



United States Department of the Interior

BUREAU OF RECLAMATION
Great Plains Regional Office
P.O. Box 36900
Billings, MT 59107-6900

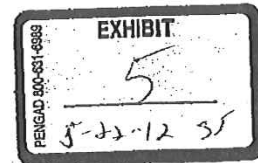
IN REPLY REFER TO:

GP-4100
LAW-5.10

May 15, 2012

RETURN RECEIPT REQUESTED

Mr. John B. Draper
Counsel for Kansas
Montgomery and Andrews
325 Paseo de Peralta
Santa Fe, NM 87501



Subject: Touhy Requests, Dated March 23, 2012, March 30, 2012, and April 1, 2012, Regarding Mr. Marvin Swanda's Deposition and Subpoena Duces Tecum; and the Amended Touhy Request for Mr. Aaron Thompson's Testimony in *Kansas v. Nebraska & Colorado*, No. 126, Orig., U.S. Supreme Court

Dear Mr. Draper:

The Bureau of Reclamation, Great Plains Region, received your April 1, 2012, Touhy Request in which you provided the trial dates of August 8-31, 2012, for *Kansas v. Nebraska & Colorado*, No. 126, Orig., U.S. Supreme Court. You also requested approval to work with the Nebraska Kansas Area Manager, Mr. Thompson, to finalize the proposed written testimony which will be submitted as his direct testimony at the trial.

Reclamation has reviewed your Touhy Requests including those dated March 23, 2012, and March 30, 2012. In addition, there has been extensive electronic communications between the States of Kansas and Nebraska Counsels of Record, with the Federal government's counsel (Mr. James DuBois Esq., and Mr. John Chaffin Esq.) and Mr. Thompson. The government counsel has actively demonstrated Reclamation's willingness to work with the States regarding *Kansas v. Nebraska & Colorado*, No. 126, Orig., U.S. Supreme Court, in order to meet the Summary of Deadlines, dated October 14, 2011.

Mr. Swanda, as a non-expert witness, will be able to testify to the facts of which he has personal knowledge during the period of his employment. I have enclosed a copy of the Touhy Request response dated April 6, 2012, regarding Mr. Swanda's Subpoena Duces Tecum that states the subjects and limitations of his testimony that he will be provided at the scheduled deposition on May 22, 2012, in Lincoln, Nebraska. These same limitations will apply to Mr. Swanda as a testifying witness if he is called, and any written testimony must also be within these limitations.

Reclamation is willing to work with the State of Kansas regarding both Mr. Thompson's and Mr. Swanda's written testimonies in order to assure that the proposed testimonies are consistent with the limitations of their Touhy Authorization. Reclamation will need to have the written testimony prepared no later than 30 work days prior to the deadline set by the Special Master in order to ensure adequate internal review is completed in time. In accordance with 43 CFR §2.85, and as you affirmed in your willingness to pay statement, the State of Kansas will pay all costs, including travel expenses for the employee to testify under the relevant substantive and procedural laws and regulations. Please note, payment regarding Mr. Swanda's travel and related fees must be coordinated directly with Mr. Swanda.

KS003875

In closing, Reclamation will continue to work with you to ensure we are all in compliance with the applicable Code of Federal Regulations (43 CFR §§2.80 – 2.90) which governs Touhy Requests.

Freedom of Information Act Regulations may be viewed at: www.doi.gov.

If you have any questions, please feel free to contact Mr. Thompson via email at AThompson@DOI.gov or at 308-389-5301, Donna Hirning at DHirning@usbr.gov or at 406-247-7713 or John Chaffin at John.Chaffin@sol.doi.gov or at 406-247-7058.

