

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Oregon State Office
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To: All Employees, Statewide

From: State Director

Subject: Testimony of Employees and Production of Records

All requests for employee testimony or the production of records must follow the regulations published in the Federal Register on July 28, 2000 (Vol. 65, No. 146, July 28, 2000, pages 46366-46370). This regulation amends 43 CFR Part 2, Subpart E, Compulsory Process and Testimony of Employees. It generally provides that Department employees may not appear as witnesses, concerning information acquired in the course of performing official duties or because of their official status, or to produce Department records in litigation either voluntarily or in response to a subpoena, without the consent of the Department.

The regulations (43 CFR ' 2.80(a)) cover:

- Testimony by employees in State and Tribal judicial, legislative or administrative proceedings;
- Testimony by employees in Federal court civil proceeding in which the U.S. is **not** a party; and
- Production of official records or certification of such records for use in Federal, State, and Tribal judicial, legislative or administrative proceedings.

The regulations (43 CFR ' 2.80(c) and (d)) **do not** apply to:

- Congressional Committee or Subcommittee requests or subpoenas for testimony or records;
- Federal court civil proceedings in which the United States **is a party**;
- Federal administrative proceedings;
- Federal, State, and Tribal criminal court proceedings;
- Procedures for obtaining records under the Freedom of Information Act or Privacy Act;

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- Employees who voluntarily testify on their own time as private citizens to facts that are **not related** to the official business of the Department; and
- Testimony by employees as expert witnesses on subjects **outside their official duties**.

Requests for employees to testify or produce records are referred to as *Touhy* Requests (pronounced AToo-ee@) in the

new regulations. Departmental approval for employee testimony has been delegated to the State Directors, and in Oregon/Washington to the District Managers (Oregon/Washington Manual Supplement 1203, Subject Function Code 1823).

Lisa Blackburn, Oregon/Washington Litigation Coordinator (OR-958.2), (503)808-6276, is designated as the Oregon/Washington contact person for coordinating review and approval of *Touhy* requests. Upon receipt of a request or subpoena for employee testimony, fax a copy to Lisa at (503)808-6308. She will assist you to determine if the regulations apply and/or the request meets the *Touhy* requirements, and initiate the required consultation with the Regional Solicitor=s Office. Depending on time frames involved, Lisa will coordinate who will have the lead, who will make contact with the requester, and assist offices who receive requests.

Districts with Unions are reminded to notify their unions of this IB and satisfy any bargaining obligations before implementation. Your servicing Human Resources Office or Labor Relations Specialist can provide you assistance in this matter.

Signed by
Charles E. Wassinger
Associate State Director

Authenticated by
Mary O'Leary
Management Assistant

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Distribution

WO-540 (Room 750, LS) - 1

[Federal Register: July 28, 2000 (Volume 65, Number 146)]
[Rules and Regulations]
[Page 46366-46370]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
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DEPARTMENT OF THE INTERIOR

43 CFR Part 2

RIN 1090-AA76

Legal Process: Testimony of Employees and Production of Records

AGENCY: Department of the Interior

ACTION: Final rule and statement of policy

SUMMARY: This regulation amends 43 CFR Part 2, Subpart E, Compulsory Process and Testimony of Employees. It generally provides that Department employees may not appear as witnesses, concerning information acquired in the course of performing official duties or because of their official status, or to produce Department records in litigation either voluntarily or in response to a subpoena, without the consent of the Department. The intended effect of this regulation is to conserve the ability of the Department to conduct official business, preserve its employee resources, minimize involvement in matters unrelated to its mission and programs, preserve its impartiality, avoid spending public time and money for private purposes, and to help avoid needless litigation. This regulation does not apply to Congressional inquiries, Federal court civil proceedings in which the United States is a party, criminal cases, or to Freedom of Information Act and Privacy Act requests.

Dates: This regulation is effective July 28, 2000.

FOR FURTHER INFORMATION CONTACT: Timothy S. Elliott, Deputy Associate Solicitor, Division of General Law, Office of the Solicitor, Department of the Interior, 1849 C Street, NW., Washington, DC 20240, telephone: (202) 208-4722; Randolph J. Myers, Attorney, Division of Parks and Wildlife, Office of the Solicitor, Department of the Interior, 1849 C Street, NW., Washington, DC, 20240, telephone: (202) 208-4338.

