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**STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD**

Hearing in the Matter of California Department )  
of Water Resources and United States Department )  
of the Interior, Bureau of Reclamation Request )  
for a Change in Point of Diversion )  
for California Water Fix )

**NOTICE OF OBJECTION BY UNITED STATES DEPARTMENT OF THE  
INTERIOR, FISH AND WILDLIFE SERVICE, AND UNITED STATES  
DEPARTMENT OF THE INTERIOR, U.S. GEOLOGICAL SERVICE, OF  
SUPPLEMENTAL NOTICE OF INTENT TO APPEAR FILED BY NATURAL  
RESOURCES DEFENSE COUNCIL, BAY INSTITUTE, AND DEFENDERS OF  
WILDLIFE**

**INTRODUCTION**

On October 12, 2017, the Natural Resources Defense Council, Bay Institute, and Defenders of Wildlife (collectively, NRDC) filed a Supplemental Notice of Intent to Appear (Notice), in which they stated their intent to call employees of the United States Department of the Interior (Department)'s Fish and Wildlife Service (FWS) and U.S. Geological Survey (USGS) as adverse witnesses. NRDC further stated its intent to subpoena these witnesses, "if not called by proponents."

The Department, FWS, and USGS, object to the Notice. As discussed below, the Department's "Touhy" regulations, 43 C.F.R. § 2.280, *et seq.*, govern this issue and set forth how and whether the Department will respond to requests or subpoenas for employee testimony in legal proceedings such as this state administrative proceeding. As an initial matter, to date, neither NRDC, nor any party to the California WaterFix hearing, has requested testimony pursuant to those regulations. Thus, the Department has not had the opportunity to determine whether to allow any such testimony. Until the Department has made such a determination, any employee testimony is improper.

Moreover, even if NRDC were to follow the Department's regulations and request employee testimony, and the Department denied that request, neither the Board, nor, by extension, NRDC, has the power to compel testimony of Department employees. Accordingly, the Notice's assertion that NRDC has the power to subpoena or otherwise compel this testimony is incorrect.

## DISCUSSION

**I. The Department's "Touhy" regulations, 43 C.F.R. § 2.280, *et seq.*, govern how the Department will respond to requests or subpoenas for employee testimony, or production of Department records, in proceedings such as this state administrative proceeding.**

Federal agencies are authorized by Congress to establish rules addressing requests or subpoenas for employee testimony and production of documents under the "housekeeping statute," at 5 U.S.C. § 301, which states:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Agency rules promulgated under the "housekeeping statute," and in accordance with the

Supreme Court's holding in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), are known as "Touhy" regulations.

The Department has validly promulgated "Touhy" regulations at 43 C.F.R. § 2.280, *et seq.* These regulations carry the force of law and provide under §§ 2.280 and 2.281, as follows:

**§ 2.280 –**

(a) This subpart describes how the Department of the Interior (including all its bureaus and offices) responds to requests or subpoenas for:

- (1) Testimony by employees in State, territorial or Tribal judicial, legislative or administrative proceedings concerning information acquired while performing official duties or because of an employee's official status;
- (2) Testimony by employees in Federal court civil proceedings in which the United States is not a party concerning information acquired while performing official duties or because of an employee's official status;
- (3) Testimony by employees in any judicial or administrative proceeding in which the United States, while not a party, has a direct and substantial interest;
- (4) Official records or certification of such records for use in Federal, State, territorial or Tribal judicial, legislative or administrative proceedings.

(b) In this subpart, "employee" means a current or former Department employee, including a contract or special government employee.

(c) This subpart does not apply to:

- (1) Congressional requests or subpoenas for testimony or records;
- (2) Federal court civil proceedings in which the United States is a party;
- (3) Federal administrative proceedings;
- (4) Federal, State and Tribal criminal court proceedings;
- (5) Employees who voluntarily testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the Department. The employee must state for the record that the testimony represents the employee's own views and is not necessarily the official position of the Department. See 5 CFR §§ 2635.702(b), 2635.807 (b).
- (6) Testimony by employees as expert witnesses on subjects outside their official duties, except that they must obtain prior approval if required by § 2.90.

