

UNITED STATES OF AMERICA

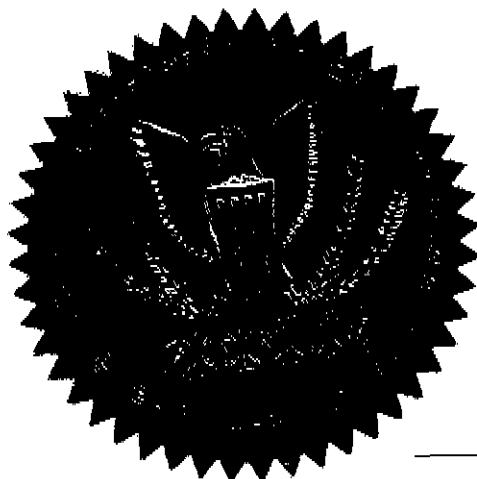
FEDERAL ENERGY REGULATORY COMMISSION

CERTIFICATION

I hereby certify that the attached 13 pages are true and correct copies of a document on the file with the Commission.

Aug 31, 2007
Date

Norma L. Anderson
Custodian



I hereby certify that the Custodian or his designee, which signature appears above, is the official custodian of the records of the Federal Energy Regulatory Commission which certification is made and was such official custodian at the time of executing the above certification.

Kimberly D. Base

SECRETARY

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Anthony G. Sousa, Charles G. Stalon,
Charles A. Trabandt and C. M. Naeve.

Idaho Power Company)

Docket No. EL85-38-000

ORDER PURSUANT TO AN ACT OF CONGRESS,
DISMISSING PETITION FOR DECLARATORY ORDER,
AND GRANTING INTERVENTIONS

(Issued March 25, 1988)

Pub. L. No. 100-216, approved December 29, 1987, directs certain actions concerning a petition by Idaho Power Company (IPC) for a declaratory order and an attached settlement agreement (Swan Falls water rights settlement) between IPC and the State of Idaho relating to eight of IPC's licensed projects on the Snake River. 1/ This order implements section 1 of Pub. L. No. 100-216.

Summary of Pub. L. No. 100-216

Section 1(a) of Pub. L. No. 100-216 authorizes and directs the Commission, "in lieu of the petition [for declaratory order] request," to issue an order under the Federal Power Act (FPA) providing that the Swan Falls water rights settlement shall not be considered by the Commission, in any proceeding before the Commission during the remaining term of the licenses for the eight projects, to be either:

- (1) inconsistent with the terms and conditions of such licenses concerning the retention of project property; or
- (2) imprudent for purposes of Section 205 of the FPA.

The order shall be issued within ninety calendar days after enactment of Pub. L. No. 100-216 and shall take effect on the date and as provided in section 3 of Pub. L. No. 100-216.

1/ This declaratory order proceeding has been designated as Idaho Power Company, Docket No. EL85-38-000. The eight licensed projects are: Project Nos. 18 (Twin Falls); 503 (Swan Falls); 1975 (Bliss); 2055 (C. J. Strike); 2061 (Lower Salmon); 2076 (Upper and Lower Malad); 2777 (Upper Salmon); and 2778 (Shoshone Falls).

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Section 1(b) provides that, notwithstanding the issuance of an order pursuant to the section (except for the specific terms and conditions of the license and the specific provisions of the FPA referred to above), the Commission may at any time consider, in accordance with existing and applicable law, whether the settlement agreement and the licensee are in full compliance with:

- (1) any terms and conditions of the license (including those relating to the protection, mitigation, and enhancement of fish and wildlife); and
- (2) any other applicable provision of Federal environmental law (including section 10 of the FPA).

Section 1(c) provides that, in issuing an order pursuant to the section, the Commission shall accept and adopt as part of the order the offers of settlement, pending before the Commission on enactment of Pub. L. No. 100-216, between the licensee, the State of Idaho, the Secretary of the Interior, the National Marine Fisheries Service (NMFS), and others.