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SUPPLEMENTARY INFORMATION: Department employees are frequently requested or subpoenaed to provide testimony or produce records in litigation. Current Department regulations do not clearly specify when its employees are required to respond to subpoenas or produce Department records. This has resulted in an employee giving testimony or providing records, which diverts such employee from performing his/her duties, and has, at times, created the appearance that the Department is taking sides in private litigation. This regulation is intended to address this situation by generally prohibiting both voluntary appearances and compliance with subpoenas unless authorized by the Department.

Subpoenas to testify concerning information which employees have acquired in the course of performing official duties, or to produce records, are essentially legal actions against the United States for which there has been no waiver

of sovereign immunity. The courts have recognized the authority of Federal agencies to limit compliance with such subpoenas. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). See also *United States v. Williams*, 170 F.3d 431 (4th Cir. 1999); *Smith v. Cromer*, 159 F.3d 875 (4th Cir. 1998); *Boron Oil Company v. Downie*, 873 F.2d 67 (4th Cir. 1989); *Davis Enterprises v. E.P.A.*, 877 F.2d 1181 (3rd Cir. 1989); *Moore v. Armour Pharmaceutical Co.*, 927 P.2d 1194 (11th Cir. 1991).

Moreover, subpoenas by State, territorial or Tribal courts, and legislative or administrative bodies, which attempt to assert jurisdiction over Federal agencies and their employees, are inconsistent with the Supremacy Clause of the U.S. Constitution. A Federal regulation, such as this one prohibiting compliance with such subpoenas, is consistent with the Supremacy Clause principle. See *McCulloch v. Maryland*, 7 U.S. (4 Wheat.) 316 (1819); *Houston Business Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208 (D.C. Cir. 1996); *United States v. McLeod*, 385 F.2d 734 (5th Cir.1967); *Giza v. Secretary of HEW*, 628 P.2d 748 (1st Cir. 1980). Accordingly, this regulation restricts a Department employee from complying with subpoenas from State, territorial or Tribal courts, and legislative or administrative bodies without the approval of the official in charge of the employee's bureau, division, office or agency of the Department.

In addition, this regulation describes procedures by which the Department will make its employees and records available in response to subpoenas in Federal court civil proceedings in which the United States is not a party. In the event that the Department or its Solicitor's Office fails to reach an agreement regarding the proper scope of a subpoena, the Solicitor's Office will coordinate with the Department of Justice to file appropriate motions, including motions to quash or for a protective order. In the case of the Department's Office of Inspector General, its General Counsel will attempt to reach an agreement or will coordinate with the Department of Justice to file appropriate motions. *Exxon Shipping Co. v. U.S. Dep't of the Interior*, 34 F.3d 774 (9th Cir. 1994) and *Comsat Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999).

The regulation does not apply to congressional proceedings. This regulation also does not apply to Federal court civil proceedings in which the United States is a party, because the Department of Justice is already representing the Department's interests and may file appropriate protective motions under the Federal Rules of Civil Procedure. This regulation likewise does not apply to either Freedom of Information Act or Privacy Act requests.

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We also recognize that there are situations in which the Department should cooperate with Federal, State, territorial and Tribal authorities as part of the Department's responsibility for developing and enforcing land and resource standards and other policies. This regulation does not preclude these efforts, and the official in charge of the employee's bureau, division, office or agency of the Department is empowered to authorize such testimony.

Further, this regulation does not apply to criminal cases before Federal, State and Tribal courts where Department employees and records are involved. The Department has over 5,000 employees who perform law enforcement functions. These and other employees regularly testify in Federal, State or Tribal courts in thousands of criminal cases. The Department has long-standing procedures with prosecutors which adequately address the proper scope of discovery, record production requests and witness subpoenas. Once prosecutors are advised by the Department of an inappropriate witness subpoena or subpoena duces tecum, prosecutors traditionally file motions to quash or for a protective order to protect the interests of the Department. As such, the Department sees no need to include criminal cases in this regulation.

