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09/24/2007 04:25 PM

To cathey\_willis@fws.gov

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Subject Touhy request



WDC Pre Hearing Memo.pdf PETITION FOR REVIEW TO EQC

TO: Cathey Willis  
U.S. Fish and Wildlife Service

FROM: Steve Jones  
Wyoming Outdoor Council

RE: Touhy request for testimony for:  
Brian Kelly  
Kimberly Dickerson

Wyoming Environmental Quality Council Docket No. 06-3804

Dear Ms. Willis:

I am writing to request that Brian Kelly and Kimberly Dickerson, both U. S. Fish and Wildlife Service employees in the Wyoming State Office in Cheyenne office, testify in the matter of an appeal brought by Powder River Basin Resource Council and Wyoming Outdoor Council of the downgrade of three tributaries to Crazy Woman Creek from Class 3 waters of the state to Class 4 waters of the state. The hearing begins at 9:30 on Sept. 26, 2007, at the Campus Ballroom of Casper College, in Casper, Wyoming. This is a hearing before the Wyoming Environmental Quality Council, appealing the decision of the Wyoming Department of Environmental Quality to remove the Class 3 designation for these tributaries. I have attached a copy of the appeal filed by Wyoming Outdoor Council in this matter.

Mr. Kelly signed a letter on behalf of the U. S. Fish and Wildlife Service concerning this downgrade, as comments to the proposed downgrade by the Wyoming Department of Environmental Quality on Dec. 12, 2005. Ms. Dickerson collaborated substantially in the writing of this letter.

Ms. Dickerson and Mr. Kelly would be expected to testify about the information set forth in the comment letter of the U. S. Fish and Wildlife Service dated Dec. 12, 2005, concerning the reclassification of the three tributaries, including "the need for more supporting data to show conclusively that the reclassifications will not adversely affect aquatic life,..." (See p. 2 of the 12/12/05 letter.) More generally, they would be asked about the ability of these tributaries to support and sustain aquatic life, and the qualities and attributes of ephemeral streams generally as it pertains to aquatic habitat. They would also be asked about the adequacy of the Use Attainability Analysis that was conducted in this case to determine the presence or absence of aquatic life, and about whether these drainages are capable of supporting aquatic life.

Ms. Dickerson and Mr. Kelly would be expected to testify, if called, about the information set forth in the comment letter of the U. S. Fish and Wildlife Service dated Dec. 12, 2005, concerning the reclassification of the three tributaries. More generally, they are expected to testify about the adequacy of the UAA to determine the presence or absence of aquatic life, and about whether these drainages are capable of supporting aquatic life.

This testimony is directly relevant to the proceeding to be held this week since the entire issue of the case is a challenge to the reclassification decision of the DEQ. This decision directly relates to the mission of the U.S. Fish and Wildlife Service, since aquatic habitat, and the protection of aquatic habitat, is of primary concern for such species as waterfowl that the Service is assigned to monitor and protect.

Their testimony is needed in this case since the letter signed by Mr. Kelly may not be admitted into evidence without either his or Ms. Dickerson's testimony. It is critical to this hearing that the information that they would discuss be made available to the decision-maker. No other comments from experts in their field addressed these issues from the standpoint of the importance of protecting aquatic life habitat, and the existence of the wetland conditions in these tributaries.

This hearing would be a one-time event, and would not draw these employees into a protracted argument between the parties. All that is needed is their testimony for one day.

I understand that Ms. Dickerson may be the best employee to testify about the substance of this letter. I further understand that she is not available to travel due to her recent cardiac surgery. Should you conclude that she is the best employee to testify in this matter, I would be willing to move, before the Environmental Quality Council, that her testimony be taken at a later time, via deposition, in Cheyenne, when she is healthy and able to testify about these matters. But I would like to know now whether the Service will allow her to testify at a later time.

This request is submitted as a Touhy request, pursuant to 43 CFR Part 2, Subpart H, Section 2.82. A check for travel expenses has already been sent to both Kimberly Dickerson and Brian Kelly for their testimony, but we would be happy to retrieve those checks and submit new checks to the U. S. Department of Interior for their travel expenses and meals, pursuant to the requirements of 43 CFR Part 2, Subpart E, Section 2.85.

Thank you very much for your expedited consideration of this matter. Please let me know if I can answer any questions you might have.

Sincerely,

[SGD]  
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Since 1967 the Wyoming Outdoor Council has worked to protect Wyoming's environment and quality of life for future generations. We envision a Wyoming thriving with abundant wildlife, healthy landscapes, clean air and water, strong communities, and sustained by renewable energy. We need your help. Join us today at  
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