

139 FERC ¶ 62,177
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Union Electric Company

Project No. 459-313

ORDER AMENDING PROJECT BOUNDARY

(Issued June 5, 2012)

1. On January 31, 2012, Union Electric Company (Ameren) filed an application with the Commission seeking to revise the boundary of the Osage Project No. 459, located on the Osage River in Benton, Camden, Miller, and Morgan Counties, Missouri, and immediately downstream of the U.S. Army Corps of Engineers' Harry S. Truman Dam. Ameren asserts that the amendment will eliminate excess land not needed for project purposes, some of which is occupied by privately-owned structures, while retaining the lands necessary for environmental, recreational, historic preservation, and energy production purposes.¹ As discussed below, I approve the application, as modified herein. Based on this action, all private residences and commercial structures will now be outside of the project boundary.

I. Background

2. The Osage Project was originally licensed in 1926² and relicensed in 1981, with an expiration date of February 28, 2006.³ In 2004, Ameren filed a relicense application for continued operation of the project (2004 relicense application).⁴

3. The project's reservoir, Lake of the Ozarks, is approximately 93 miles long, with about 1,150 miles of shoreline and a surface area of about 55,342 acres at the reservoir's

¹ See Ameren's January 31, 2012 filing, cover letter at 1.

² See 6th FPC Annual Report 243 (1925) (authorizing issuance of the license). The license was issued February 6, 1926, in an unpublished order.

³ See *Union Electric Co.*, 15 FERC ¶ 62,038 (1981).

⁴ See Ameren's February 24, 2004 Application for License for Major Project-Existing Dam.

high level elevation limit of 660' (i.e., feet) Union Electric Datum (UED).⁵ The lake has four major arms: Osage, Niangua, Gravois, and Grand Glaize.

4. The project boundary, which was established in the 1926 license and has not changed substantially since then, generally follows elevation 662', except in some upstream areas where it follows higher contour elevations (ranging between 663' and 678' UED)⁶ or irregularly shaped metes and bounds property lines.⁷ As described in more detail below, the use of both contour and metes and bounds to define the project boundary line primarily results from how property rights needed for construction and operation of the hydroelectric project were originally obtained in the early 1930s. Property that was acquired in fee resulted in project boundary areas described or delineated with contour elevations. Property where Ameren's predecessor condemned or obtained flood easements resulted in project boundary areas that are defined by metes and bounds.

5. Ameren explains⁸ that in the 1920s and early 1930s, Union Land Development Company (Union Land) acquired entire tracts of property for the project and conveyed in fee portions of the property from the water to specified contour elevations on the shoreline (ranging from 662' to 678' UED) to its affiliate, Union Electric Light and Power Company (Ameren's predecessor). Union Land granted Ameren's predecessor flooding easements over the remaining property. In most cases, the flooding easement was given over the entire tract of land owned by Union Land, even though only a small portion of the property was affected by the Osage Project.

6. The boundary along approximately 72 percent of the lake's shoreline is defined by contour elevations, and the remaining 28 percent is defined by metes and bounds.⁹

⁵ UED is 0.9 feet higher than mean sea level. All Lake of the Ozarks elevations referred to in this order are UED, unless otherwise noted.

⁶ The project boundary contour generally increases in elevation proceeding upstream from the dam.

⁷ Metes and bounds is a method of describing real estate that typically uses physical features of the local geography, along with directions and distances, to establish a parcel's boundary.

⁸ See Ameren's March 31, 2006 Comments on the draft Environmental Assessment for relicensing the project, at 9-10, and Attachment 3.

⁹ The metes and bounds parcels, which generally follow old property lines, are widely distributed throughout the project area.

About 32,000 acres of project lands surround the reservoir, with most of the acreage in areas where the project boundary is established by metes and bounds. These metes and bounds areas, which generally follow old property lines, are those that were originally acquired as flood easements only. In the ensuing years, the remaining rights in these lands were sold and resold. Currently, almost all are privately-held lands.¹⁰ Ameren explains that most of these lands have been developed as allowed by the deeds and easements originally granted in the 1930s (when the project was being constructed).¹¹

7. In its 2004 relicense application, Ameren proposed modifying the project boundary so that project lands currently defined by metes and bounds would be eliminated from the boundary, and the boundary instead would match the contour elevation project boundary of the adjacent properties.¹² This would have eliminated approximately 31,000 of the 32,000 acres of land within the project boundary.

