

UNITED STATES
DEPARTMENT OF
AGRICULTURE

OFFICE OF
THE GENERAL
COUNSEL

P.O. Box 25005
Denver, CO 80225-0005
(303) 275-5552, FAX 275-5557

September 25, 2007

FILED
SEP 25 2007
Terri A. Lorenzon, Director
Environmental Quality Council

Terri Lorenzon
Executive Director
Environmental Quality Council
122 W. 25th St.
Herschler Bldg., Room 1714
Cheyenne, WY 82002

Dear Ms. Lorenzon:

Subject: Subpoena of Phillip Gonzales

Our office represents the agencies of the United States Department of Agriculture in certain legal matters.

You have subpoenaed Phillip Gonzales, an employee of the Natural Resources Conservation Service of this Department, to appear at a Hearing on Wednesday, September 26, 2007 at 9:30 AM. As we understand it, you wish testimony in regard to a water quality reclassification issue raised by Kennedy Oil.

The USDA regulations at 7 CFR 1.210, et seq, effective October 19, 1990 as amended November 29, 1993, prohibit USDA employees from testifying in actions in which the United States is not a party unless it has been found by the head of the agency or his delegee that it would be in the interest of the United States. We have been advised by the agency that they do not consider it in the best interest of the government at this time.

The Supreme Court has specifically recognized the authority of agency heads to restrict testimony of their subordinates. United States ex rel. Touhy v. Ragen, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951).

An action seeking relief against a federal official, acting within the scope of his authority, is an action against the United States, subject to governmental privilege of immunity. Larsen v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 688, 69 S.Ct. 1457, 1460, 93 L.Ed. 1628 (1949).

Because of sovereign immunity, a state court has no jurisdiction to compel an employee to testify. Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989). The principle of federal supremacy reinforces the protection of sovereign immunity in such a case. *Id.* See also Sharon Lease Co. v. FERC, 691 F. Supp. 381 (D.C. 1988); Marcoux v. Mid-States Livestock, et al, 66 F.R.D. 573 (W.D. Mo. 1975). A state court has no jurisdiction to hold an employee in contempt for not testifying based on his/her regulations. Swett v. Schenk, 792 F.2d 1447 (9th Cir. 1986).

The regulations at 7 CFR 1.210, et seq., have the force and effect of law. An employee can neither be compelled to disobey a direct order from the head of his agency given pursuant to those regulations, nor be punished for adherence to the mandate of those regulations. Boatright v. Radiation Sterilizers, Inc., 592 F.Supp. 1314 (D. Colo. 1984).

Without authorization to testify, if the employee is forced to testify, he may be subject to disciplinary action under the regulations. Also, without authorization to testify, any testimony he might be forced to give is outside the scope of his employment, and, therefore, cannot be relied upon.

To the extent that documents are being requested, the request is being treated as a request under the Freedom of Information Act as required by the regulations and the documents will be released by the agency pursuant to the Freedom of Information Act.

We request that you withdraw the subpoena since the employee is not authorized to testify. Please let us know as soon as possible if you are willing to do so. Once the subpoena has been withdrawn, we will have Mr. Gonzales return the check which was provided with the subpoena.

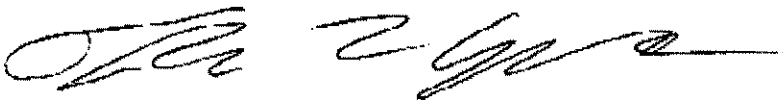
A copy of 7 CFR 1.210, et seq, is attached.

NOTE: The subpoena was served on Mr. Gonzales yesterday, September 24, 2007, and while the agency has indicated that they still would have denied authorization to testify we are frequently able to work with parties to help provide them with information if we are given sufficient notice. Unfortunately because of the short notice, we are not going to be able to provide you with any assistance in this matter. We have asked Mr. Gonzales whether there is any NRCS file regarding this matter and he has indicated that there is no written documentation of any kind that has been created by NRCS.