Section 2 sets out three savings provisions. Subsections (a) and (b), respectively, provide that nothing in section 1 shall be construed as (1) affecting any stipulation or other agreement entered into by the State of Idaho or IFT prior to enactment of Pub. L. No. 100-216 relating to any fish and wildlife matters affected by any of the eight projects, or (2) modifying, changing, expanding, or limiting the authority of the Commission under the FPA or other applicable law relating to fish and wildlife. Subsection (c) contains specific disclaimers regarding water, water-related, and Indian rights. The subsection provides that nothing in Pub. L. No. 100-216 shall be construed as (1) affecting the rights or jurisdiction of the United States, the states, Indian tribes, or other entities over waters of any river or stream or over any ground resources, (2) altering or establishing the respective rights of states, the United States, Indian tribes, or any person with respect to any water or water-related right, or (3) altering, amending, repealing, interpreting, modifying, or being in conflict with, the treaty rights or other rights of any Indian tribe.

Section 3 calls for a joint agreement to conduct detailed evaluations and studies and for a report thereon. The studies are to concern "the timing, quantity, and quality of instream flows and related matters to protect, enhance, and mitigate fish and wildlife resources, including anadromous fish and related

habitat of the Snake River and the Deer Flat National Wildlife Refuge." 2/

Section 3(a)(1) requires the federal and licensee parties to the offers of settlement and the settlement agreement (i.e., Interior, NMFS, and IPC), immediately after enactment of Pub. L. No. 100-216, to enter into good faith negotiations for a joint agreement. The negotiations shall be completed and a joint agreement entered into by all the parties shall be filed with the Commission not later than sixty calendar days after issuance of this order pursuant to section 1. After it is filed, the agreement shall be considered as part of the order issued pursuant to section 1.

Section 3(a)(2) provides that if the joint agreement is not entered and filed within the sixty-day period, the Commission shall, within an additional sixty-day period, 3/ issue an order requiring the undertaking of the evaluations and studies and prescribing the duties and responsibilities of the parties to finance them. In issuing an order under the subsection, the Commission may take into consideration such information as the parties may stipulate and file with the Commission resulting from such negotiations. In any judicial review of the order issued under section 1, the order (or the adequacy thereof) issued under this paragraph of section 3 shall not be a basis for that review or for a stay of the effective date of the order issued under section 1.

Section 3(a)(3) provides that the order referred to in section 1 shall be effective and final when the joint agreement referred to in paragraph (1) of section 3(a) is filed by all the parties with the Commission, or not later than sixty calendar days after such order is issued, whichever comes first. The order referred to in paragraph (2) of section 3(a) shall be effective and final when issued. 4/

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- 2/ The wildlife refuge is located on the Snake River, downstream of the Swan Falls Project No. 503, which is one of the eight licensed projects to which the petition for a declaratory order and settlement agreement relate.
 - 3/ The Commission may for good cause extend the time for issuance for an additional period of not more than forty-five calendar days.
 - 4/ When effective, each order issued and joint agreement adopted shall be enforced by the Commission under the FPA, and the licensee shall pay its assigned share at the time and in the manner directed by the Commission.

Section 3(a)(4) requires that the studies and evaluations and the report thereof required by subsection (a) shall be made available by the federal parties to the public and the Commission and shall be considered by the Commission in accordance with existing and applicable law. A floor amendment by the Senate during final passage and agreed to by the House of Representatives ^{5/} added a provision that nothing in Pub. L. No. 100-216 requires the Commission to take any action pursuant to such consideration by the Commission or authorizes or grants the Commission any authority to take any action based on the findings, recommendations, results, or conclusions of the required study. Thus, any further action that might be taken by the Commission as a result of the studies and report would need to be based on authority other than Pub. L. No. 100-216.

Section 3(a)(5) provides that any final order issued pursuant to Pub. L. No. 100-216 shall be subject to judicial review in the same manner as orders under the FPA are subject to judicial review under the FPA.

Section 3(b) provides for participation by the Governor of the State of Idaho. At any time prior to the effective date of the order issued under section 1(a), the Governor shall have the option to participate in good faith in the negotiations required by section 3. In exercising such option, the Governor shall agree to carry out the state's responsibilities under the agreement or any order issued by the Commission under section (a)(2).