8. In March 2007, the Commission issued a new 40-year license for the continued operation and maintenance of the project (2007 relicense order).¹³ The order denied Ameren's request to remove lands from the project boundary, because Ameren had not provided sufficient information to support its request and removal of the lands would be premature without an approved Shoreline Management Plan (SMP).¹⁴ The order stated

¹⁰ See Osage Project No. 459 Shoreline Management Plan (SMP), filed March 28, 2008, at 6-7. The State of Missouri holds title to some of the lands.

¹¹ See *id.*

¹² See February 24, 2004 Relicence Application, Vol. I, at G-1.

¹³ 118 FERC ¶ 62,247 (2007).

¹⁴ An SMP is essentially a land use plan, in which a licensee, in consultation with stakeholders and subject to Commission approval, determines what types of development and environmental protection are appropriate on the licensee's shoreline lands. Typically, certain areas are reserved for public recreation, in others, certain uses consistent with residential and commercial development on adjacent, non-project lands are permitted, and some are restricted in order to protect environmental values. Many SMPs include buffer zones immediately adjacent to the shoreline, where land-disturbing activities are significantly restricted in order to protect the environmental and public access. Not all projects require SMPs; these plans are generally required where it appears that the project's shoreline may be subject to competing developmental pressures such that public access or environmental resources are at risk. An SMP is only applicable to lands owned or controlled by a licensee, and has no effect on areas in which a licensee has no interest.

that Ameren could resubmit its request when it filed an SMP,¹⁵ as required by Article 417 of the license.

A. Ameren's Proposed SMP

9. In March 2008, Ameren filed a proposed SMP.¹⁶ The SMP included classification maps, generally incorporated the permitting and management measures Ameren had undertaken over the years, and proposed certain types of non-project uses and construction activities that would be allowed within the project boundary. Although the SMP stated that Ameren intended to file an application to amend the project boundary to remove lands that are privately-held and not needed for project purposes,¹⁷ the company did not file such an application either before or with its SMP filing.

10. Ameren's SMP proposed that owners of non-conforming structures would be required to register their structures with Ameren prior to January 1, 2012.¹⁸ Ameren proposed to then: (1) seek a revision of the project boundary to exclude the structure and the land on which it is located; (2) take action to affirm or secure rights necessary to manage and control the non-conforming structure, presumably with an eye to removal of the structure; (3) convey an interest in project lands or otherwise authorize a structure to remain on project lands or waters, allowing the continued use of the structure; or (4) require the owner to remove the structure, or part thereof, that is within the project boundary. Ameren would file an annual report with the Commission of all non-conforming structures for which interests were conveyed under the guidelines, including information on the nature of the interest conveyed, the location of the non-conforming structure, and the nature of the use of the non-conforming structure.

B. The July 26 Order

11. On July 26, 2011, Commission staff, by delegated authority, issued an order¹⁹ that approved Ameren's proposal with some procedural changes. With respect to Ameren's proposal regarding non-conforming structures, the order stated that Ameren should:

¹⁵ 118 FERC ¶ 62,247 at P 91-95.

¹⁶ See Osage Project No. 459 SMP, filed March 28, 2008.

¹⁷ SMP at 7.

¹⁸ SMP at 43-44 and B-12 through B-15.

¹⁹ *Union Electric Co.*, 136 FERC ¶ 62,070 (2011).

inspect and identify all lands within the project boundary; identify existing non-conforming structures and encroachments; identify the project purposes being served by the underlying lands, and take appropriate actions to resolve such non-conforming structures and encroachments with the goal of removing them from the project boundary. In the majority of cases, the existing non-conforming structure/encroachment should be removed in a timely manner and the site restored to pre-existing conditions. However, it may not always be feasible to remove the non-conforming structure/encroachment in the near term due to site-specific circumstances or hardship, and later removal of the encroachment may be warranted.^[20]

12. To this end, the order required Ameren, by May 1, 2012, to file for Commission approval a detailed report of each non-conforming structure and encroachment and Ameren's proposed course of action.²¹ The order further required that, "for each encroachment identified in the report that cannot be authorized pursuant to the current requirements of the license, the report shall include a proposed plan and schedule for removing or otherwise resolving the encroachment."²²

13. On August 25, 2011, Ameren filed a request for rehearing of the July 26 order. The company objected to the requirement that it file, by May 1, 2012, a comprehensive report regarding encroachments, stating that the current project boundary included over 4,000 possible encroachments, and the detailed assessment of each one that is required by the July 26 order would be infeasible in the time given.