Sincerely,

STEVEN C. SILVERMAN
Regional Attorney

By


Thomas L. Japhet
Attorney

Enclosure

cc: Ryn Fenner, NRCS-Casper
Phillip Gonzales, NRCS- Buffalo

decision on the application as expeditiously as possible after completion of proceedings on the application. Whenever possible, the decision shall be made by the same administrative judge or panel that decided the contract appeal for which fees are sought. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. This decision also shall include, if at issue, findings on whether the position of the Department was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

§ 1.201 Department review.

(a) Except with respect to a proceeding covered by § 1.183(a)(1)(ii) of this part, either the applicant or agency counsel may seek review of the initial decision on the fee application, in accordance with the provisions of §§ 1.145(a) and 1.146(a) of this part. If neither the applicant nor agency counsel seeks review, the initial decision on the fee application shall become a final decision of the Department 35 days after it is served upon the applicant. If review is taken, it will be in accord with the provisions of § 1.145(b) through (i) and 1.146(b) of this part.

(b) With respect to a proceeding covered by § 1.183(a)(1)(ii) of this part, either party may seek reconsideration of the decision on the fee application in accordance with Rule 29 of the Board of Contract Appeals contained in § 24.21 of this title. In addition, either party may appeal a decision of the Board of Contract Appeals to the Court of Appeals for the Federal Circuit in accordance with 41 U.S.C. 607.

§ 1.202 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 1.203 Payment of award.

An applicant seeking payment of an award shall submit to the head of the agency administering the statute involved in the proceeding a copy of the final decision of the Department granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

Subpart K—Appearance of USDA Employees as Witnesses in Judicial or Administrative Proceedings

SOURCE: 55 FR 42347, Oct. 18, 1990, unless otherwise noted.

§ 1.210 Purpose.

This subpart sets forth procedures governing the appearance of USDA employees as witnesses in order to testify or produce official documents in judicial or administrative proceedings when such appearance is in their official capacity or arises out of or is related to their employment with USDA. These regulations do not apply to appearances by USDA employees as witnesses in judicial or administrative proceedings which are purely personal or do not arise out of or relate to their employment with USDA. This subpart also does not apply to Congressional requests or subpoenas for testimony or documents.

§ 1.211 Definitions.

(a) *Administrative proceeding* means any proceeding pending before any federal, state, or local agency and undertaken for the purpose of the issuance of any regulations, orders, licenses, permits, or other rulings, or the adjudication of any matter, dispute, or controversy.

(b) *Appearance* means testimony or production of documents the request for which arises out of an employee's official duties with USDA or relates to his or her employment with USDA. For

the purpose of this section also includes an action, interrogatory, written submission,

(c) *Judicial proceeding* or controversy, federal, state, or local.

(d) *Travel expenses* means the amount of money paid to a witness for transportation, meals, and other expenses in connection with a judicial or administrative proceeding.

(e) *USDA* means the Department of Agriculture.

(f) *USDA agency* means a regional unit of USDA reports to an official with the Secretary of Agriculture.

(g) *Valid summons*, a compulsory process mes is served properly and authority and the jurisdiction of the court or agency or official that

(h) *Witness fees* mean money paid to a witness for attendance at an administrative proceeding.

§ 1.212 General.

No USDA employee shall testify or produce official or administrative records unless authorized in accordance with this subpart.

§ 1.213 Appearance on behalf of the United States.

An employee of USDA may appear as a witness on behalf of the United States in any judicial or administrative proceeding without a summons, subpoena, or compulsory process. Employee permission for such appearance shall be obtained from their immediate supervisor in the USDA agency or has issued instruction otherwise.

§ 1.214 Appearance as a party or on behalf of a party other than the United States where the employee is not a party.

(a) An employee of USDA may appear as a party or on behalf of a party in a valid summons, subpoena, or compulsory process.

ing; or of the official or attorney representing the United States, in the case of an administrative proceeding, to represent the interests of the employee and USDA.

