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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
NORTHERN ARAPAHO TRIBE, and)
EASTERN SHOSHONE TRIBE)
)
Plaintiff-Intervenors)
)
v.)
)
JOHN HUBENKA, and)
LECLAIR IRRIGATION DISTRICT)
)
Defendants.)

Civil Action No. 10-CV-0093-ABJ

AMENDED COMPLAINT

The United States of America, through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Administrator of the United States Environmental Protection Agency, alleges as follows:

NATURE OF THE ACTION

1. This is a civil action commenced under section 309(b) and (d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(b) and (d), to obtain injunctive relief against Mr. John Hubenka ("Mr. Hubenka") and the LeClair Irrigation District ("LeClair") and civil penalties against Mr. Hubenka, for the discharge of pollutants into waters of the United States in Fremont County, Wyoming, without authorization by the United States Department of the Army, in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

2. In this action, the United States seeks (1) to enjoin the discharge of pollutants into waters of the United States without a permit in violation of CWA section 301(a), 33 U.S.C. § 1311(a); (2) to require Defendants, at their own expense and at the direction of the Environmental Protection Agency, to restore and/or mitigate the damages caused by their unlawful activities; and (3) to require Mr. Hubenka to pay civil penalties as provided in 33 U.S.C. § 1319(d).

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355.

4. Venue is proper in the District of Wyoming pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) and (c), because the Defendants reside in this District, the subject property is located in this District, and the causes of action alleged in this Complaint arose in this District.

5. Notice of the commencement of this action has been provided to the State of Wyoming pursuant to CWA section 309(b), 33 U.S.C. § 1319(b).

THE PARTIES

6. The Plaintiff in this action is the United States of America. Authority to bring this action is vested in the United States Department of Justice pursuant to 28 U.S.C. §§ 516 and 519, and 33 U.S.C. § 1366.

7. Defendant Hubenka is an individual residing in or near Riverton, Wyoming. At all time relevant to this complaint, Mr. Hubenka was employed as the operations manager for LeClair.

8. Defendant LeClair is an irrigation district established as a corporation under Wyoming law with its principal place of business in Riverton, Wyoming.

9. At all times relevant to the Complaint, one or both of the Defendants either owned or controlled the real property that is the subject of this Complaint and/or otherwise controlled activities that occurred on such property.

STATUTORY BACKGROUND

10. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344.

11. CWA section 404(a), 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

12. CWA section 502(12), 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

13. CWA section 502(6), 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, dredged spoil, rock, sand and cellar dirt.

14. CWA section 502(7), 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

15. 33 C.F.R. § 328.3(a)(1), (2) and (4), and 40 C.F.R. § 232.2, define "waters of the United States" to include: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all interstate waters; and (iii) tributaries to such waters.

16. CWA section 502(14), 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

17. CWA section 502(5), 33 U.S.C. § 1362(5), defines "person" to include "an individual" and a "corporation."

18. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

19. CWA section 309(d), 33 U.S.C. § 1319(d), authorizes the commencement of an action for civil penalties against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a) or who violates any order issued by the Environmental Protection Agency under CWA section 309(a), 33 U.S.C. § 1319(a).

GENERAL ALLEGATIONS

20. Commencing in approximately 2000, at specific times best known by the Defendants, Mr. Hubenka and/or persons acting on his behalf, discharged dredged or fill material into waters of the United States without a permit under CWA section 404, in order to construct four dikes in the Wind River approximately 19 miles west of Riverton in Fremont County, Wyoming (hereinafter referred to as the "Wind River Site"). Commencing in approximately 2000, at specific times best known by the Defendants, LeClair and/or persons acting on its behalf, discharged dredged or fill material into waters of the United States without a permit under CWA

section 404, in order to construct one of the four dikes – the dike located approximately 900 feet downstream of the LeClair diversion dam in Section 32, Township 2 North, Range 2 East of the Wind River Meridian (Dike #1).

21. The dredged or fill material that the Defendants and/or persons acting on their behalf, caused to be discharged includes, among other things, dredged spoil, dirt, rock and sand, all of which constitute "pollutants" as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

22. The Defendants and/or persons acting on their behalf used mechanized earth-moving equipment to accomplish the discharges. This equipment constitutes "point sources" as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

23. The Defendants did not obtain a permit from the Secretary of the Army, acting through the Chief of Engineers, for the discharges of this dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344.

24. One or both of the Defendants either owned or otherwise asserted control over the land on which each unauthorized discharge of dredged or fill material into waters of the United States occurred.

25. Mr. Hubenka conducted, contracted for, supervised and/or otherwise controlled the unauthorized activities identified in Paragraph 20. LeClair conducted, contracted for, supervised and/or otherwise controlled the unauthorized activities associated with construction of Dike #1.

26. The Defendants are persons within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5).

27. The Wind River at the Wind River Site is a relatively permanent, continuously flowing body of water forming a geographic feature that is described in ordinary parlance as a river. The Wind River is a traditional navigable water.