14. Instead, Ameren proposed that, before addressing individual encroachments, it would first revise the project boundary to include only those lands needed to support project purposes, and then address the encroachments that exist within the new boundary. Ameren proposed to file, by September 1, 2013, an application to amend the project

²⁰ 136 FERC ¶ 62,070 at P 40.

²¹ 136 FERC ¶ 62,070, ordering paragraph (E). The report must, for each structure/encroachment: (1) describe its type, size, and location; (2) include a detailed map or drawing showing its location in relation to the project boundary and shoreline; (3) describe Ameren's ownership or other rights to the lands underlying the encroachment; (4) describe the specific project purposes served by the underlying lands and any adverse impacts the encroachment may have on those purposes; and (5) describe Ameren's plan for authorizing or removing the structure.

²² 136 FERC ¶ 62,070, ordering paragraph (E).

boundary to remove property that is not necessary to achieve or support a project purpose.²³ According to Ameren, “by revising the project boundary, the majority of encroachments (including residential dwellings) would be removed, thereby dramatically reducing the number and types of residual encroachments that would need to be managed under the SMP.”²⁴

C. The November 10 Order

15. On November 10, 2011, the Commission issued an order on rehearing of the July 26 order.²⁵ Among other things, the Commission explained that: (1) nothing in the SMP, the July 26 order, or in November 10 order has any impact on property rights, so that whatever rights entities have in lands within the boundaries of the Osage Project -- whether conferred by deed, lease, easement, or other conveyance -- have not been and will not be altered by action in these proceedings; (2) nothing in the Commission’s orders affects any previously-issued valid permit authorizing a non-project use of project lands or waters; and (3) if an entity has built a structure on lands on which it has a right to do so, that structure is not an encroachment, and the Commission’s orders do not suggest that it needs to be removed. Further, the Commission has no jurisdiction to rule on property rights, which are matters of state law, and any dispute regarding the rights granted by conveyance documents must be resolved in an appropriate court.

16. The Commission stated that a licensee may include within the boundaries of a licensed project only those lands that are needed for projects purposes, including power production, recreation, environmental protection, flood control, shoreline control, irrigation, and water supply. Accordingly, the Commission directed Ameren to file, by June 1, 2012, an application to revise the project boundary to remove any lands that are not needed for project purposes.²⁶

17. The application, to be prepared in consultation with stakeholders, must include: (a) a proposal to remove property currently located in the project boundary that is not necessary to achieve or support a project purpose, such as power production, recreation, environmental protection, flood control, shoreline control, public access, irrigation, and water supply; (b) a description of the proposed project boundary, including an

²³ Property proposed for removal would include property owned in fee by Ameren as well as property over which Ameren holds an easement.

²⁴ Ameren’s August 25, 2011 request for rehearing of July 26 order at 25.

²⁵ *Union Electric Co.*, 137 FERC ¶ 61,114 (2011).

²⁶ 137 FERC at 61,600.

identification of the various buffer widths around the reservoir; (c) a description of the ownership or rights to the underlying lands held by the licensee or by others; (d) maps that depict the locations of all structures located within the current and proposed project boundary and that contain detailed information (i.e., parcel maps) showing the structure in relation to the current and proposed project boundary; (e) a description of why the land is no longer needed for project purposes (the description should detail the licensee's ownership or rights to the parcels of underlying lands that are proposed for removal); (f) a description of any wetlands and other sensitive areas within the current project boundary and how such wetlands or sensitive areas will be retained within the project boundary or, in areas where such lands are partially within the current project boundary, a proposal as to whether the portion of these lands that is outside the current boundary will be brought into the project boundary; (g) an identification of those lands needed for flowage and a description of the basis for the level of flowage to be contained in the project boundary (e.g., normal maximum water level, 100-year flood, 500-year flood); and (h) an identification of the total cumulative acreage of project lands to be removed from the project, such that the acreage can be verified.²⁷