(d) If there is any question regarding the validity of a summons, subpoena, or other compulsory process, an employee shall contact the Office of the General Counsel for advice.

(e)(1) In determining whether the employee's appearance is in the interest of USDA, authorizing officials should consider the following:

- (i) what interest of USDA would be promoted by the employee's testimony;
- (ii) whether an appearance would result in an unnecessary interference with the duties of the USDA employee;
- (iii) whether an employee's testimony would result in the appearance of improperly favoring one litigant over another.

(2) The considerations listed in paragraph (e)(1) of this section are illustrative and not exhaustive.

§ 1.215 Subpoenas duces tecum for USDA records in judicial or administrative proceedings in which the United States is not a party.

(a) Subpoenas duces tecum for USDA records in judicial or administrative proceedings in which the United States is not a party shall be deemed to be requests for records under the Freedom of Information Act and shall be handled pursuant to the rules governing public disclosure under subpart A of this part.

(b) Whenever a subpoena duces tecum compelling the production of records is served on a USDA employee in a judicial or administrative proceeding in which the United States is not a party, the employee, after consultation with the General Counsel or his or her designee, shall appear in response thereto, respectfully decline to produce the records on the grounds that it is prohibited by this section and state that the production of the records involved will be handled in accordance with subpart A of this part.

§ 1.216 Appearance as a witness or production of documents on behalf of a party other than the United States where the United States is a party.

(a) An employee of USDA served with a valid summons, subpoena, or other compulsory process demanding his or her appearance, or otherwise requested to appear or produce documents on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party, shall promptly notify the head of his or her USDA agency and the General Counsel or his or her designee of the existence and nature of the order compelling his or her appearance, or of the document requesting his or her appearance. He or she shall also specify, if that is known, the nature of the judicial or administrative proceeding and the nature of the testimony or documents requested.

(b)(1) Except as provided in paragraph (b)(2) of this section, an employee of USDA only may appear as a witness or produce records on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party if such appearance or production has been ordered by the service on the employee of a valid summons, subpoena, or other compulsory process issued by a court, administrative agency, or other official authorized to compel his or her appearance.

(2) An employee requested to appear as a witness or produce records on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party, without being served a valid summons, subpoena, or other compulsory process, may appear or produce records only if such appearance or production has been authorized by a representative of the Department of Justice, the United States Attorney, or other counsel who is representing the United States in the case of a judicial proceeding; or by the official or attorney representing the United States, in the case of an administrative proceeding.

(c) The head of the agency shall consult with the General Counsel or his or her designee if there are grounds to believe that the employee's attendance at the proceeding would require the production of documents and, if necessary, to quash the summons, subpoena, or other compulsory process, or to seek relief from the proceeding under paragraph (b)(2).

(d) As appropriate, the General Counsel or his or her designee shall seek the assistance of the Department of Justice, a United States Attorney, or other counsel representing the United States, in the case of a judicial proceeding; or of the General Counsel or his or her designee representing the United States, in the case of an administrative proceeding, to represent the employee and USDA.

(c) If there is any question regarding the validity of a summons, subpoena, or other compulsory process, an employee shall contact the Office of the General Counsel for advice.

§ 1.217 Witness fees and expenses.

(a) Any employee of USDA who attends a judicial or administrative proceeding as a witness or produces official records on behalf of the United States shall be reimbursed for travel expenses in accordance with the Agriculture Travel Regulations.

(b) An employee of USDA who attends a judicial or administrative proceeding on behalf of the United States is not entitled to reimbursement for attendance.

(c) An employee of USDA who attends a judicial or administrative proceeding on behalf of the United States is not entitled to reimbursement for travel expenses incurred in connection with such attendance, except to the extent that such expenses are reimbursed for by the court, the United States Attorney, or other counsel compelling his or her appearance on behalf of the party on whose behalf he or she appears.

