



U.S. Department of Justice

Environment and Natural Resources Division

MTG
90-1-2-14114

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March 23, 2015

BY EMAIL AND U.S. MAIL

Ralph I. Lancaster, Jr.
Pierce Atwood
Merrill's Wharf
254 Commercial Street
Portland, ME 04101

Re: Processing of *Touhy* Requests

Dear Special Master Lancaster:

I write on behalf of the United States to notify you, as contemplated by Case Management Order 4, that we anticipate that agencies within the Department of Agriculture (the National Resources Conservation Service and the National Agricultural Statistics Service), Department of the Interior (the Fish and Wildlife Service and the United States Geological Survey), Department of Commerce (the Department and the National Oceanic and Atmospheric Administration), and Department of Defense (the U.S. Army Corps of Engineers) will require more than 120 days in which to process the States' requests for information from those agencies made under each agency's *Touhy* regulations. The *Touhy* requests were each accompanied by a non-party subpoena issued under Federal Rule of Civil Procedure 45 that purports to require the agencies to begin production in 30 days and to complete production in 120 days.

Under 5 U.S.C. § 301 many agencies have promulgated so-called *Touhy* regulations, see *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), governing the response to third-party subpoenas for official information. These regulations typically prohibit the unauthorized release of information by current (and sometimes former) agency employees, provide a procedure for centralized agency decisionmaking concerning how the agency will respond to a subpoena or other request for testimony or documents served on an agency employee, and provide a procedure by which a subpoenaing litigant may obtain an agency decision.

Each agency subpoenaed in this case has promulgated *Touhy* regulations. The agencies are making every effort to, in 120 days, carry out the required processes under their respective *Touhy* regulations, make a determination whether to produce documents sought under the regulations, and produce those documents that the agencies determine can be released. But for many of the requests it appears that it simply will not be possible to complete the necessary review and production in 120 days. Highlights of some of the practical obstacles are as follows:

- The requests are voluminous and seek information going back 40 years or more, and they potentially cover hundreds of thousands of documents *per agency*. Simply identifying and locating responsive documents will be a heavy burden on each agency that may take more than 120 days to complete.
- The requests will require the agencies to locate, compile, and review documents held electronically and older documents that are not available in electronic form. The latter are likely to require searches in agency headquarters as well as in multiple locations and different field offices. For example, the Natural Resources Conservation Service has identified that searches might be required in facilities in each of the counties in the ACF Basin.
- Processing the requests will require the agencies to devote significant resources to the task, diverting scarce resources from projects within each agency's mission. Each agency must therefore determine under its regulations the appropriate balance in allocating its resources to process the *Touhy* requests. For example, the Corps of Engineers employees with the most relevant knowledge to the *Touhy* requests are the same employees actively working on the revision of the water control plans and manuals for the ACF Basin. As we have explained, the Corps' manuals are long overdue for updating, and litigation prevented the Corps from doing so for nearly 20 years. The Eleventh Circuit's decision in *In re: MDL 18-24 Tri-State Water Rights Litigation*, 644 F.3d 1160 (11th Cir. 2011), finally freed the Corps from those litigation constraints and allowed the Corps to proceed with updating the manuals. The Corps has committed substantial resources to this undertaking. It issued its final scoping report for its update of the Master Manual in March 2013, and is publicly committed (including in a representation to the Court in these proceedings) to releasing a draft Master Manual and an environmental impact statement in September 2015, and to releasing and implementing a final Manual in March 2017. See U.S. Amicus Br. 9 (citing U.S. Army Corps of Eng'rs, ACF Master Water Control Manual Update, <http://www.sam.usace.army.mil/Missions/PlanningEnvironmental/ACFMasterWaterControlManualUpdate.aspx> (last visited March 22, 2015)). Both parties, moreover, have taken the position that relief ordered in this case should not interfere with the Corps' regulatory responsibilities. See Ga.

Mot. to Dismiss 15-18, 25; Fla. Br. in Opp. to Ga. Mot. to Dismiss 20-21. If the Corps' employees are required to devote significant time to attempt to process the *Touhy* requests in 120 days, it would yet again jeopardize the Corps' ability to timely complete its revision of the manuals.