18. The order further directed Ameren to file a report within one year of the Commission's order on Ameren's project boundary application that determines which, if any, of the privately-built structures within the revised project boundary are in fact encroachments, as opposed to structures that the builders had the right to construct. The report must indicate which, if any, of those encroaching structures interfere with project purposes (for example, a structure constructed in an area reserved for flood control or in an area designated for public recreation). As to any encroaching structures that do impact project purposes, Ameren must work with the owners of the structures to determine whether there is a solution that can satisfy both project purposes and the needs of the structure's owner, and propose that solution in the report.²⁸

II. Ameren's Project Boundary Application

19. In its January 31, 2012 filing, Ameren proposes a comprehensive adjustment of the project boundary to elevation 662' UED, with additional adjustments for residential and commercial structures below elevation 662.0 where appropriate. The proposed boundary would remain above elevation 662' where necessary to encompass project facilities, project recreation sites, public access sites, historic properties, wetlands, and Missouri State Parks.

²⁷ *Id.*

²⁸ *Id.* at 61,600-01.

20. Ameren provides maps showing the original acquisition parcels and how Ameren acquired the property interests in those parcels (i.e., acquired in fee, acquired through condemnation, or obtained easements).

21. Fee Acquisition – Union Land purchased entire tracts of undeveloped and predominantly agricultural property. As the dam and reservoir construction was completed, Union Land conveyed its entire ownership interest in portions of the properties below the various elevations to Ameren’s predecessor for the operations of the project. In this conveyance, Union Land also granted Ameren’s predecessor flooding easements over the remainder of its retained property. Significantly, and subject to certain limitations, Union Land reserved an easement for the benefit of its successors and assigns to allow access and construction on Ameren’s predecessor’s property, including land within the project boundary, so long as such access and construction does not interfere with project purposes.

22. Condemnation Acquisition – Ameren’s predecessor acquired property by condemnation for the operation of the project. Those properties are described by a metes and bounds description to various elevations, depending on the location within the project.

23. Flood Easement Acquisition – Ameren’s predecessor obtained flooding easements directly from private owners. In the majority of those cases, the flood easement was provided over the entire tract of land owned by the grantor, even though typically only a small portion of the property would be impacted by the project. In most cases, the project boundary was established following the original tract owned by the grantor, even though not all of the land was needed for project purposes.

24. The following table summarizes how the project boundary is currently defined:

Boundary Location	Length in Miles	Percentage (%)
662’ Elevation	526.66	42.74
663’ Elevation	27.75	2.25
664’ Elevation	30.23	2.45
665’ Elevation	133.81	10.86
666’ Elevation	4.62	0.38
667’ Elevation	17.70	1.44
668’ Elevation	34.17	2.77
669’ Elevation	8.10	0.66
670’ Elevation	36.43	2.96
671’ Elevation	4.38	0.36
672’ Elevation	24.41	1.98
673’ Elevation	28.69	2.33
674’ Elevation	7.77	0.63

678' Elevation	0.13	0.01
Following Property Lines (Metes and Bounds)	347.29	28.19
Total	1,232.14	100

25. Ameren is proposing to establish the project boundary at elevation 662' UED in most locations. According to Ameren, this would remove excess lands it acquired at the time of original construction of the project and establish a boundary that encompasses only those lands necessary for project purposes. In discrete and limited locations, Ameren is proposing to lower the proposed boundary below elevation 662' (referred to as a carve-out) to exclude from the boundary any existing residential and commercial structures. In these carve-out locations, the boundary would be set two feet horizontally and outside and/or away from the walls of residential and commercial structures so that Ameren retains control of the shoreline necessary for project operations. In certain other areas, Ameren is proposing to leave the boundary at elevations higher than 662' to encompass areas that are needed for project purposes including: project recreation sites; public access sites; state parks; wetlands; and historic properties. Ameren states its application does not propose to extend the boundary beyond its current limits.

26. As noted above, the current project boundary is already defined as the 662' contour for 527 miles (43 percent of the existing boundary). The only change proposed in these areas would be for carve outs to exclude any residential or commercial structures built below that elevation.

27. Twenty eight percent of the existing boundary is defined by metes and bounds and includes large blocks of land that in most cases extend well beyond 200 feet from the 660' contour (the reservoir's high level limit) at the Lake of the Ozarks, and over which Ameren holds flood easements. Ameren states that, although it has flood easements over the all these lands, most of this land is not within the area affected by project operations. These lands comprise approximately 30,000 acres of the 32,000 total acres in the current project boundary above the 660' contour (the reservoir's high level limit). Ameren states that, while flood easements may remain on the entire properties, the areas above the 662' contour do not serve project purposes and should be removed from the project boundary.

