**UNITED STATES DEPARTMENT OF AGRICULTLURE**

**BEFORE THE SECRETARY OF AGRICULTURE**

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

Ruling on Motion to Establish Burden of Proof

On May 4, 2006 the Forest Service filed a motion seeking a ruling that the burden of proof in this proceeding lies with Idaho Power Company. On May 15, 2006, Idaho Power filed a response, contending that the burden of proof lies with the Forest Service. In this ruling, I hold that Idaho Power has the burden of proving its case, by a preponderance of the evidence, with respect to the six disputed issues of alleged material facts relating to mandatory condition 4.

This is the first case referred to the United States Department of Agriculture's Office of Administrative Law Judges under the Energy Policy Act of 2005 (EPAct).[1] The EPAct amended the Federal Power Act[2] to add a "trial type" administrative hearing process regarding disputed issues of material fact with respect to mandatory conditions that the Forest Service developed for inclusion in hydropower licenses. Neither the EPAct, nor the regulations promulgated under the Act at 7 C.F.R.§ 1 et seq., subpart O, make mention of which party has the burden of going forward at the hearing nor which party has

[1] A parallel case, referred to the Department of Interior, was resolved by stipulation of the parties.
[2] EPAct P.L. 109-58, 119 Stat. 594 et seq., at Sec. 241

the burden of proof, or what the standard of proof is. I find that in this proceeding the burden of going forward, and the burden of proving its case by the preponderance of the evidence, is on Idaho Power.

There appears to be no dispute that this issue is governed by Section 7(c) of the Administrative Procedure Act, which pertinently provides that "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." In essence, Idaho Power contends that as the proponent of the condition that is being imposed on its license, the Forest Service should be viewed as the proponent for the purpose of burden of proof, while the Forest Service contends that Idaho Power is the entity challenging an Agency decision and, as such has the burden of proof at the upcoming hearing. Given the purpose of this type of hearing, which is to adjudicate factual issues alleged to be "material" by Idaho Power, as opposed to the issues that will be adjudicated before the Federal Energy Regulatory Commission or in the federal courts, I find that the position advocated by the Forest Service is the most appropriate for this proceeding.

Although Idaho Power contends otherwise, the Supreme Court's decision is Schaffer v. Weast, 126 S. Ct. 528 (2005) does appear to me to be dispositive on the issue of burden of proof ("the default rule") where a statute or regulation is silent. The Court succinctly held that ". . . the burden lies, as it typically does, on the party seeking relief." In the instant proceeding, the hearing is being requested by Idaho Power. Idaho Power is seeking [relief] to establish certain facts that it alleges are material, as a basis to challenge, in the subsequent proceeding before the FERC, a mandatory condition imposed by the Forest Service. In *that*

proceeding, but not in this one, the Forest Service may well be in a different position than in this one, as it may be required to present to the FERC modified conditions and prescriptions which are a reflection of my findings on disputed issues of material facts, among other things. Likewise, under Escondido[3], the FERC's decision must be upheld if supported by substantial evidence. Each of these three proceedings, although part of the same ultimate process, is significantly different in many aspects, not the least of which is which party has the burden of proof. The fact that the conditions are imposed by the Forest Service does not provide a basis for putting the burden of proof on that Agency for this proceeding as suggested by Idaho Power in its Response Brief. The purpose of the instant proceeding is to make findings in an administrative hearing setting on the disputed issues of material facts contained in Idaho Power's request for hearing, not for ruling on the validity of the conditions themselves.

As both parties must recognize, in a matter where the standard of proof is the preponderance of the evidence, the burden of proof only becomes significant when the weight of the evidence is equally balanced. In the unlikely event that this exact balance of evidence is achieved with respect to any of the six disputed issues of alleged material fact, I will hold that Idaho Power has failed to meet its burden of proof.

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**MARC R. HILLSON**
Chief Administrative Law Judge

May 31, 2006

[3] *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765