While this regulation applies to information which employees acquire in the course of performing official duties, to production of records in Department files and to testimony concerning such records, we recognize that there are situations where Department employees may properly serve as expert witnesses on subjects outside the scope of their official duties and on behalf of private parties. Such situations are treated as outside activities under 5 CFR Part 2635, Subpart H, and employees providing this testimony are required to comply with those regulations and to perform those activities on their own time or while in an approved leave status. Employees must also review and comply with 5 CFR 2635.805, which details a separate authorization procedure for an employee to testify as an expert witness, not on behalf of the United States, in any proceeding before a court or agency in which the United States is a party or has a direct and substantial interest. In both instances, we require employees to state for the record that they are appearing as private individuals and that their testimony does not necessarily represent the official views of the Department of the Interior.

We also recognize that employees may, on their own time or while in an approved leave status, appear as private

citizens in proceedings in which Department policies and programs are not at issue. This regulation does not restrict such activities.

Finally, the Department of the Interior is sometimes asked to authenticate copies of official records for purposes of admissibility under 28 U.S.C. 1733, Federal Rule of Civil Procedure 44, or comparable State or Tribal law. Since official actions and policies can best be proved by Department records, and since this regulation provides that it is generally inappropriate for employees to appear as witnesses to discuss the background of Department policies and action in private litigation, this regulation provides that we will authenticate a copy of Department records on request. See 43 U.S.C. 1460.

Public Comment Procedures

Since this regulation establishes internal policy for Department employees, the Administrative Procedure Act does not require that it be published as a proposed regulation for notice and public

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comment. 5 U.S.C. 553(a)(2). This regulation revises current regulations and provides immediate clarifying guidance on how Department employee testimony and Department records may be obtained. As such, the Department finds that good cause exists for making the regulation effective less than thirty days after publication. 5 U.S.C. 553(b)(3)(B).

We welcome and encourage public comment by any one of several methods. You may mail comments to the Office of the Solicitor, Department of the Interior, 1849 C Street, NW., Room 6510, Washington, DC 20240. For the next six months, you may also comment via e-mail on the Internet addressed to: Witness_regs@ios.doi.gov. Please submit Internet comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include "Attn: 1090-AA76" and your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at Office of the Solicitor, Division of Parks and Wildlife at (202) 208-4338. Finally, you may also fax comments to Office of the Solicitor at (202) 208-1790. These are not toll-free numbers.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the regulation making record, which we will honor to the extent allowed by law. There also may be circumstances in which we would withhold from the regulation making record a respondent's identity, as allowed by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Drafting Information

The following persons participated in the writing of this regulation: Randolph J. Myers, Arthur E. Gary, Robert H. Moll, Timothy S. Elliott, Karen Sprecher Keating, and David A. Watts, Office of the Solicitor, Department of the Interior, 1849 C Street, NW., Washington, DC 20240.

Compliance With Other Laws

Regulatory Planning and Review (E.O. 12866)

This regulation is not a significant rule and is not subject to review by the Office of Management and Budget under Executive Order 12866.

(1) This regulation will not have an effect of \$100 million or more on the economy. This regulation regulates how and when Department employees and documents may be provided in certain situations. As such, it will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

(2) This regulation will not create a serious inconsistency or interfere with an action taken or planned by another agency.

(3) This regulation does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(4) This regulation is consistent with well-established constitutional and statutory principles and does not raise novel legal or policy issues.

Regulatory Flexibility Act

The Department of the Interior certifies that this regulation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. et seq.). This regulation merely regulates how and when Department employees may testify and that documents may be provided in certain situations.

Small Business Regulatory Enforcement Fairness Act

This regulation is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. Because this regulation only regulates how and when Department employees may testify and that Department documents may be provided in certain situations, this regulation:

- a. Does not have an annual effect on the economy of \$100 million or more.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This regulation does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. This regulation does not have a significant or unique effect on State, local or tribal governments or the private sector because this regulation only regulates how and when Department employees may testify and Department documents may be provided in certain situations. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this regulation does not have significant takings implications. A takings implication assessment is not required.