Section 3(c) provides for funding for the federal share of the studies. For carrying out the evaluations and studies required by Pub. L. No. 100-216, the federal agencies referred to, Interior and NMFS, shall, subject to applicable appropriation acts, utilize such funds as may be available and are authorized and directed to seek further appropriations as may be necessary. The federal share of the costs of carrying out the evaluations and studies shall be determined pursuant to the joint agreement under subsection (a) (or the Commission order under subsection (a)(2), if applicable). Subsection (c) also requires the federal agencies to provide for consultation with the affected Indian tribes and other interested public or private persons during the conduct of any study conducted pursuant to Pub. L. No. 100-216.

Section 4 requires the Commission, Interior, and NMFS to provide information to Congress on the status of all actions taken or required by Pub. L. No. 100-216 and of any delays (and the reasons therefor) in implementing such actions.

^{5/} See 133 Cong. Rec. 518,443-451 (daily ed. December 18, 1987) and 133 Cong. Rec. H11,884-85 (daily ed. December 18, 1987).

Background

The immediate impetus for the petition for a declaratory order in this proceeding apparently was litigation concerning IPC's water rights on the Snake River, particularly at its Swan Falls Project No. 503, and allegations that IPC had failed to protect and preserve its water rights and that, by so doing, IPC had wasted its assets and overstated its capital investment, thus resulting in overcharges to its ratepayers. 6/ Following the Idaho Supreme Court decision in the above litigation, in 1984 IPC and the State of Idaho entered into an agreement (the Swan Falls water rights settlement), and IPC filed with the Commission a petition for a declaratory order, with the agreement between it and Idaho attached and incorporated. The petition asked for a declaratory order that implementation of the agreement would assure a sufficient supply of water for IPC's eight licensed projects and that the agreement would be in the public interest. While the provisions of the agreement are rather complex, one of the provisions (paragraph 7) apparently would have recognized IPC's right to minimum flows at the Swan Falls project to be at substantially lower levels than the disputed water right 7/ it holds for the project.

Numerous filings were made concerning the petition for declaratory order. NMFS, the Fish and Wildlife Service of the Department of the Interior, the Idaho Natural Resources Legal Foundation, Inc. (INRLF), the Golden Eagle Audubon Society, the Idaho Wildlife Federation (IWF), the Idaho Consumer Affairs, Inc., the Nez Perce Indian Tribe, the Columbia River Inter-Tribal Fish Commission, the Confederated Tribes of the Umatilla Indian Reservation, and the Washington Departments of Fisheries and Wildlife, as well as IPC and the State of Idaho, have variously submitted comments, motions to intervene, offers of settlements, or other pleadings.

As demonstrated by the filings in this proceeding, two interrelated points became increasingly apparent. First, there was growing environmental concern, and opposition, respecting approval of the settlement. Second, it became increasingly apparent that there was not readily available sufficient

6/ See Idaho Power Co. v. State, 661 P.2d 741, 748 (Idaho 1983); see also S. Rep. No. 8, 100 Cong., 1st Sess. 1-2 (1987).

7/ In Idaho Power Co. v. State, the court held that IPC's water rights at the Swan Falls project were vested but remanded for further proceedings on affirmative defense issues raised below and not there decided. 661 P.2d at 752, 756.

information to resolve the concerns and to provide an adequate basis for decision.

While the matter was pending before the Commission, legislation was introduced in the Congress. Late in the 99th Congress, the House of Representatives and the Senate agreed to limited legislation as part of the Appliance bill, H.R. 5465. As stated in H.R. Rep. No. 418, 100th Cong., 1st Sess. (1987), at 4, on the bill that became Pub. L. No. 100-216, both Houses in the 99th Congress agreed that IPC's petition was far too broad and granted authority for a more limited Commission order. The legislation in the 99th Congress did not receive Presidential approval, however, for reasons unrelated to the Swan Falls provisions.