(d) This subpart does not affect the rights of any individual or the procedures for obtaining records under the Freedom of Information Act (FOIA), Privacy Act, or statutes governing the certification of official records. The Department FOIA and Privacy Act regulations are found at 43 CFR Part 2, subparts B and D.

(e) Nothing in this subpart is intended to impede the appropriate disclosure under applicable laws of Department information to Federal, State, territorial, Tribal, or foreign law enforcement, prosecutorial, or regulatory agencies.

(f) This subpart only provides guidance for the internal operations of the Department, and neither creates nor is intended to create any enforceable right or benefit against the United States.

**§ 2.281 –**

(a) Except for proceedings covered by § 2.80(c) and (d), it is the Department's general policy not to allow its employees to testify or to produce Department records either upon request or by subpoena. However, if you request in writing, the Department will consider whether to allow testimony or production of records under this subpart. The Department's policy ensures the orderly execution of its mission and programs while not impeding any proceeding inappropriately.

(b) No Department employee may testify or produce records in any proceeding to which this subpart applies unless authorized by the Department under §§ 2.80 through 2.90 United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

**II. NRDC's Notice is premature and improper because NRDC has not submitted a request to the Department for FWS or USGS employee testimony pursuant to the Department's "Touhy" regulations; nor has the Department agreed to allow such testimony.**

Sections 2.80 through 2.90 prescribe the process for a requester to undertake in order to secure testimony of a Department employee. While NRDC's Notice lists FWS and USGS employees, to date, neither NRDC, nor any other party to the California WaterFix hearing, has submitted any request for employee testimony or documents pursuant to the Department's "Touhy" regulations.<sup>1</sup> Thus, the Department has not considered or determined whether its regulations would allow any such testimony. Until these procedures are followed, no FWS or USGS employee may testify.

Moreover, even if a party follows the "Touhy" process, the Department may, pursuant to its Touhy regulations, not allow its employees to testify or to produce

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<sup>1</sup> They are also free to avail themselves to access of federal records under the federal Freedom of Information Act.

Department records either upon request or by subpoena. Specifically, 43 C.F.R. § 2.281 provides that “it is the Department’s general policy not to allow its employees to testify or to produce Department records either upon request or by subpoena.” The Department’s “Touhy” regulations apply even though the Department’s Bureau of Reclamation is the petitioner in this state administrative forum, which is covered under § 2.280, and not excluded from the regulations under § 2.281(c). Therefore, not only are FWS and USGS employees required to follow the Department’s “Touhy” regulations, but the regulations apply equally to Bureau of Reclamation employees.

**III. To the extent the Department receives a request to testify and denies it, its employees cannot be forced to testify before the Water Board.**

The Department, FWS, and USGS also object to NRDC’s assertion that it will subpoena federal employee testimony. First, under *Touhy* and its progeny, subordinate federal employees cannot be compelled to testify, or held in contempt for refusing to comply with a court order for testimony, when that refusal is in reliance on a validly promulgated regulation to the contrary. *See Touhy*, 340 U.S. 462 (1951). In *Touhy*, for example, a federal court sought to compel production of documents from the Federal Bureau of Investigation (FBI) by issuing a subpoena *duces tecum* to an FBI employee. Following an order of the Attorney General that prohibited FBI employees from releasing FBI documents in legal proceedings, the employee did not comply with the court-issued subpoena. The U.S. Supreme Court held that the FBI employee’s refusal to comply with the subpoena was proper because the employee relied upon a validly-adopted rule of the FBI.

Similarly, in *Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986), a National Transportation Safety Board (NTSB) investigator refused to answer questions in a state

court civil action for wrongful death, relying on NTSB validly-adopted rules. The state court attempted to hold the federal employee in contempt. The action was removed to federal court, which dismissed the contempt action. On appeal, the Ninth Circuit upheld the dismissal on the “Touhy” doctrine. *Id.* The panel held that the NTSB rule was unquestionably valid, and that the state court lacked jurisdiction to use contempt procedures against the federal investigator.

