



U.S. Department of Justice

Environment and Natural Resources Division

MTG
90-1-2-14114

*Appellate Section
701 San Marco Blvd.
Jacksonville, FL 32207*

*Telephone (202) 532-3147
Facsimile (202) 353-1873*

July 6, 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 update you on our progress in processing the *Touhy* requests made to seven federal agencies in connection with this case. 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 complete production in 120 days in accordance with the operative case management plan, which for each agency would be July 10, 2015. For the reasons below, we respectfully request that the deadline be extended by 45 days for the federal agencies sent *Touhy* requests and reserve the right to submit a subsequent request for a further extension of time if necessary.

In my letter to you dated March 23, 2015, we gave notice that we anticipated that it would take more than 120 days for agencies within the Department of Agriculture (the Natural Resources Conservation Service and the National Agricultural Statistics Service), Department of the Interior (the Fish and Wildlife Service and the United States Geological Survey), and Department of Defense (the U.S. Army Corps of Engineers) and the Department of Commerce (the Department and the National Oceanic and Atmospheric Administration) to process the States' requests for information from those agencies made under each agency's *Touhy* regulations. As of this writing, the Department of Commerce expects to complete its processing of the *Touhy* requests by the current deadline. The other federal agencies continue to anticipate that it will take more than 120 days from the date the *Touhy* requests were served to complete the regulatory process and make final decisions on the requests.

Although, as explained below, we do not believe that the 120-day deadline is enforceable through a subpoena enforcement proceeding in this court, out of respect for these proceedings and an abundance of caution, we respectfully request that the case management plan be amended to extend the time for compliance with the subpoenas an additional 45 days.

Each agency subpoenaed in this case has promulgated so-called *Touhy* regulations. 5 U.S.C. § 301 *see United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). 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. The agencies have endeavored 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. Each agency has committed substantial hours to the requests. For example, the Department of the Interior has devoted more than 300 hours just to processing the requests made to the United States Geological Survey. Those efforts have already borne fruit: each agency has worked with the States to narrow, refine, and prioritize the *Touhy* requests, and as a result each agency has produced documents in response to the requests or will produce documents in short order. Each agency also continues to work with the States to further refine the requests as the States process the documents already turned over.

But for many of the requests it simply will not be possible to complete the necessary review and production in 120 days. The obstacles faced by each agency are set forth below.

The Corps of Engineers

To date, the Corps of Engineers has provided the States with an index to prior administrative records containing many documents requested by the States as well as a number of models for the ACF basin. The Corps will not be able to respond to the remaining requests by July 10, 2015.

The Corps of Engineers has already devoted agency resources to responding to the *Touhy* requests, but this effort is diverting critical resources from the Corps' effort to revise the water control plans and manuals for the ACF basin because the 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. 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 additional time to attempt to process the *Touhy* requests, it would yet again jeopardize the Corps' ability to timely complete its revision of the manuals.

To handle simultaneously the work involved with updating the ACF Master Manual and processing the *Touhy* requests, the Corps has undertaken to hire outside contractors to gather and review the relevant documents to determine whether they can be released under the Corps' *Touhy* regulations. Doing so requires procuring funds and contracting the work and educating the contractors on the request and the Corps' documents and regulations. The Corps has begun that effort, but much work remains to gather and review the voluminous amount of material requested by the States, including many pre-decisional documents related directly to the ongoing update of the ACF Master Manual. The Corps will not be in a position to make a final determination on the *Touhy* requests by July 10, 2015.

The Natural Resources Conservation Service

The Natural Resources Conservation Service has produced aggregated statistical data from 1997 to the present in response to the *Touhy* requests. The NRCS requests involve approximately 80 counties across three states. The agency is the process of determining what information it will be able to produce beyond aggregated statistical data, and has been working with both state and field offices to clarify the scope of and respond to the requests. As records are collected, NRCS is determining what non-privileged information can be produced and how quickly – keeping in mind the States' request to focus on those specific subsets of their overall requests to which they require more than aggregated statistical information. NRCS requires more time primarily because of the large number of counties involved, which requires additional resources and research to locate, assess, and organize any responsive materials. Staff from NRCS's state and field offices Alabama, Georgia, and Florida continue to be engaged in locating and compiling responsive materials. NRCS will not be able to complete its processing of the *Touhy* requests by July 10, 2015.

The National Agricultural Statistics Service

For responsive data from 1997 to the present, the National Agricultural Statistical Service produced on July 1, 2015, requested data from the Census Agriculture conducted in 2012, 2007, 2002, and 1997. NASS has also located data from 1992, the only Census year from 1992-1996. NASS believes it can produce requested data from the 1992 Census by August 1, 2015. Despite its efforts, NASS will not be able to complete production by July 10, 2015.

The U.S. Fish and Wildlife Service and the U.S. Geological Survey

Both the Fish and Wildlife Service and USGS released an initial, extensive production of documents on May 29, 2015. Fish and Wildlife produced 246,530 files totaling 151 GB. USGS produced 29,600 files totaling 37.4 GB. Although both agencies have worked with the states to narrow the requests, there are still a number of individual requests that have not been resolved, mainly relating to potentially privileged items and one or two requests that remain broad and burdensome. The States are in the process of reviewing the documents from the first production, and we understand that they will use that review to further clarify and narrow their remaining requests. Until that is resolved, we cannot provide a reliable date by which either agency can complete production. But neither agency will be able to complete production by July 10, 2015.

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 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 because 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, 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 for collateral litigation over these and any related issues concerning the third-party subpoenas in this original action, and we have worked cooperatively with the States to respond to the *Touhy* requests. A 45-day extension of time will further the United States' efforts to complete each agency's *Touhy* process without the need for litigation. A 45-day extension will also not materially delay this litigation, as the agencies intend to produce documents on a rolling basis as they are identified and determined releasable. Also, the State of Florida has informed the government that it intends to serve a *Touhy* request on the State Department in the near future. The State Department will have 120 days from service to respond. We will also continue to work with the States to keep you informed of our progress and of any significant timing issues as the agencies process the *Touhy* requests, including the need for a further extension if necessary. We have conferred with counsel for both Florida and Georgia, and neither state opposes this request.

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 6th day of July, 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
MICHAEL T. GRAY,
United States Department of Justice
Environment & Natural Resources Division
701 San Marco Blvd.
Jacksonville, FL 32207