28. The remaining 29 percent of the existing project boundary is contour-based at elevations above the proposed 662' elevation, ranging from 663' to 678'. Ameren is proposing to amend the boundary in these areas to follow the 662' contour, except where there are proposed carve outs to exclude any residential or commercial structures built below the 662' contour.

29. This boundary amendment proposal would result in a total of 28,251 acres of land not needed for project purposes being removed from the project boundary, with almost all of this land located in areas covered by metes and bounds.

A. Pre-Filing Consultation

30. Ameren held initial public scoping meetings on November 19, 2011 (Camdenton Town Hall), and December 7, 2011 (Warsaw Town Hall) regarding its proposed boundary amendment. On December 15, 2011, Ameren sent letters to lakefront property owners and included its draft proposed application. On December 22, 2011, and January 3, 2012, Ameren sent reminder letters to all lakefront property owners reminding them of its 30-day comment period and providing contact information. Ameren held meetings on January 3, 2012 (Osage Beach area) and January 5, 2012 (Sunrise Beach area) to collect public comment on its draft application. By the conclusion of its 30-day comment period, Ameren received over 400 comments. Ameren included its consultation record and response to the comments it received in Appendix F of its application. On January 24, 2012, Ameren held a meeting with the Missouri Department of Natural Resources to discuss the agency's comments on the proposal.

B. Public Notice, Comments, and Interventions

31. On February 2, 2012, the Commission issued a public notice of Ameren's proposed project boundary amendment, soliciting comments and motions to intervene and establishing a deadline of March 5, 2012 for submittals.

32. In response to the public notice, timely motions to intervene were filed by Mr. Pat Kelleher, Ms. Stacy Shore, Mr. Douglas Stalder, and Ms. Nancy A. Brunson (on behalf of Duncan's Point Home Owners and Lot Owners Association, Inc.). The intervenors oppose or express concern regarding certain aspects of the amendment application. In addition, the Commission received comments from the City of Osage Beach, the U.S. Department of the Interior's Office of Environmental Policy and Compliance (Interior), the Missouri Department of Natural Resources (Missouri DNR), and 51 individuals and couples (many of whom own property around the lake).²⁹ Forty eight of the commenters oppose certain aspects of the amendment application, asking that the project boundary be

²⁹ All but one of these commenters (Robert M. Dye) filed eComments. An eComment is a simplified way to submit brief text comments in a proceeding. The eComment system does not require a FERC eRegistration account. There is a limit of 6,000 characters and all information must be public. The system is for text comments only and may not be used to intervene or submit other information to the Commission.

further reduced.³⁰ Missouri DNR, Joseph Roeger, Larry Erickson, and Robert Maddux support Ameren's application. Interior stated that it had no comments on the proposal.

33. As discussed below, the comments and motions to intervene have been considered in deciding whether, or under what conditions, to approve Ameren's application.

III. Discussion

34. Pursuant to Part I of the Federal Power Act (FPA), the Commission, when issuing a license for a hydropower project, requires the licensee to undertake appropriate measures to promote both developmental (power) and non-developmental uses (e.g., scenic, recreational, environmental) of a waterway.³¹ These public interest uses, identified by the Commission in its licensing orders, constitute the "project purposes."³²

35. Our regulations provide that a "project boundary must enclose only those lands necessary for the operation and maintenance of a project and for other project purposes such as recreation, shoreline control, or protection of environmental resources"

36. As explained above, Ameren proposes a comprehensive adjustment of the project boundary to elevation 662' UED, except in areas that encompass project facilities, project recreation sites, public access sites, historic properties, wetlands, and Missouri State Parks. In those areas, the project boundary would remain unchanged. Where there are

³⁰ Arthur Spacher, Janet Udelhofen, R. Fred Stevenson, Victoria Luber, Jim Darcy, Dean Pluth, Mini and Jim Bascue, Rich Knoch, William Copeland, George and Rita Harrison, Clifford Simmons, Edwin L. Moore, Teresa Smith, William M. Beneke, George E. King, Martha Bultemeier, Mark and Peg Robbins, Lisa Bredemann, Gregory Ransom, Stacy Shore, Rachel Bredemann (two separate comments), Ron Witt, Charles Sanzottera, Clifton Luber, Jeffrey Bredemann, Mary Anne Bredemann, James R. Pennino, Richard/Joyce Hudson, Charles R. Peterson, James Morton, George Roser, James N. Blaine, Jane E. Boyce, Edwin Moore, John Scott Hagan, C. Ray, David T. Raden, John E. Zubek, Steve Lee, Dennis Sloan, Charles L. Burns, Stan Rohde, Barry Bezenek, Gary Brulez, Beverly Luetkemeyer, Doris Lucke, Fred Miller, and Robert M. Orr.