In the 100th Congress, the Swan Falls legislation (H.R. 519 and S. 214) was again introduced. As subsequently modified and clarified ^{8/} and amended during final passage, ^{9/} the legislation became Pub. L. No. 100-216.

Discussion

This order, as noted above, implements section 1 of Pub. L. No. 100-216. Pursuant to section 1 and the pertinent legislative history, ordering paragraphs (A) and (B) dismiss the petition for declaratory order and provide the required action with respect to the settlement agreement dated October 25, 1984, that the petition for declaratory order concerned.

Ordering paragraph (C) accepts and adopts as part of this order the offers of settlement pending before the Commission on enactment of Pub. L. No. 100-216. There are two offers of settlement that are within the provisions of section 1(c) of Pub. L. No. 100-216 and are accepted and adopted as part of this order, pursuant to section 1(c).

One is an offer of settlement between NMFS and INRLF, and IPC and the State of Idaho, filed on July 31, 1985. The parties agreed to clarify the October 25, 1984 settlement agreement between the State and IPC, in that (1) the settlement agreement was not presented to the Commission as a comprehensive plan under Section 10(a) of the FPA; (2) NMFS and INRLF do not agree that the settlement agreement represents a comprehensive plan under section 10(a) which fully takes into account the public interest in anadromous fish; and (3) the settlement agreement shall not operate to preclude or compel compliance with existing flow

8/ See H.R. Rep. No. 418, *supra*.

9/ See n. 5 and accompanying text.

regimes nor to prevent, compel, or limit the Commission's consideration of other flow regimes or fisheries conditions for licensed projects in the Snake River basin.

The second is an offer of settlement between the Department of the Interior, and IPC and the State of Idaho, filed on March 17, 1986. The first and third points in this offer of settlement are basically the same as the corresponding points in the NMFS and INRLF offer of settlement with IPC and the State, discussed above. The second point is modified somewhat to state that Interior does not agree that the settlement agreement represents a comprehensive plan under section 10(a) of the FPA which fully takes into account the public interest in preserving anadromous or resident fisheries or the wildlife habitat of the Deer Flat National Wildlife Refuge. This second offer of settlement also added a fourth point, namely, that nothing in the settlement agreement shall operate in any way to interfere with, preclude, limit, or prejudice the assertion of and quantification of federal reserved water rights in the Snake River basin.

Ordering paragraph (D) acts on pending motions to intervene. Pub. L. No. 100-216 does not expressly require the grant or denial of intervention; H.R. Rep. No. 418, *supra*, at 14, states that the Committee leaves to the Commission the decision whether to act upon or dismiss the motions to intervene.

The State of Idaho, the National Marine Fisheries Service, and the Idaho Natural Resources Legal Foundation, Inc. have been granted intervention by operation of the Commission's rules. Late motions to intervene, which are pending, have been filed by the Idaho Wildlife Federation, the Department of the Interior, the Nez Perce Tribe, the Columbia River Inter-Tribal Fish Commission, the Confederated Tribes of the Umatilla Indian Reservation, the Washington Department of Fisheries, and the Washington Department of Wildlife. Except for DOI's motion, responses in opposition to each of these pleadings were filed by IPC, the State, or both. IPC and the State argue that good cause has not been sufficiently shown for lateness, there would be disruption to the proceeding, the movants are already adequately represented, and a general adjudication of water rights is now underway in state court. Although we are concerned that the movants waited so long to file their motions to intervene, we will nevertheless grant their intervention because of the unique circumstances of this proceeding. Each of the movants has an interest ^{10/} in the results of the studies that Congress has

^{10/} Although the House report leaves action on intervention to the Commission, the act and the report, by reference to Indian tribes and others, recognize the interest of those
(continued...)

directed be carried out under Pub. L. No. 100-216. In addition, we see no prejudice, disruption, or additional burden to this proceeding by granting intervention out of time.

