

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

**Center for Biological Diversity,
Plaintiff,**

No. CIV-00-848-PCT-SMM

ORDER

vs.

**Federal Energy Regulatory Commission,
Defendant.**

By Order filed March 28, 1997, in Southwest Center for Biological Diversity v Federal Energy Regulatory Commission, 967 F.Supp. 1166 (D. Ariz. 1997), the Court held that it lacked subject matter jurisdiction to hear Plaintiff's Complaint regarding the Federal Energy Regulatory Commission's failure to comply with the Endangered Species Act when it issued a license to Phelps Dodge. Specifically, the Court held that "any attempt to challenge a license issued by the FERC [Federal Energy Regulatory Commission], however, artfully pleaded, will fall under the exclusive jurisdiction of the Federal Courts of Appeal under the FPA." Id. At 1173 (citing California Save Our Streams Council, Inc. v. Yeutter, 887 F.2d 908, 910-11 (9th Cir. 1989)).

On May 20, 1999, Plaintiff filed a petition with the FERC requesting that it initiate a consultation with the United States Fish and Wildlife Service (USFWS) pursuant to the Endangered Species Act in relation to the license issued to Phelps

Dodge. The petition is currently pending before the FERC. On May 8, 2000, Plaintiff filed a Complaint seeking to have this Court require the FERC to issue a decision on the petition.

On September 13, 2000, the FERC filed a Motion to Dismiss asserting that this Court lacks subject matter jurisdiction. The Court agrees. For the reasons set forth in its published decision in Southwest Center for Biological Diversity v. Federal Communications Commission, the Court of Appeals has exclusive jurisdiction over this action. See also Telecommunications Research & Action v. Federal Communication Commission, 750 F.2d 70, 75 (D.C. Cir. 1984) (action to compel decision on unreasonably delayed petition properly lies in court appeals when a statute commits final agency action to review by the court of appeals). Accordingly.

IT IS ORDERED that Defendant's Motion to Dismiss for lack of Subject Matter Jurisdiction (Doc No. 13) is granted. All other pending motions are denied as moot.

IS IS FURTHER ORDERED that the action is dismissed without prejudice to allow Plaintiff to file its action in the proper court.

DATED this 15th day of February, 2001.

Stephem M. McNamee

Chief United States District Judge