(d) An employee of USDA who attends a judicial or administrative proceeding on behalf of the United States is not entitled to reimbursement for travel expenses incurred in connection with such attendance, except to the extent that such expenses are reimbursed for by the court, the United States Attorney, or other counsel compelling his or her appearance on behalf of the party on whose behalf he or she appears.

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type of USDA served with summons, subpoena, or other process demanding his or her, or otherwise requested produce documents on behalf other than the United States or administrative proceeding in which the United States shall promptly notify the or her USDA agency and Counsel or his or her designee and nature of the filing his or her appearance, or process requesting his or her. He or she shall also state as known, the nature of the administrative proceeding, nature of the testimony or requested.

Except as provided in paragraph of this section, an employee of USDA only may appear as a witness or produce records on behalf of a party other than the United States in an administrative proceeding in which the United States is a party if the employee or production has been requested by the service on the employee by a valid summons, subpoena, or compulsory process issued by an administrative agency, or is otherwise authorized to compel his appearance.

An employee requested to appear as a witness or produce records on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party without being served a valid summons, subpoena, or other compulsory process, may appear or produce records only if such appearance or production has been authorized by a representative of the Department of Justice, a United States Attorney, or Counsel who is representing the United States in the case of a judicial proceeding; or by the official or attorney representing the United States, in the case of an administrative proceeding.

(c) The head of the USDA agency shall consult with the General Counsel or his or her designee as to whether there are grounds to oppose the employee's attendance or production of documents and, if so, whether to seek to quash the summons, subpoena, compulsory process, or to deny authorization under paragraph (b)(2) of this section.

(d) As appropriate, the General Counsel or his or her designee will request the assistance of the Department of Justice, a United States Attorney, or other counsel representing the United States, in the case of a judicial proceeding; or of the official or attorney representing the United States, in the case of an administrative proceeding, to represent the interest of the employee and USDA.

(e) If there is any question regarding the validity of a summons, subpoena, or other compulsory process, an employee shall contact the Office of the General Counsel for advice.

§1.217 Witness fees and travel expenses.

(a) Any employee of USDA who attends a judicial or administrative proceeding as a witness in order to testify or produce official documents on behalf of the United States is entitled to travel expenses in connection with such appearance in accordance with the Agriculture Travel Regulations.

(b) An employee of USDA who attends a judicial or administrative proceeding on behalf of the United States is not entitled to receive fees for such attendance.

(c) An employee of USDA who attends a judicial or administrative proceeding on behalf of a party other than the United States when such appearance is in his or her official capacity or arises out of or relates to his or her employment with USDA is entitled to travel expenses in accordance with the Agriculture Travel Regulations to the extent that such expenses are not paid for by the court, agency, or official compelling his or her appearance or by the party on whose behalf he or she appears.

(d) An employee of USDA who attends a judicial or administrative proceeding on behalf of a party other than

the United States when such appearance is in his or her official capacity or arises out of or relates to his or her employment with USDA is required to collect the authorized fees for such service and remit such fees to his or her USDA agency.

§1.218 Penalty.

An employee who testifies or produces records in a judicial or administrative proceeding in violation of the provisions of this regulation shall be subject to disciplinary action.

§1.219 Delegations.

(a) Except as provided in paragraphs (b), (c), or (d) of this section, the head of a USDA agency may delegate his or her responsibilities under this subpart, including the requirement to be notified of the receipt of a subpoena as provided in §§1.214(a) and 1.216(a) of this part, to employees of his or her agency as follows:

(1) In the National office of the agency, to a level no lower than two levels below the agency head;

(2) In a field component of an agency, to a level no lower than the official who heads a state office.

(b) Notwithstanding paragraph (a) of this section, the Chief of the Forest Service may delegate his responsibilities under this subpart as follows:

(1) In the National office of the Forest Service, to a level no lower than a Deputy Chief of the Forest Service;

(2) In a field component of the Forest Service, to a level no lower than a Regional Forester or Station Director.