This “Touhy” doctrine is jurisdictional, and applies to both requests for production of documents and testimony. *Gomez v. Gates (In re Boeh)*, 25 F.3d 761, 765-6 (9th Cir. 1994). Moreover, it can apply irrespective of whether a subpoena is issued from a state or federal court, in criminal or civil proceedings, or in administrative or Tribal proceedings. It can further apply irrespective of whether the federal records or employee testimony may be material to the underlying legal proceeding in question. *FBI v. Superior Court of Cal.*, 507 F. Supp. 2d 1082 (N.D. Cal. 2007). Thus here, even if the Department were to receive and reject a request for testimony under its “Touhy” regulations, application of the “Touhy” doctrine prevents the Department’s employees from being held in contempt for refusing to comply with a court order for testimony, when that refusal is in reliance on the Department’s validly promulgated regulation.

In addition to the “Touhy” doctrine, Federal sovereign immunity independently deprives a state court (or state administrative agency) of jurisdiction to enforce a subpoena.

The general rule is that a suit against the United States is defined broadly as any action seeking a judgment that would: 1) "expend itself on the public treasury or domain;" 2) "interfere with the public administration;" or 3) "restrain the Government from acting" or "compel it to act." *Washington v. Udall*, 417 F.2d 1310, 1315 (9th Cir. 1969) (citing *Dugan v. Rank*, 372 U.S. 609, 620, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963) (citations omitted)). An action against a government employee constitutes a suit

against the United States assuming it would have one of these effects. *See id.* at 1313-14.

*FBI v. Superior Court of Cal.*, 507 F. Supp. 2d 1082, 1094 (N.D. Cal. 2007). While there are two exceptions to the principle that sovereign immunity bars a suit against a government employee,<sup>2</sup> neither would apply to this circumstance. Nor are we aware of any applicable waiver of sovereign immunity, including any precedent holding that Section 8 of the Reclamation Act of 1902 waives federal sovereign immunity for suits against federal employees in state administrative proceedings.

### CONCLUSION

For the foregoing reasons, the Department respectfully objects to NRDC's Notice and asks that it be withdrawn or stricken as to FWS and USGS employees.

Respectfully submitted on this 14<sup>th</sup> day of November, 2017.



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Reclamation

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<sup>2</sup> The two recognized exceptions are "1) when an employee's actions exceed the scope of the statutory powers conferred upon him or her; and 2) when, despite acting within the scope of his or her authority, the employee was acting unconstitutionally. *Dugan*, 372 U.S. at 621-22.

**STATEMENT OF SERVICE**

**CALIFORNIA WATERFIX PETITION HEARING  
Department of Water Resources and U.S. Bureau of Reclamation  
(Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board (Board) and caused a true and correct copy of the following document(s):

**NOTICE OF OBJECTION BY UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, AND UNITED STATES DEPARTMENT OF THE INTERIOR, U.S. GEOLOGICAL SERVICE, OF SUPPLEMENTAL NOTICE OF INTENT TO APPEAR FILED BY NATURAL RESOURCES DEFENSE COUNCIL, BAY INSTITUTE, AND DEFENDERS OF WILDLIFE**

to be served by Electronic Mail (email) upon the parties listed in Table 1 of the Current Service List for the California WaterFix Petition Hearing, dated November 2, 2017, posted by the State Water Resources Control Board at  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml):

**For Petitioners Only:**

I caused a true and correct <b>hard copy</b> of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:  <b>Method of Service: <u>U.S. Mail - Certified</u></b>
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I certify that the foregoing is true and correct and that this document was executed on November 14, 2017  
Date

Signature: 

Name: James Hines  
Title: Administrative Assistant  
Party/Affiliation: U.S. DOI  
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