Sincerely,

/s/
Michael J. Ryan
Regional Director

Enclosure

cc: Mr. Justin D. Lavene
Assistant Attorney General
State of Nebraska
1445 K Street
Lincoln NE 68508-2731

Mr. Marvin Swanda
c/o McCook Field Office (NK-410)
1706 West Third
McCook, NE 69001

Ms. Autumn Bernhard
Counsel of Record for the State of Colorado
Assistant Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

Mr. James J. DuBois
U.S. Department of Justice
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
(via electronic mail only)

bc: DOI – Office of the Solicitor
Attn: Mr. Matthew Parsons
(via electronic mail)

GP-1000, GP-1154, GP-4600 (Erger, Guenther), GP-5600 (Chastain),
NK-100, NK-200, NK-410 (Scott)
(w/ enclosure to ea)

WBR:DHirning:lcampbell::5/14/2012:406-247-7713: Control Numbers: 12018780, 12020563, 12020229
T:\Business Resources\3000 Correspondence\GP-3100\Hirning\Hirning 5-14-12 Final Response to Mr~
Draper March and April Touhy Requests re Mrs Thompson and Swanda depositions and test 5 14 12 H.docx



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF RECLAMATION
Great Plains Regional Office
P.O. Box 36900
Billings, MT 59107-6900

GP-4100
LAW-5.10

May 15, 2012

RETURN RECEIPT REQUESTED

Mr. Justin D. Lavene
Assistant Attorney General
State of Nebraska
1445 K Street
Lincoln NE 68508-2731

Subject: Final Response to Your May 3, 2012, Touhy Request and Amended Notice of Deposition of Mr. Marvin Swanda and Subpoena Duces Tecum in *Kansas v. Nebraska*, No. 126, Original

Dear Mr. Lavene:

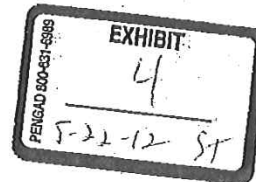
On May 3, 2012, Department of the Interior Field Office Solicitor, Mr. John Chaffin, forwarded to the Bureau of Reclamation, Great Plains Region, an electronic copy of the State of Nebraska's supplemental *Amended Notice of Deposition of Mr. Marvin Swanda and Subpoena Duces Tecum and Touhy Request*.

The State of Nebraska served Mr. Swanda, by United States Postal Service - In Care Of, Mr. Chaffin, a Subpoena Duces Tecum on May 3 2012. Your letter states Mr. Swanda's deposition is scheduled for May 22, 2012, from 8:00 a.m. to 5:00 p.m., in the Nebraska Attorney General's Office, located at 1221 N. Street, Suite 601, Lincoln, Nebraska.

The scope of this Touhy Request is the same as your March 30, 2012, Touhy Request which you have incorporated by reference and which states: "The State of Nebraska respectfully requests that Mr. Marvin Swanda appear for deposition and provide the testimony, documents and information specified in Kansas' Touhy Request dated March 30, 2012, for use in the above -referenced litigation." You also documented: "On Motion, Nebraska requested leave to depose Mr. Swanda out of time, and that motion was granted by the Special Master by Order of April 26, 2012."

The State of Kansas' March 30, 2012, Touhy Request stated: "Mr. Swanda's testimony is not reasonably available from any other source. Mr. Swanda, as a former long-time Reclamation employee, possesses knowledge of the historical operations of the Reclamation projects in the Republican River Basin (RRB) that no other single person possesses. Mr. Swanda will be able to testify to facts of which he has personal knowledge during the period of his employment. Specifically, Mr. Swanda's testimony would consist of the following subjects if this Touhy Request is approved, each subject limited to the knowledge he gained during the time of his employment at Reclamation:

1. Documents of the initiation and operations of the RRB Reclamation projects.
2. Concerns of Reclamation regarding groundwater use above Reclamation projects and how those concerns were documented.