³¹ See FPA section 10(a)(1) and 4(e), respectively, 16 U.S.C. §§ 803(a)(1) and 797(e) (2006).

³² Section 4.41(h)(2) of the regulations, 18 C.F.R. § 4.41(h)(2) (2011). Existing residential, commercial, or other structures may be included in the boundary only to the extent that underlying lands are needed for project purposes (e.g., for flowage, public recreation, shoreline control, or protection of environmental resources. *Id.*

existing residential and commercial structures below elevation 662', Ameren proposes additional adjustments (carve outs) to eliminate these structures from the boundary.

37. The boundary of about 43 percent of the shoreline (about 526 miles) is already at elevation 662' and under Ameren's proposal would remain unchanged, except for carve outs to eliminate existing residential and commercial structures. The boundary for about 29 percent of the shoreline (about 357 miles) is in contour elevations between 663' and 678' and under Ameren's proposal would be reduced to 662'.

38. Almost all of the land proposed for removal from the boundary (28,251 acres) is located in areas where the current boundary is established by metes and bounds. These areas, which are widely distributed throughout the project area and represent about 28 percent of the shoreline (about 347 miles), are those over which Ameren holds flood easements only. Almost all are privately held lands, and most have been developed as allowed by the deeds and easements originally granted in the 1930s (when the project was being constructed).

39. All but a few of the commenters and intervenors support the removal from the Osage Project boundary of lands not needed for project purposes. Several commenters³³ support Ameren's amendment proposal, but most argue that it does not remove enough lands from the boundary.

40. The commenters supporting Ameren's proposal state that (1) Ameren has made known its ownership lines and the areas that it controls and that many entities have been negligent or irresponsible in not knowing, or ignoring, where their property lines are and that Ameren's proposal should be approved; (2) Ameren's proposal is the least disruptive to waterfront property at the lake; and (3) Ameren's proposal should be approved to remove homes from the project boundary so that no homes would be destroyed. The Missouri DNR states that redrawing the project boundary should not result in any immediate or obvious impacts.

41. The commenters³⁴ that think Ameren's proposal does not go far enough and that additional lands should be removed from the boundary assert that the project boundary should be set at elevation 660', the reservoir's high level limit, to reflect the fact that they possess deeds showing they own the land down to the 660' elevation. Some allege that not setting the boundary at 660' is the equivalent of a "land grab" by Ameren and will result in many lake front lots becoming virtually worthless, as the owners will not be able

³³ Missouri DNR, Joseph Roeger, Larry Erickson, and Robert Maddux support Ameren's application.

³⁴ See n. 30, *supra*.

to build on them without encroaching into the project boundary. Finally, many express concern that public access issues will arise on this private property, and the general public will now be allowed to picnic and camp on their waterfront property.³⁵

42. Pat Kelleher and Douglas Stalder oppose shrinking the project boundary to 662', stating that the reservoir should remain available for public recreation access.³⁶ Nancy A. Brunson objects to Ameren's proposed adjustment to the project boundary in the area of Duncan's Point resort, which encompasses the area of the Pebble Creek Subdivision, explaining that the current project boundary in this area (664') is required for public access by several Commission orders, and thus should not be reduced to the proposed 662' elevation.

43. In order to consider Ameren's proposal, it must first be determined whether the lands proposed for removal serve a project purpose, i.e., project operations (including reservoir elevations and flowage), environmental protection (buffer zones), and public recreation, including public access to the reservoir shoreline.

A. Lands Needed for Project Operation

44. Article 407 of the license requires Ameren, to the extent possible, to manage lake levels to maintain the following elevations:

Top of flood pool = 661'

High-level limit = 660'

³⁵ Lisa Bredemann, Gregory Ransom, Rachel Bredeman, Jeffrey Bredemann, Mary Anne Bredemann, James Morton, David T. Raden, and Robert M. Orr refer to an alternative proposal by Camden County and ask the Commission to consider it. However, Camden County did not file comments in this proceeding and the commenters do not describe the proposal in sufficient detail to allow an analysis of it.