This order implementing section 1 of Pub. L. No. 100-216 will also have the effect of establishing time-tables for other actions under Pub. L. No. 100-216, more specifically, those required by section 3, briefly discussed above. Section 3 calls for immediate negotiations by the federal and licensee parties to the offers of settlement and the settlement agreement (i.e., Interior, NMFS, and IPC) for a joint agreement. The joint agreement is to be for conducting and financing detailed evaluations and studies, and for a report on fish and wildlife resources, as discussed above. The negotiations shall be completed and a joint agreement entered into by all the parties shall be filed with the Commission not later than 60 calendar days after this order is issued under section 1 of Pub. L. No. 100-216. Pursuant to section 3(b), at any time prior to the effective date of the section 1 order, the Governor of the State of Idaho shall have the option to participate in the negotiations; in exercising the option, the Governor shall agree to carry out the State's responsibilities under the agreement or any order issued by the Commission under section 3(a)(2). 10/

We do not anticipate that the parties will not be able to enter into and file the section 3(a)(1) study agreement within the 60-day period. We believe, however, particularly in light of the time constraints in section 3(a)(2), and the fact that the Commission is not designated as a party to the negotiations, that it would be helpful to include in this order certain provisions to be applicable in the event the parties are unable to agree on the section 3(a)(1) study within the allowed period of time.

These provisions are set out in ordering paragraph (E). They provide procedures for the filing of information that will

10/ (...continued)

entities in this proceeding. Indeed, the House report, at p.17, amplifies on the section 3(c) requirement for consultation by the federal agencies with Indian tribes or others during the section 3 studies, by stating that "[p]resumably, the agencies will consult during the negotiations as well."

11/ Under section 3(a)(2), as discussed above, if the parties do not enter into and file the joint agreement within the 60-day period, the Commission within prescribed times must issue an order requiring the evaluations and studies and prescribing the duties and responsibilities of the parties to conduct and finance them.

be helpful to the Commission in the event that it must issue a further order pursuant to section 3(a)(2) because there is no joint agreement under section 3(a)(1). 12/ What, if any, additional procedures may be appropriate can best be determined later in the event there is no joint agreement pursuant to section 3(a)(1).

Ordering paragraph (F) requests the Governor to advise the Commission of the exercise of his option to participate under section 3(b). The provision would be applicable only in the event a section 3(a)(1) joint agreement, showing the Governor's decision to be a designated participant, is not filed within the 60-day period after issuance of this order. Such a provision is appropriate so that the Commission's records will definitely show how the Governor has exercised his option under section 3(b). Further, in the event a section 3(a)(2) order becomes necessary, the Commission should know, at an early date, whether the Governor has decided to participate or not participate.

Ordering paragraph (G) of this order implements section 3(a)(3) of Pub. L. No. 100-216. 13/ The ordering paragraph provides that this order shall be final and effective when the joint agreement pursuant to section 3(a)(1) is filed with the Commission, or 60 calendar days after issuance of this order, whichever comes first.

12/ In the event the Commission must act pursuant to section 3(a)(2), paragraph (2) gives the Commission discretion as to the procedures it will follow, rather than setting out particular procedures to be observed. That the Commission is given discretion is also shown by H.R. Rep. No. 418, *supra*, which states, at 16:

If the Commission has to exercise this authority because of a failure of the parties to reach an agreement, FERC may, but is not required to, obtain written comments or hold hearings. Further, FERC, in order to facilitate its efforts, is authorized to consider any information provided by stipulation by the parties that result from their negotiations. FERC, however, is not limited to relying on only stipulated information, nor is FERC precluded from considering input from other public or private entities or persons. FERC should act on the best information available.

13/ As noted above, section 3(a)(5) provides that any final order issued pursuant to Pub. L. No. 100-216 shall be subject to judicial review in the same manner as final orders under the FPA are subject to judicial review under the FPA.

The Commission orders:

(A) The petition for a declaratory order filed on November 26, 1984, in Docket No. EL85-38-000 is dismissed.