KS003877

3. Concerns of Reclamation regarding Nebraska's Integrated Management Plans and how these concerns were documented."

I am granting your request for Mr. Swanda's testimony subject to the following limitations:

1. Mr. Swanda is authorized to provide testimony based on his personal knowledge, gained during the time of his employment at Reclamation and relating to:
 - a. Documents of the initiation and operations of the RRB Reclamation projects.
 - b. Document concerns of Reclamation regarding groundwater use above Reclamation projects based on his own personal experience.
 - c. Document concerns of Reclamation regarding Nebraska's Integrated Management Plans up to the time of his retirement from Reclamation which was December 31, 2010.
2. Mr. Swanda may offer lay opinions or inferences rationally based on Mr. Swanda's own perceptions and not based on scientific, technical, or other specialized knowledge within scope of Rule 702, Rule 701, FRE.
3. Mr. Swanda is not authorized to offer expert testimony including testimony in the form of opinion or otherwise based on scientific, technical, or other specialized knowledge related to his work for Reclamation.
4. Because he is not authorized to offer expert testimony, Mr. Swanda may not answer hypothetical questions based on information presented at or before the hearing or deposition, including facts not within his personal knowledge.
5. Mr. Swanda is not authorized to testify as to matters or actions of Reclamation arising after his separation from Reclamation.
6. Mr. Swanda is not authorized to testify to official policies of Reclamation or to any interpretations of law by Reclamation, the Office of the Solicitor or the Secretary of the Interior.

Mr. Swanda, as a former employee, does not possess any documents responsive to the Subpoena Duces Tecum.

We have advised Mr. Swanda of this approval, and the parameters of his authorization to testify.

In accordance with 43 C.F.R. § 2.85, you stated your willingness to pay the applicable fees associated with Mr. Swanda's testimony. Since Mr. Swanda is a retired employee, the costs associated with his travel and related expenses will need to be coordinated directly with him. FOIA regulations may be viewed at www.doi.gov.

Please feel free to contact Mr. Thompson via email at AThompson@usbr.gov, Donna Hirning at DHirning@usbr.gov, or John Chaffin at John.Chaffin@sol.doi.gov regarding this Touhy Request.

Sincerely,

/s/

Michael J. Ryan
Regional Director

cc: Mr. John Draper
Counsel of Record, State of Kansas
Montgomery and Andrews
Santa Fe, NM 87501

Mr. Marvin Swanda
c/o McCook Field Office (NK-410)
1706 West Third
McCook, NE 69001

Ms. Autumn Bernhard
Counsel of Record for the State Colorado
Assistant Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

Mr. James J. DuBois
U.S. Department of Justice
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
(via electronic copy only)

bc: DOI -- Office of the Solicitor
Attn: Mr. Matthew Parsons
(via electronic mail)

GP-1000, GP-1154, GP-4100 (Hirning), GP-4600 (Erger, Guentner), GP-5600 (Chastain)
NK-100, NK-410

WBR:DHirning:lcampbell:5/14/12:406-247-7713; Control Number: 12028359
T:\Business Resources\3000 Correspondence\GP-3100\Hirning\Hirning 5-14-12 Final Response to Ne
Justin Lavene re Marv Swanda 5-22-12 Deposition and Testimony 5 14 12 H.docx



United States Department of the Interior

BUREAU OF RECLAMATION
Great Plains Regional Office
P.O. Box 36900
Billings, MT 59107-6900

IN REPLY REFER TO:

GP-4100
LAW-5.10

APR - 6 2012

RETURN RECEIPT REQUESTED

Mr. Justin D. Lavene
Assistant Attorney General
State of Nebraska
1445 K Street
Lincoln NE 68508-2731

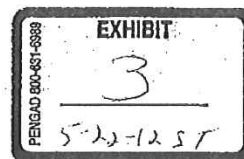
Subject: Touhy Request and Amended Testimony of Mr. Marvin Swanda, and Subpoena
Duces Tecum in *Kansas v. Nebraska & Colorado*, No. 126, Original, U.S. Supreme
Court, Letters Dated: March, 30, 2012

Dear Mr. Lavene:

The Bureau of Reclamation, as well as the Department of the Interior Solicitor's Office, and the Department of Justice received your Touhy Request, and Subpoena regarding No. 126, Original, U.S. Supreme Court. As requested in your letter, we continue expeditious efforts to make the information and testimony you have requested available within time limits imposed by the ongoing interstate litigation, while also ensuring compliance with the Department's regulations.