Federalism (E.O. 13132)

The Department of the Interior has determined this regulation conforms to the Federalism principals of Executive Order 13132. It also certifies that to the extent a regulatory preemption

occurs, it is because the exercise of State and Tribal authority conflicts with the exercise of Federal authority under the U.S. Constitution's supremacy clause and Federal statute. This regulation is, however, restricted to the minimum level necessary to achieve the objections of 5 U.S.C. 301 pursuant to which this regulation is promulgated.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this regulation does not unduly burden the judicial system, under United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951), and does meet

the requirements of section 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This regulation contains no reporting or record keeping requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3510 et seq.

National Environmental Policy Act (NEPA)

This regulation is of an administrative, legal and procedural nature and therefore is categorically excluded from NEPA, 516 DM 2 Appendix 1.10. This regulation also does not constitute a major Federal action significantly affecting the quality of the human environment under NEPA, 42 U.S.C. 4321 et seq. A detailed statement under the NEPA is not required.

List of Subjects in 43 CFR Part 2

Administrative practice and procedure, Classified information, Freedom of information, and Government employees.

In consideration of the foregoing, the Department amends 43 CFR Part 2, Subpart E as set forth below:

1. The authority citation for Subpart E is revised to read as follows:

Authority: 5 U.S.C. 301, 552 and 552a; 31 U.S.C. 9701; 43 U.S.C. 1460; and Reorganization Plan No. 3 of 1950, 15 FR 3174.

2. Sections 2.80 and 2.82 are removed and Title 43, Part 2, Subpart E of the Code of Federal Regulations is revised to read as follows:

Subpart E--Legal Process: Testimony by Employees and Production of Records

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General Information

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General Information

Sec. 2.80 What does this subpart cover?

(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.

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(b) In this subpart, Aemployee@ 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 Secs. 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 Sec. 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.

Sec. 2.81 What is the Department's policy on granting requests for employee testimony or Department records?

(a) Except for proceedings covered by Sec. 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 Secs. 2.80 through 2.90 United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951).

Responsibilities of Requesters

Sec. 2.82 How can I obtain employee testimony or Department records?

(a) To obtain employee testimony, you must submit:

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(1) A written request (hereafter a *Touhy* Request;@ see Sec. 2.84 and United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951)); and

(2) A statement that you will submit a check for costs to the Department of the Interior, in accordance with Sec. 2.85, if your *Touhy* Request is granted.

(b) To obtain official Department records, you must submit:

(1) A *Touhy* Request; and

(2) A Statement that you agree to pay the costs of duplication in accordance with 43 CFR Part 2, appendix A, if your *Touhy* Request is granted.

(c) You must send your *Touhy* Request to:

(1) The employee's office address;

(2) The official in charge of the employee's bureau, division, office or agency; and

(3) The appropriate unit of the Solicitor's Office.

(d) To obtain employee testimony or records of the Office of Inspector General, you must send your *Touhy* Request to the General Counsel for the Office of Inspector General.

(e) 43 CFR Part 2, Appendix B contains a list of the addresses of the Department's bureaus and offices and the units of the Solicitor's Office. The General Counsel for the Inspector General is located at the address for the Office of the Inspector General. If you do not know the employee's address, you may obtain it from the employee's bureau or office.

Sec. 2.83 If I serve a subpoena duces tecum, must I also submit a *Touhy* request?

Yes. If you serve a subpoena for employee testimony, you also must submit a request under United States ex rel. *Touhy v. Regan*, 340 U.S. 462 (1951)? If you serve a subpoena duces tecum for records in the possession of the Department, you also must submit a *Touhy* Request.

Sec. 2.84 What information must I put in my *Touhy* Request?

Your *Touhy* Request must:

(a) Identify the employee or record;

(b) Describe the relevance of the desired testimony or records to your proceeding and provide a copy of the pleadings underlying your request;

(c) Identify the parties to your proceeding and any known relationships they have to the Department's mission or programs;

(d) Show that the desired testimony or records are not reasonably available from any other source;

(e) Show that no record could be provided and used in lieu of employee testimony;

(f) Provide the substance of the testimony expected of the employee; and

(g) Explain why you believe your *Touhy* Request complies with Sec. 2.88.