28. The name of the Wind River changes to the Bighorn River near Thermopolis, Wyoming. The Bighorn River is an interstate river and traditional navigable water, which flows north into Montana, where it joins the Yellowstone River.

29. The Wind River constitutes a water of the United States and is a navigable water under CWA section 502(7), 33 U.S.C. § 1362(7).

30. The Defendants have violated and continue to violate CWA section 301(a), 33 U.S.C. § 1311(a), by their unauthorized discharges of dredged or fill material into waters of the United States at the Wind River Site.

31. Each day that such material remains in place constitutes a separate violation of CWA section 301(a), 33 U.S.C. § 1311(a).

32. Unless enjoined, the Defendants are likely to continue to discharge dredged or fill material into and/or to allow dredged or fill material to remain in the Wind River Site in violation of CWA section 301, 33 U.S.C. § 1311.

33. On September 20, 2004, Mr. Hubenka was charged with three criminal counts under the CWA of knowingly discharging dredged and fill material into the Wind River without a permit.

34. Mr. Hubenka's criminal case was tried to a jury between September 21 and 28, 2004.

35. Mr. Hubenka was found guilty on all three counts.

36. On October 28, 2004, the U.S. Environmental Protection Agency issued a First Amended Findings of Violation and Administrative Order for Compliance to Mr. Hubenka requiring removal of unauthorized dredged and fill material from the Wind River Site and restoration of the Wind River Site to its pre-impact conditions and grade ("First Amended Order").

37. On December 27, 2004, the United States District Court for the District of Wyoming sentenced Mr. Hubenka to one year of probation. The Court made Mr. Hubenka's compliance with the First Amended Order a condition of the probation.

38. The United States Court of Appeals for the Tenth Circuit affirmed Mr. Hubenka's conviction.

39. Mr. Hubenka has not complied with the First Amended Order.

40. The dikes constructed of the dredged and fill material discharged by the Defendants and/or people acting on their behalf remain at the Wind River Site.

**First Claim for Relief - Mr. Hubenka
(Discharge of Pollutants Into Waters of the United States without a Section 404 Permit)**

41. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 40.

42. Commencing in approximately 2000, at specific times best known by Mr.

Hubenka, Mr. Hubenka and/or persons acting on his behalf discharged dredged or fill material in and around the Wind River Site located in Fremont County, Wyoming.

43. The Wind River Site is a "water of the United States" within the meaning of the CWA and the regulations promulgated thereunder.

44. Mr. Hubenka's activities at the Wind River Site resulted in the placement of approximately 13,500 cubic yards of dredged and fill material and caused adverse impacts to at least 2 ½ miles of the Wind River.

**Second Claim for Relief - Mr. Hubenka
(Violations of Administrative Order)**

45. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 44.

46. On October 28, 2004, Region 8 of the U.S. Environmental Protection Agency issued the First Amended Order to Mr. Hubenka.

47. Mr. Hubenka received the First Amended Order on November 10, 2004.

48. The First Amended Order specified certain actions that Mr. Hubenka was required to complete in order to come into compliance with the Clean Water Act.

49. Mr. Hubenka did not comply with the requirements of the First Amended Order.

**Third Claim for Relief - LeClair
(Discharge of Pollutants into Waters of the United States Without a Section 404 Permit)**

50. Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 49.

51. Commencing in approximately 2000, at specific times best known by LeClair, LeClair and/or persons acting on its behalf, including but not limited to Mr. Hubenka, discharged dredged or fill material in and around the Wind River Site to construct Dike #1.

52. The Wind River Site is a "water of the United States" within the meaning of the CWA and the regulations promulgated thereunder.

53. LeClair's activities at the Wind River Site to construct Dike #1 resulted in the placement of approximately 2,200 cubic yards of dredged and fill material and caused adverse impacts to at least 2 ½ miles of the Wind River.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, the United States of America, respectfully requests that this Court order the following relief:

That the Defendants be permanently enjoined from discharging or causing the discharge of dredged or fill material or other pollutants into any waters of the United States except in compliance with the CWA;

That the Defendants be enjoined jointly to undertake measures, at the Defendants' own expense and at the direction of the Environmental Protection Agency, to effect complete restoration of the Wind River Site at and in the vicinity of Dike #1;

That Mr. Hubenka be enjoined to undertake measures, at Mr. Hubenka's own expense and at the direction of the Environmental Protection Agency, to effect complete restoration of the Wind River Site at and in the vicinity of the three dikes located approximately two miles downstream from the LeClair Diversion Dam near Mr. Hubenka's residence;

That Mr. Hubenka be assessed pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), a civil penalty for each day of each violation of CWA section 301(a), 33 U.S.C. § 1311(a), and each day of violation of the First Amended Order;

That the United States be awarded costs and disbursements in this action; and

That this Court grant the United States such other relief as the Court may deem just and proper.

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DATED this 15th day of March, 2011.

Respectfully submitted,

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Division

/s/ Alan D. Greenberg

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March 2011, I electronically filed the foregoing United States' Amended Complaint with the Clerk of the Court using the electronic filing system, which will send notification of such filing to the registered CM/ECF user at the following e-mail addresses:

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