(B) During the remainder of the current license terms for Project Nos. 18, 503, 1975, 2055, 2061, 2726, 2777 and 2778, in no proceeding before the Commission shall the Commission consider the settlement agreement between Idaho Power Company and the State of Idaho, dated October 25, 1984, to be either (1) inconsistent with the terms and conditions of the licenses identified above concerning the retention of project property, or (2) imprudent for purposes of Section 205 of the Federal Power Act.

(C) The offer of settlement, filed on July 31, 1985, between the National Marine Fisheries Service and the Idaho Natural Resources Legal Foundation, and the State of Idaho and Idaho Power Company, and the offer of settlement, filed on March 17, 1985, between the Department of the Interior, and the State of Idaho and Idaho Power Company, are accepted and adopted as part of this order.

(D) The motions to intervene in Docket No. EL85-38-000 filed by the Idaho Wildlife Federation, the Department of the Interior, the Nez Perce Indian Tribe, the Columbia River Inter-Tribal Fish Commission, the Confederated Tribes of the Umatilla Indian Reservation, the Washington Department of Fisheries, and the Washington Department of Wildlife are granted.

(E) In the event a joint study agreement pursuant to section 3(a)(1) of Pub. L. No. 100-216, approved December 23, 1987, is not filed within 60 calendar days after issuance of this order:

(a) the Idaho Power Company, the National Marine Fisheries Service, the Department of the Interior, and the Governor of the State of Idaho (if the Governor has exercised his option to participate) shall, within 70 calendar days after issuance of this order, each file with the Commission, with supporting documentation, the entity's proposals and recommendations for the section 3 joint study and report, the entity's proposals or recommendations concerning responsibilities for conducting and financing the study and preparing the report, and the entity's estimate of time required to complete the evaluations and studies and file the report;

(b) each entity filing under (a) of this ordering paragraph shall at the same time serve a copy of its filing on each

other party to this proceeding, in accordance with the Commission's rules of practice and procedure (18 C.F.R. Part 385); and

(c) if any party desires to respond to the filings made under (a) and (b) of this ordering paragraph, such responsive pleadings shall be made within 15 days after the date of service required under (b) above.

(F) In the event a joint study agreement, pursuant to section 3(a)(1) of Pub. L. No. 100-216, approved December 29, 1987, which agreement shows the decision of the Governor of the State of Idaho to be a designated participant, is not filed within 60 calendar days after issuance of this order, the Governor is requested, within 60 calendar days after issuance of this order, to file with the Commission a statement of his exercise of his option to participate pursuant to section 3(b) of Pub. L. No. 100-216.

(G) This order shall be effective and final when the joint agreement pursuant to section 3(a)(1) of Pub. L. No. 100-216 is filed with the Commission, or 60 calendar days after issuance of this order, whichever comes first.

By the Commission:

(- S.E.A.L.)

Lois D. Cashell
Lois D. Cashell,
Acting Secretary.



Department of Energy
 Bonneville Power Administration
 PO Box 3621
 Portland, Oregon 97208-3621

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Ms. Lois Cashell
 Secretary to the Commission
 Federal Energy Regulatory Commission
 825 North Capitol Street, NE
 Washington, D.C. 20426

Dear Ms. Cashell:

Bonneville Power Administration (BPA) requests that you provide notification prior to convening meetings or taking any action concerning the Swan Falls Agreement (Docket Number ~~EL85-33-000~~). As provided in H.R. 519 recently enacted by Congress, we understand the Federal Energy Regulatory Commission may soon begin discussions regarding a study of the Swan Falls Agreement. In addition to notification, we would appreciate any available information concerning the Commission's plans regarding this study.

BPA is interested in the Swan Falls agreement since it may reduce Snake River flows critical to the downstream migration of juvenile salmon and steelhead. Reduced flows may also reduce the amount of electricity produced by downstream hydro projects. Both of these effects may increase BPA expenditures and decrease our revenues.

We appreciate your assistance and look forward to your response.

Sincerely,

Ed Sienkiewicz
 Senior Assistant Administrator for
 Power Management

- cc:
- E. Sheets, Northwest Power Planning Council
 - Wold, National Marine Fisheries Service
 - Hanson, Idaho Department of Fish and Game

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