Sec. 2.85 How much will I be charged?

We will charge you the costs, including travel expenses, for employees to testify under the relevant substantive and procedural laws and regulations. You must pay costs for record

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production under 43 CFR Part 2, Appendix A. Costs must be paid by check or money order payable to the Department of the Interior.

Sec. 2.86 Can I get an authenticated copy of a Department record?

Yes. We may provide an authenticated copy of a Department record, for purposes of admissibility under Federal, State or Tribal law. We will do this only if the record has been officially released or would otherwise be released under Sec. 2.13 or this Subpart.

Responsibility of the Department

Sec. 2.87 How will the Department process my *Touhy* Request?

(a) The appropriate Department official will decide whether to grant or deny your *Touhy* Request. Our Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, may negotiate with you or your attorney to refine or limit both the timing and content of your *Touhy* Request. When necessary, the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, also will coordinate with the Department of Justice to file appropriate motions, including motions to remove the matter to Federal court, to quash, or to obtain a protective order.

(b) We will limit our decision to allow employee testimony to the scope of your *Touhy* Request.

(c) If you fail to follow the requirements of this Subpart, we will not allow the testimony or produce the records.

(d) If your *Touhy* Request is complete, we will consider the request under Sec. 2.88.

Sec. 2.88 What criteria will the Department consider in responding to my *Touhy* Request?

In deciding whether to grant your *Touhy* Request, the appropriate Department official will consider:

(a) Your ability to obtain the testimony or records from another source;

(b) The appropriateness of the employee testimony and record production under the relevant regulations of procedure and substantive law, including the FOIA or the Privacy Act; and

(c) Our ability to:

(1) Conduct our official business unimpeded;

(2) Maintain impartiality in conducting our business;

(3) Minimize the possibility that we will become involved in issues that are not related to our mission or programs;

(4) Avoid spending public employee's time for private purposes;

(5) Avoid the negative cumulative effect of granting similar requests;

(6) Ensure that privileged or protected matters remain confidential; and

(7) Avoid undue burden on us.

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Responsibilities of Employees

Sec. 2.89 What must I, as an employee, do upon receiving a request?

(a) If you receive a request or subpoena that does not include a *Touhy* Request, you must immediately notify your supervisor and the Solicitor's Office, or the General Counsel of the Office of the Inspector General, as applicable, for assistance in issuing the proper response.

(b) If you receive a *Touhy* Request, you must promptly notify your supervisor and forward the request to the head of your bureau, division or office. After consulting with the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, the official in charge will decide whether to grant the *Touhy* Request under Sec. 2.88.

(c) All decisions granting or denying a *Touhy* Request must be in writing. The official in charge must ask the applicable unit of the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, for advice when preparing the decision.

(d) Under 28 U.S.C. 1733, Federal Rule of Civil Procedure 44(a)(1), or comparable State or Tribal law, a request for an authenticated copy of a Department record may be granted by the person having the legal custody of the record. If you believe that you have custody of a record:

(1) Consult your delegated authority to determine if you can grant a request for authentication of records; and

(2) Consult the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel,

concerning the proper form of the authentication (as authentication requirements may vary by jurisdiction).

Sec. 2.90 Must I get approval before testifying as an expert witness on a subject outside the scope of my official duties?

(a) You must comply with 5 CFR 2635.805(c), which details the authorization procedure for an employee to testify as an expert witness, not on behalf of the United States, in any judicial or administrative proceeding in which the United States is a party or has a direct and substantial interest. This procedure means:

- (1) You must obtain the written approval of your Deputy Ethics Official;
- (2) You must be in an approved leave status if you testify during duty hours; and
- (3) You must state for the record that you are appearing as a private individual and that your testimony does not represent the official views of the Department.

(b) If you testify as an expert witness on a matter outside the scope of your official duties, and which is not covered by paragraph (a) of this section, you must comply with 5 CFR 2635.802 and 5 CFR 3501.105.

Dated: July 11, 2000.

John D. Leshy,
Solicitor.

[FR Doc. 00-18480 Filed 7-27-00; 8:45 am]

BILLING CODE 4310-55-M.

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