³⁶ Although Mr. Kelleher and Mr. Stadler state that they are members of the public who hunt, fish, and recreate at FERC licensed projects, there is no indication that they have ever recreated at the Osage Project.

Mr. Kelleher also alleges that Ameren's filing should be rejected as deficient because the filing does not meet the requirements of the November 10 order. He does not, however, point to any specific deficiency.

Low-level limit = 3 feet below guide curve³⁷

Emergency low-level limit = 645.0 feet

45. While Ameren normally operates the project so that the reservoir level stays at 660' or below, the license authorizes reservoir elevations up to 661'. There is the potential during high flow events for exceeding the top of the flood pool elevation of 661'. Ameren provided information showing the maximum water levels at Lake of the Ozarks between 1977 (when the upstream Truman Dam commenced operation) and 2010. During this time, the maximum water surface elevation exceeded 661' on several occasions and once exceeded 662' during a single, significant flood event that occurred in 1986 (when the reservoir elevation exceeded 664'). Thus, it is clear that project operations will, on occasion, exceed the 660' elevation and may rise to elevation 662'. Rarely, and only during very extreme weather conditions, would water levels possibly exceed elevation 662'.

46. Typically, licensees should include all lands within the project boundary that are needed to maintain reservoir levels and additional flowage. For the Osage Project, Ameren provides evidence that reservoir elevations have remained below the 662' elevation since the upstream Truman dam commenced operation in 1977, with the exception of one historical flood event. Ameren indicates that, while project operations should keep reservoir elevations below the 662' elevation, it will retain all historic flood easements over all the privately held land located within the proposed boundary. Ameren would also continue to hold flood easements on lands proposed for removal from the project boundary.

47. In reviewing the proposed project boundary with respect to the carve-out areas below elevation 662', there are numerous habitable structures located either partially or entirely below the 662' elevation. During high water events, water levels may reach or exceed the elevation of the dwelling, potentially causing the structure to be inundated. Changing the project boundary to carve out the structures will not change the fact that water levels could still reach, or inundate, these structures. These structures will still be exposed to high water elevations and inundation during excessive high flow events, but once these properties are removed from the project boundary, the Commission will not have any jurisdiction over the matter. Since Ameren indicates it will retain all historic flood easements over property it does not own in fee around the reservoir, Ameren will retain the right to flow water over those lands should the need arise. Any concerns

³⁷ A guide curve provides a set of target reservoir elevations which the operator of a reservoir seeks to meet throughout the year.

regarding the inundation of these lands will be between Ameren and the landowners, and outside of Commission jurisdiction.

48. As for the recommendation to lower the project boundary around the entire reservoir to the 660' elevation, project operations under Article 407 allow for Ameren to operate such that water levels may reach, and on occasion exceed, the 661' elevation. Establishing the project boundary around the entire reservoir at the 660' elevation clearly will not encompass lake levels that have historically been needed for project operations. Setting the project boundary at the 662' elevation will encompass all lake levels historically reached at the Lake of the Ozarks since 1987, with the exception of one unusual, extremely high flow event.

B. Recreation/Public Access

49. Under its license, Ameren operates and maintains numerous project recreation sites, and has reserved four sites for potential future development for public recreation at the project. Under Ameren's proposal, the project boundary at these current and future recreation sites would remain unchanged.

50. Upon approval of Ameren's proposal, shoreline buffer will be of varying widths. Although about 54 percent of the shoreline (599.6 miles) will have a buffer width less than 25 feet, about 25 percent of the shoreline (285.1 miles) will have a buffer zone with a width of 25-100 feet, and about 20 percent (220 miles) will have buffer zone widths of 100 feet or greater. As part of the approved shoreline management plan, Ameren will continue to implement its vegetative cover policy to create a shoreline buffer zone on lands that extend from the shoreline up to the project boundary in order to preserve riparian vegetation, enhance the aesthetics of the lake, provide riparian habitat, decrease sediment and nutrient runoff, and protect water quality in undeveloped portions of the lake.

