



File Code: 2770

Date: APR 08 2014

Route To:

Subject: Clarification Regarding Exercise of Section 4(e) Authority in Roadless Areas

To: Beth Pendleton, Regional Forester, R-10

This letter is to clarify Forest Service (FS) direction and regulations regarding exercise of Federal Power Act (FPA) Section 4(e) authority as it relates to ensuring projects comply with applicable Forest plan standards and guidelines, especially those proposed in roadless areas.

As you are aware, Section 4(e) of the FPA, 16 U.S.C. section 797(e), provides *[t]hat licenses shall be issued...and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.* The Federal Energy Regulatory Commission (FERC) must incorporate, without change, any Section 4(e) conditions provided by the FS. Courts have determined that the scope of 4(e) does not allow the FS to veto a license.¹ But, the FS can exercise its authority under Section 4(e) to impose terms and conditions reasonably related to Forest Service resource management obligations.

If sited and designed properly, hydro projects provide an environmentally and economically preferred source of power due to the near elimination of hydrocarbon emissions from diesel fuels and reduce the risk of catastrophic diesel fuel spills associated with shipping, handling, and storing activities. Cost savings due to shifting from diesel to hydropower are significant. The cost of electricity from hydroelectric projects is 9 cents to 10 cents per kilowatt hour, with diesel-generated power ranging from 48 cents to 54 cents per kilowatt hour.

The recent Ninth Circuit Court of Appeals decision (*Organized Village of Kake v. USDA* (No. 11-35517, 9th Cir., March 26, 2014)) reversing the Alaska District Court and re-instating the Tongass Exemption to the 2001 Roadless Rule has no effect on actions undertaken in Alaska under the Federal Power Act, such as approving road construction and reconstruction or the cutting or removal of timber for hydroelectric development.

Therefore, Section 4(e) can be used to mitigate the impacts of any project including the location and size of a dam, associated project works (pipelines, roads, facilities), reasonable access, and necessary and appropriate mitigation measures. The FS may develop any conditions necessary to protect the reservation, such as limiting or prohibiting certain roads, preserving remote characteristics, defining the size of facilities, project operations (run-of-river vs. large storage reservoirs, etc.) so long as the conditions do not constitute a veto and thereby usurp FERC's role in deciding to license a hydropower facility.

¹ See *Escondido* 466 U.S. 765 (1984) and *Rainsong* 106 F.3d 269 (9th Cir. 1997) (withdrawing 78 F.3d 659)



Notwithstanding the May 21, 2012, Roadless Activities Review Process, you may proceed under Forest Service Manual 2770.4 to submit appropriate 4(e) conditions to FERC as necessary for the adequate protection and use of National Forest System lands in Alaska. All 4(e) terms and conditions are subject to Washington Office review, before submittal, upon request.

If you have any questions regarding this clarification please contact Jim Peña, Associate Deputy Chief, National Forest System, at (202) 205-3171 or Gregory Smith, Director, Lands and Realty Management, at (202) 205-1769.

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FOR THOMAS L. TIDWELL
Chief