

**Testimony of
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Federal Energy Regulatory Commission
Before the
Subcommittee on Water and Power
Committee on Energy and Natural Resources
United States Senate**

March 30, 2006

Madam Chairman and Members of the Subcommittee:

I appreciate the opportunity to comment on S. 1577, a bill to exempt the Spearfish Project, located in South Dakota, from the otherwise applicable licensing requirements of the Federal Power Act (FPA). My name is J. Mark Robinson, and I am the director of the Office of Energy Projects at the Federal Energy Regulatory Commission. Our office is responsible for non-federal hydroelectric licensing, administration, and safety; certification of interstate natural gas pipelines and storage facilities; and, authorization and oversight over the construction, operation, and safety of Liquefied Natural Gas (LNG) terminals. I appear today as a Commission staff witness speaking with the approval of the Chairman of the Commission. The views I express are my own and not necessarily those of the Commission or of any individual Commissioner.

Under Part 1 of the Federal Power Act, the Commission issues licenses to non-Federal interests authorizing the construction, operation and maintenance of water power projects on navigable waters of the United States, on federal lands and on streams over which the Congress has jurisdiction. Licenses are also required to utilize surplus water or waterpower from government dams.

Licenses may be issued under the FPA only if, in the judgment of the Commission, the proposed project is best adapted to a comprehensive plan for the development and utilization of the water resources of the river basin involved for all public purposes. The licenses are issued for terms up to 50 years and contain terms and conditions that are designed to ensure that the comprehensive development standard is met. The terms and conditions reflect consideration of all environmental and developmental aspects of the project, including such factors as the effect of project construction and operation on fish and wildlife resources, irrigation, flood control, water supply, recreation, and the safety of the public.

Legislative Background

Prior to passage on June 20, 1920, of the Federal Water Power Act, the responsibility for licensing and overseeing hydroelectric facilities was dispersed among several arms of government. The construction and operation of dams in navigable waters, in non-navigable tributaries whose flows affected such waters, and on federal lands were regulated under four general statutes: Section 7 of the River and Harbor Act of 1890, as amended; sections 9 and 10 of the River and Harbor Act of March 3, 1899; the General Dam Act of 1906; and, the General Dam Act of 1910.

If a hydroelectric project was located on a navigable water of the United States, it needed Congressional authorization. In addition, if the project was located on public lands of the United States, it required authorization from the Secretary of the Interior. If

the project was located on federal forest reserves (i.e., National Forest lands), it required authorization from the Secretary of Agriculture.

The passage of the Federal Water Power Act of 1920 (FWPA) superseded prior statutes. The FWPA created the Federal Power Commission and made it unlawful to operate a hydroelectric project in navigable waters or on federal lands without a license from the Federal Power Commission. The Federal Water Power Act established firmly the principle of federal regulation of water power projects and established a national policy in the use and development of water power projects on public lands and navigable streams.

Section 23(b) of the FPA requires either a Commission license or a valid pre-1920 federal permit for a hydropower project covered by Part I of the statute. Such permits were issued before the FPA was passed. They were grandfathered by Section 23(b), under which the permittee could either operate under the permit until it expired or apply for a license under the FPA. Although most of these permits have expired or been converted into licenses, the problem of determining what constitutes a valid permit or right-of-way still arises (as in case of the Spearfish Project). In 1935, the FPA was amended to broaden the Commission's authority and jurisdiction over water power projects to include projects that are located on commerce clause waters and which would also affect the interests of interstate or foreign commerce.

Spearfish Project

S. 1577 would exempt the Spearfish Project, located in South Dakota, from the otherwise applicable licensing requirements of the FPA. As noted previously, under Part I of the FPA, hydropower projects are required to be licensed, if, among other things, they are located on the public lands or reservations of the United States.

In September 2000, following receipt of an environmental complaint, the Commission began a review of the jurisdictional status of the Spearfish Project, operated by the Homestake Mining Company (Homestake). The complaint concerned the alleged dewatering of the Spearfish Creek downstream of the Spearfish Project, especially in the summer, to the detriment of resident trout. In August 2001, the Commission found that the project was required to be licensed, because it was located on federal lands, within the Black Hills National Forest.

However, the Commission subsequently reversed this finding on March 1, 2002 (Order Granting Rehearing and Denying Late Intervention) because Homestake had demonstrated that it held a valid right-of-way under a 1905 Act that permitted rights-of-way in National Forests for projects, such as Spearfish, that operated for mining purposes (at the time of the Commission order, the project's power was being used for mining operations). The Commission therefore concluded that the project need not be licensed.

In April 2002, Homestake informed the Commission that it had ceased mining operations as of December 31, 2001, but that it interpreted the FPA as allowing it to continue generating for activities associated with mine reclamation. In an order issued

June 17, 2002, the Commission ruled that the 1905 Act made no reference to reclamation, and that since mining operations had ceased, Homestake or any successor could not generate electricity at the project without a Commission license. Homestake did not seek judicial review of this order. To date, the Spearfish Project is still operating. It is my understanding that for several years the City of Spearfish has been exploring the possibility of acquiring and operating the project.

In passing the FPA, Congress made the decision that, to protect public resources, projects located on federal lands and reservations must be licensed by the Commission. The Spearfish Project, being located in part on National Forest lands, meets this criterion. I am aware of no reason why this project should be treated differently than others that are similarly situated. Exempting the project from the requirements of the FPA would set a precedent for exempting individual projects from the otherwise applicable requirements of the FPA. Congress has charged the Commission with examining thoroughly all of the environmental and developmental aspects of projects such as the Spearfish Project, and of licensing those projects with appropriate conditions to ensure that they are best adapted to the comprehensive development of affected waterways. In the absence of the Commission's licensing jurisdiction, there is no guarantee that there will be any consideration of the resources that the Commission is charged with weighing and protecting.

Exempting this project would also remove Commission oversight for dam safety. Therefore, Homestake would not need to comply with Part 12 of the Commission's dam

safety regulations. Currently, Homestake has an approved Emergency Action Plan and is inspected by the Commission every three years. Conformance with the Congressional intent expressed in the Federal Power Act requires that the Spearfish Project be licensed.

As a result of these concerns, I do not support S. 1577.

I appreciate the opportunity to present my views to the Subcommittee. Thank you.