Each agency is working or will work actively with the States to better define and narrow the scope of the *Touhy* requests, and we are hopeful that effort will shorten the decisionmaking and production time. But we do not anticipate that full production can be completed in 120 days for any of the seven agencies sent *Touhy* requests and subpoenaed in this case.

We are mindful of the important nature of this action, of the timelines you have set for discovery and trial, and of the role that the United States has requested for its participation as amicus curiae. We will endeavor to complete each agency's review of the *Touhy* requests in a timely manner so as not to unduly delay resolution of this action, but we anticipate the legally required procedures under the regulations will take more than 120 days to complete, especially given the volume of materials sought. We also note that the United States has in another original action proceeded in this manner under its *Touhy* regulations. In *Kansas v. Nebraska*, No. 126, Original, the States subpoenaed for deposition a former Bureau of Reclamation employee. The Bureau concluded that it did not have sufficient time to process the request under its *Touhy* regulations before the date of the deposition and did not allow the former employee to testify then, solely on the basis that it had not completed its *Touhy* process. Ultimately, the Bureau processed the request according to its regulations and allowed the testimony of the former employee, with restrictions, on a later date.

Furthermore, although under the Case Management Order legal objections to discovery need not be filed until 30 days following service, we note that legal issues can arise concerning any challenges to agencies' processing of *Touhy* requests through a subpoena enforcement proceeding. It is well-established that an agency employee should not be compelled by the Court to disregard the agency's *Touhy* regulations and produce documents in response to a subpoena. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951). The United States has contended in cases in the lower courts in the past that, as an aspect of its sovereign immunity, any judicial review of an agency's decision to withhold documents or testimony under the *Touhy* regulations must proceed under the arbitrary and capricious standard of the Administrative Procedure Act (APA), which provides the only applicable waiver of sovereign immunity, through a justiciable challenge to an agency's final agency action. See *In re Boeh*, 25 F.3d 761, 764-65 (9th Cir. 1994); *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999). But see *Watts v. S.E.C.*, 482 F.3d 501 (D.C. Cir. 2007); *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774 (9th Cir. 1994). A necessary corollary is that any dispute over the timing of an agency's processing of a *Touhy* request would also be governed

by the APA, in seeking to “compel agency action unlawfully withheld or unreasonably delayed” and applying the APA’s standards. 5 U.S.C. § 706(1).

We hope to avoid any need to address these and any related issues concerning the third-party subpoenas in this original action, and will work with the States to do so. We will also work with the States to keep you informed of our progress and of any significant timing issues as the agencies process the *Touhy* requests.

Very truly yours,

s/Michael T. Gray

In The
Supreme Court of the United States

STATE OF FLORIDA,
Plaintiff

v.

STATE OF GEORGIA
Defendant

Before the Special Master

Hon. Ralph I. Lancaster

CERTIFICATE OF SERVICE

This is to certify that the foregoing letter from Michael T. Gray on behalf of the United States to Special Master Lancaster has been served this 23d day of March, 2015, in the manner specified below:

For State of Florida	For State of Georgia
<p><u>By U.S. Mail and Email:</u> Allen Winsor Solicitor General <i>Counsel of Record</i> Office of Florida Attorney General The Capital, PL-01 Tallahassee, FL 32399 T: 850-414-3300 allen.winsor@myfloridalegal.com</p> <p>By Email Only: Donald G. Blankenau Jonathan A. Glogau Christopher M. Kise Matthew Z. Leopold Osvaldo Vazquez Thomas R. Wilmoth floridawaterteam@foley.com</p>	<p><u>By U.S. Mail and Email:</u> Craig S. Primis, P.C. <i>Counsel of Record</i> Kirkland & Ellis, LLP 655 15th St., NW Washington, D.C. 20005 Craig.primis@kirkland.com</p> <p><u>By Email Only:</u> Samuel S. Olens Nels Peterson Britt Grant Seth P. Waxman K. Winn Allen Sarah H. Warren georgiawaterteam@kirkland.com</p>

s/Michael T. Gray
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