Pacific Legal Foundation  
930 G St  
Sacramento, California 95814

Dated: 03/08/16

# APPENDIX A

# TO CONSENT DECREE

APPENDIX A

Mitigation Plan

*Andy Johnson v. U.S. Environmental Protection Agency*, Civil Action No. 15-CV-147-SWS

February 25, 2016

Six Mile Creek, Uinta County, Wyoming

Mitigation Planting

Mr. Johnson shall plant dormant live willow cuttings in areas highlighted in white (refer to *Mitigation Planting Map*, attached as Exhibit 1). Nursery grown stock or local native salvaged willows may be substituted to meet planting density requirements. Plantings shall be completed during the spring of 2016. If any of the plantings die prior to September 30, 2017, they shall be replaced.

Cuttings from on-site or local willows shall be utilized in the mitigation effort to the maximum extent possible. The abundance of willows in the vicinity of the project area provides an excellent source for site-adapted cuttings. Willow cuttings should be collected in the fall after abscission (leaf-fall) or in the spring before leaf-out. Cuttings will have a minimum diameter of 3/4-inch and be comprised of wood that is at least 2 years old. Cuttings will be placed within the areas highlighted in white in the Mitigation Planting Map within a three-foot wide band around the shoreline. Willows will be spaced such that a willow will be planted in any two-foot by two-foot square area in which no willow currently exists and will be planted such that every nine foot section of the band will contain at least six existing or planted willows. If any soil is removed during the planting of willow cuttings below the ordinary high water mark of the pond or in adjacent wetlands, it shall not be redeposited below the ordinary high water mark or in adjacent wetlands. No additional soil shall be deposited below the ordinary high water mark of the pond or in adjacent wetlands. For a more detailed description on the correct technique in planting of willow stakes, refer to the technical paper prepared by the U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS) "*How to Plant Willow and Cottonwood for Riparian Restoration*" dated January 2007, attached as Exhibit 2.

If, prior to September 30, 2017, the pond for some reason is dewatered for maintenance/inspection, manual watering of the plantings shall be undertaken to prevent loss of the riparian habitat that has been established.

The site should be monitored for the presence of invasive and noxious weeds through September 30, 2017. The Uinta County Weed and Pest Department should be contacted regarding its availability for, and advice on, weed monitoring and control within the project area and recommendations from the County shall be followed.

By September 30, 2016 and September 30, 2017, Mr. Johnson shall submit to EPA sufficiently detailed videos taken during the 2016 and 2017 summer growing seasons, respectively, to demonstrate compliance with the requirements of this mitigation plan.

**Fencing for Livestock Control**

Fencing shall be placed on the north side of the pond as shown on the Mitigation Plan Map to prevent impacts from grazing livestock in the planting areas adjacent to the pond. The fence shall be maintained through September 30, 2017. No livestock shall be allowed access to the land on the south side of the pond through September 30, 2017. Fencing shall be of the type commonly used to manage livestock.