

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	EPAct Docket No. 06-0001
Idaho Power Company)	
Hells Canyon Complex)	
FERC Project No. 1971)	
)	

Ruling Denying Motions to Dismiss Issues

With the filing on May 11, 2006 of the Voluntary Withdrawal by Idaho Power Company of its challenge to nine conditions as a result of stipulations entered into with the United States Forest Service, the only condition imposed by the Forest Service on Idaho Power that remains challenged in this proceeding is condition 4.

Condition 4 concerns sandbar maintenance and restoration. With respect to that condition, Idaho Power has submitted six disputed issues of material fact for a hearing under the new Energy Policy Act. The Forest Service, along with intervenors the National Marine Fisheries Service and Idaho Rivers United and American Rivers, have moved to dismiss with respect to each alleged disputed material fact, and intervenor States of Idaho and Oregon have also moved to dismiss with respect to condition 4.

After carefully reviewing the motions and responses, I am denying all motions to dismiss.

While there is not a great deal of legislative history surrounding the relevant changes to the Federal Power Act, the purpose of the 2005 amendments, as they apply to the role of USDA's administrative judiciary in the hydroelectric power licensing process, is quite clear. Congress wanted to provide the parties an opportunity to develop facts that might prove material to the decision making of the Federal Energy Regulatory

Commission, and enhance the review of the federal courts. If I allow the development of facts, and find that a fact is material, and make a fact finding, and the FERC or the court decides that the fact is not material, the effect on the expedited schedule would be de minimus since all matters within my jurisdiction must be decided by July 19, 2006. However, if I erroneously dismiss a matter as immaterial, the regulatory process could be significantly delayed, as there is the possibility of the FERC or the federal courts remanding the case for a subsequent factual finding.

Additionally, while Judge Heffernan's rationale in the parallel Department of Interior proceeding is not binding on me, I find, too, that the arguments of the government in this matter would render the very purpose of the amended Federal Power Act as it applies to these proceedings virtually meaningless. These proceedings were designed to allow the development of facts, to allow the FERC to make decisions with a solid factual basis, and based upon more than the opinions and recommendations and opinions of government officials. Couching every factual issue as potentially involving a legal or policy decision, as the Forest Service and intervenors consistently appear to do, serves to do little but avoid the very task that Congress sought to impose on the administrative judiciary by the 2005 amendments. Each of the factual issues alleged to be disputed by Idaho Power appears to involve, at least arguably, underlying competing factual issues which I believe it is within my jurisdiction to resolve.

Thus, for example, it is possible that the FERC may find it immaterial the degree to which the Hells Canyon Complex contributes to sandbar degradation vis-à-vis motorboat usage and other causes. However, if the FERC does decide that the degree of the contribution of the Hells Canyon Complex is a material factor, than this

administrative forum appears to be the arena that Congress has chosen for findings relating to that factor to be made. Similarly, it is clearly not within my authority to make a determination as to whether certain lands lying in the Hells Canyon area belong to the federal government, or to Idaho or Oregon. But it does not seem outside of the authority that Congress has placed in this forum for me to have the authority to make a factual finding based upon credible evidence as to the location of the Ordinary High Water Mark. And, if it turns out that I make a finding outside of my jurisdiction, the FERC, and the reviewing court, are both free to ignore the finding.

In sum, the overarching intent of Congress in passing the Energy Policy Act of 2005 amendments to the Federal Power Act is to allow licensees such as the Idaho Power Company an opportunity to seek expedited administrative resolution, before a United States Department of Agriculture Administrative Law Judge, of disputed material facts regarding conditions imposed by the United States Forest Service. Denial of the Forest Service and Intervenors' Motions to Dismiss is the path most consistent with congressional intent.

Accordingly, the Motions to Dismiss Idaho Power Company's Request for Hearing on issues 4.1 through 4.6 are denied.

Marc R. Hillson
MARC R. HILLSON
Chief Administrative Law Judge

May 24, 2006