(c) Notwithstanding paragraph (a) of this section, the General Counsel may delegate his responsibilities under this subpart as follows:

(1) In the National office of the Office of the General Counsel, to a level no lower than an Assistant General Counsel;

(2) In the field component of the Office of the General Counsel, to Regional Attorneys who may redelegate their responsibilities to Associate Regional Attorneys and Assistant Regional Attorneys who report to them.

(d) The responsibilities assigned to heads of agencies and to Assistant and

ing payment of an to the head of the ag the statute in- eding a copy of the Department grant- mpanied by a state- icant will not seek sion in the United agency will pay the the applicant with- icial review of the deriving decision of ndication has been licant or any other ding.

Appearance of USDA as Witnesses in Judicial or Administrative Proceedings

17. Oct. 19, 1990, unless

ts forth procedures arance of USDA em- es in order to testify l documents in judi- rative proceedings ance is in their offi- rices out of or is re- mployment with USDA. do not apply to ap- DA employees as wit- l or administrative are purely personal t of or relate to their USDA. This subpart ply to Congressional enas for testimony or

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means testimony or uments the request out of an employee's h USDA or relates to ment with USDA. For

the purpose of this subpart, an appear- ance also includes an affidavit, deposi- tion, interrogatory, or other required written submission

(c) *Judicial proceeding* means any case or controversy pending before any fed- eral, state, or local court.

(d) *Travel expenses* means the amount of money paid to a witness for reim- bursement for transportation, lodging, meals, and other miscellaneous ex- penses in connection with attendance at a judicial or administrative proceed- ing.

(e) *USDA* means the United States Department of Agriculture.

(f) *USDA agency* means an organiza- tional unit of USDA whose head re- ports to an official within the Office of the Secretary of Agriculture.

(g) *Valid summons, subpoena, or other compulsory process* means an order that is served properly and within the legal authority and the jurisdictional bound- aries of the court or administrative agency or official that has issued it.

(h) *Witness fees* means the amount of money paid to a witness as compensa- tion for attendance at a judicial or ad- ministrative proceeding.

§1212 General.

No USDA employee may provide tes- timony or produce documents in a judi- cial or administrative proceeding un- less authorized in accordance with this subpart.

§1213 Appearance as a witness on be- half of the United States.

An employee of USDA may appear as a witness on behalf of the United States in any judicial or administra- tive proceeding without the issuance of a summons, subpoena, or other compul- sory process. Employees should obtain permission for such an appearance from their immediate supervisor unless the USDA agency or General Counsel has issued instructions providing oth- erwise.

§1214 Appearance as a witness on be- half of a party other than the United States where the United States is not a party.

(a) An employee of USDA served with a valid summons, subpoena, or other compulsory process demanding his or

her appearance, or otherwise requested to appear on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, shall promptly notify the head of his or her USDA agency of the existence and na- ture of the order compelling his or her appearance, or of the document re- questing his or her attendance. He or she shall also specify, if that is known, the nature of the judicial or adminis- trative proceeding and the nature of the testimony or documents requested.

(b)(1) An employee of USDA served with a valid summons, subpoena, or other compulsory process, or requested to appear as a witness on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, may appear only if such appear- ance has been authorized by the head of his or her USDA agency, with the concurrence of the General Counsel, based upon a determination that such an appearance is in the interest of USDA.

(2) An employee of USDA requested to appear as a witness on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, without the service of a valid summons, subpoena, or other compul- sory process, may appear only if such appearance has been authorized by the head of his or her USDA agency and ap- proved by the appropriate Assistant Secretary, Under Secretary or other general officer, and by the General Counsel, based upon a determination that such an appearance is in the inter- est of USDA.

(c) Unless an appearance is author- ized as provided in paragraphs (b)(1) or (b)(2) of this section, the employee shall appear at the stated time and place (unless advised by the General Counsel or his or her designee that the summons, subpoena, or other process was not validly issued or served), produce a copy of these regulations and respectfully decline to provide any tes- timony. As appropriate, the General Counsel or his or her designee will re- quest the assistance of the Department of Justice or of a United States Attor- ney, in the case of a judicial proceed-