

JOHN R. GREEN
Acting United States Attorney
STEVEN K. SHARPE
Assistant United States Attorney
District of Wyoming
P.O. Box 668
Cheyenne, WY 82003-0668

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF POWDER)
RIVER BASIN RESOURCE COUNCIL OF THE)
RECLASSIFICATION AND DOWNGRADE OF THREE) Docket No. 06-3804
DRAINAGES TO CRAZY WOMAN CREEK (Kennedy)
South Area Addition) AND THEIR TRIBUTARIES)

**UNITED STATES' MOTION TO QUASH SUBPOENAS TO
BRIAN KELLY and KIM DICKERSON**

The United States Fish and Wildlife Service, by and through the United States Attorney for the District of Wyoming and Assistant United States Attorney Steven K. Sharpe, moves to quash testimonial subpoenas served on employees of the U.S. Fish and Wildlife Service, Brian Kelly and Kim Dickerson, and, as grounds therefor, states as follows:

1. On or about September 13, 2007, the Wyoming Outdoor Council had subpoenas issued by the Environmental Quality Council for two employees of the United States Fish and Wildlife Service: Brian T. Kelly and Kim Dickerson. *See* Exhibits "A" and "B." The subpoenas commanded Mr. Kelly and Ms. Dickerson to appear on September 26, 2007 at 9:30 a.m. at the Casper College, Campus Ballroom, 125 College Drive, Casper, Wyoming to give trial testimony concerning information acquired during the course of their official duties. Neither the United States Fish and Wildlife Service, nor its employees are parties to the present case.

2. Officials from the United States Fish and Wildlife Service notified counsel for Wyoming Outdoor Council that he needed to comply with regulations promulgated pursuant to *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) ("*Touhy* regulations"). *See* 43 C.F.R. §2.80 et. seq. On September 24, 2007 at 4:30 p.m., counsel for the Wyoming Outdoor Council, sent an email to Cathey Willis from the U.S. Fish and Wildlife Service making a formal *Touhy* request for the testimony of both employees. *See* attached Exhibit "C."

3. On September 25, 2007, the U.S. Fish and Wildlife Service declined to authorize trial testimony by Mr. Kelly and Ms. Dickerson in the present case as shown by Exhibit “D” attached to this motion. It should also be noted that employee Dickerson is on extended sick leave and is recovering at home from surgery. She is physically unable to attend the hearing and testify, and is not scheduled to be back to her official duties until the middle of November.

4. The policy behind such *Touhy* regulations “is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business.”¹ *Boron Oil Co. v. Downie*, 873 F.2d 67, 70 (4th Cir. 1989).

5. It is beyond dispute that a State court lacks jurisdiction to enforce a subpoena directed to a federal employee. *See, e.g., Edwards v. U.S. Dep’t of Justice*, 43 F.3d 312 (7th Cir. 1994); *Houston Business Journal, Inc. v. Office of Comptroller of Currency, U.S. Dep’t of Treasury*, 86 F.3d 1208, 1212 (D.C. Cir. 1996); *State of La. v. Sparks*, 978 F.2d 226, 235 (5th Cir. 1992); *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989); *In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir. 1997), *cert. denied*, 522 U.S. 1027; *In re Gray*, 1998 WL 712663 (10th Cir.); *Kansas v. Call*, 760 F.Supp. 190, 192 (D.Kan. 1991), *aff’d*, 961 F.2d 220 (10th Cir. 1992).

6. Therefore, this tribunal should quash the subpoena directed to the federal employees in this case. Under sovereign immunity principles, this tribunal does not have jurisdiction to compel the federal employees to testify in the present case.

Wherefore, for the foregoing reasons, the United States asks this tribunal to enter an order quashing the subject subpoenas.

¹ Plaintiffs’ remedy, if any, for the United States Fish and Wildlife Services determination not to authorize trial testimony for the federal employees in the present case is under the Administrative Procedures Act, 5 U.S.C. § 702 et seq., by pursuing a case for review of agency action in federal court. *Boron*, 873 F.2d at 71.

DATED this 25th day of September, 2007.

JOHN R. GREEN
Acting United States Attorney

By: /s/ Steven K. Sharpe
STEVEN K. SHARPE
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify on the 25th day of September, 2007, I served a true and correct copy of the foregoing **UNITED STATES MOTION TO QUASH SUBPOENAS** upon the following by the methods indicated below:

Steve Jones
Wyoming Outdoor Council
262 Lincoln Street
Lander, WY 82520
Fax: (307) 332-6899
steve@wyomingoutdoorcouncil.org

By Facsimile
 By U.S. Mail - postage prepaid
 By Hand Delivery
 By Overnight Courier
 Email service

Joe Girardin
Environmental Quality Council
Herschler Building
Cheyenne, Wyoming
jgirar@state.wy.us

By Facsimile
 By U.S. Mail - postage prepaid
 By Hand Delivery
 By Overnight Courier
 Email service

/s/ Steven K. Sharpe
UNITED STATES ATTORNEY'S OFFICE