The State of Nebraska served Mr. Swanda a *Subpoena Duces Tecum* on March 22, 2012, and in accordance with 43 CFR §2.83, the Bureau of Reclamation received an electronic copy of the required Touhy Request at 7:40pm (CDT), Friday, March 30, 2012. Due to the short time available for review of the request, authorization for testimony could not be obtained prior to the date scheduled for the deposition. In accordance with 18 USC §207, Mr. Swanda did not testify at the April 03, 2012, scheduled deposition in Lincoln, Nebraska.

The March 30, 2012, Touhy Request from the State of Kansas, which you incorporated into your Touhy Request, states: "Mr. Swanda's testimony is not reasonably available from any other source. Mr. Swanda, as a former long-time Reclamation employee, possesses knowledge of the historical operations of the Reclamation projects in the Republican River Basin ("RRB") that no other single person possesses. Mr. Swanda will be able to testify to facts of which he has personal knowledge during the period of his employment. Specifically, Mr. Swanda's testimony would consist of the following subjects if this Touhy Request is approved, each subject limited to the knowledge he gained during the time of his employment at Reclamation.



KS003880

1. Documents of the initiation and operations of the RRB Reclamation projects.
2. Concerns of Reclamation regarding groundwater use above Reclamation projects and how those concerns were documented.
3. Concerns of Reclamation regarding Nebraska's Integrated Management Plans and how these concerns were documented."

I am granting your request for Mr. Swanda's testimony subject to the following limitations:

- 1) Mr. Swanda is authorized to provide testimony based on his personal knowledge, gained during the time of his employment at Reclamation and relating to:
 - a) Documents of the initiation and operations of the RRB Reclamation projects.
 - b) Document concerns of Reclamation regarding groundwater use above Reclamation projects based on his own personal experience.
 - c) Document concerns of Reclamation regarding Nebraska's Integrated Management Plans up to the time of his retirement from Reclamation which was December 31, 2010.
- 2) Mr. Swanda may offer lay opinions or inferences rationally based on Mr. Swanda's own perceptions and not based on scientific, technical, or other specialized knowledge within scope of Rule 702, Rule 701, FRE.
- 3) Mr. Swanda is not authorized to offer expert testimony including testimony in the form of opinion or otherwise based on scientific, technical, or other specialized knowledge related to his work for Reclamation.
- 4) Because he is not authorized to offer expert testimony, Mr. Swanda may not answer hypothetical questions based on information presented at or before the hearing or deposition, including facts not within his personal knowledge.
- 5) Mr. Swanda is not authorized to testify as to matters or actions of Reclamation arising after his separation from Reclamation.
- 6) Mr. Swanda is not authorized to testify to official policies of Reclamation or to any interpretations of law by Reclamation, the Office of the Solicitor or the Secretary of the Interior.

Mr. Swanda, as a former employee, does not possess any documents responsive to the Subpoena Duces Tecum.

When Reclamation receives a copy of Mr. Swanda's updated subpoena, we will advise him of this approval, and the parameters of his authorization to testify.

In accordance with 43 C.F.R. § 2.85, you stated your willingness to pay the applicable fees, if approval to your Touhy Request regarding Mr. Swanda was granted. Since Mr. Swanda is a retired employee, the costs associated with his travel and related expenses will need to be coordinated directly with him.

Please feel free to contact Mr. Aaron Thompson (AThompson@usbr.gov), Donna Hirling (DHirling@usbr.gov), or John Chaffin (John.Chaffin@sol.doi.gov) regarding this Touhy Request.

Thank you for your courtesy and cooperation in this matter.

Sincerely,



Michael J. Ryan
Regional Director

cc: Mr. John Draper
Counsel of Record, State of Kansas
Montgomery and Andrews
Santa Fe, NM 87501

Mr. Marvin Swanda
c/o McCook Field Office (NK-410)
1706 West Third
McCook, NE 69001

Ms. Autumn Bernhard
Counsel of Record for the State Colorado
Assistant Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

James J. DuBois
U.S. Department of Justice
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
(electronic copy only)