51. With regard to commenters concerns that the public will be able to camp and picnic on privately-owned lands in the project boundary and Mr. Kelleher's and Mr. Stalder's contentions that amending the project boundary would reduce public access to the reservoir shoreline, standard Article 18 of the Osage Project license directs the licensee "to allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes."³⁸ Almost all of the land being proposed to be removed from the project boundary involves land

³⁸ See Form L-3 (revised October 1975), published at 54 FPC 1817 (1975), incorporated by reference in the Osage Project license, 15 FERC ¶ 62,038 at 63,046, ordering paragraph D.

where Ameren only possesses flowage easements. As such, to the extent that Ameren's rights do not allow for public access, these lands are not currently available to the public. Thus, taking them out of the project boundary would not reduce the public's access to the reservoir's shoreline. Moreover, the public would still be able to access the shore through lands owned in fee by Ameren or lands for which Ameren possesses rights that would allow for public entry.³⁹

52. As for the comments relating to the general public camping and picnicking on land between the high water mark and the 662' elevation, public access is available on lands owned by Ameren. Section 6.2 of Ameren's approved shoreline management plan specifically addresses public access and states adjacent property owners must not prohibit public access to shoreline areas and that the public has the right to access the shoreline within the project boundary on lands owned or controlled by Ameren. Moreover, camping along the shoreline generally is restricted to designated camping areas around the reservoir and prohibited on the remaining lands owned by Ameren within the project boundary.

1. Duncan's Point Area

53. Another area that needs further examination involves the issue of public access within the project boundary extending from the Duncan Point Subdivision, along the Pebble Creek Development to the Daniel R. Duncan Park at the back of Lick Creek Cove. There are numerous Commission orders addressing this issue that started with a September 7, 2004 letter, from John E. Estep of the Division of Hydropower Administration and Compliance, to Ameren that directed Ameren to obtain all property rights below the 664' contour line along the Pebble Creek Development and include it within the project boundary. Further, Ameren was directed to mitigate impacts to public access by providing a trail and shoreline access area toward the back of Lick Creek Cove and developing a park (Daniel R. Duncan Park).⁴⁰

54. Within this area, public access along the shoreline from the Duncan Point Subdivision to the back of Lick Creek Cove needs to be provided. Nancy A. Brunson objects to Ameren's requested comprehensive adjustment to the project boundary (from elevation 664' to 662') in this area. Mrs. Brunson states the proposed change inhibits access to the shoreline of Duncan's Point residents and others by preventing the free

³⁹ Upon approval of Ameren's proposal, Ameren will own in fee approximately 70 percent of the land within the project boundary of elevation 662' and will retain flowage easements over the remaining 30 percent.

⁴⁰ See Order Modifying and Approving Pebble Creek Public Access Plan issued April 8, 2009, 127 FERC ¶ 62,024).

exercise of recreational rights, blocking access to public access areas and to the Daniel R. Duncan Park, matters that were addressed in previous Commission orders.

55. In reviewing the proposed project boundary, it is clear that Ameren is proposing a project boundary of 662' along the area of the Duncan Point Subdivision and 664' along the area of the Pebble Creek Development. In the back of Lick Creek Cove, there appears to be an inconsistency regarding Daniel R. Duncan Park with what is proposed and what was previously included in the boundary. To ensure adequate public access is provided along the waterfront in these areas as has been the historical use along that reach of shoreline (allowing residents of Duncan Point to access the shoreline all the way to Daniel R. Duncan Park at the back of Lick Creek Cove), Ameren must amend the project boundary in this area to: (1) incorporate the 664' contour along the entire Duncan Point Subdivision and along the Pebble Creek Development, and (2) include all the lands at the back of Lick Creek Cove that are part of Daniel R. Duncan Park.

56. The needed revisions to the project boundary, as identified above, should be provided when Ameren files the Exhibit G drawings required by this order.

2. State Parks

57. Currently, lands above elevation 662' and occupied by two state parks, the Ha Ha Tonka State Park and the Lake of the Ozarks State Park, are included within the project boundary. Ameren does not propose any changes to the existing project boundary at these parks. However, these parks are operated and maintained by the State of Missouri, not by Ameren. Because they are not project recreation facilities, they need not be enclosed within the project boundary for recreation purposes.⁴¹ Accordingly, Ameren should review the project boundary in the area of these two state parks and file a proposal to amend the project boundary in these areas to include only those lands needed for project operations (i.e., up to elevation 662') or other project purposes.

C. Property Rights

58. A number of commenters state they possess deeds showing that they own land to the water (660' elevation) and argue that the project boundary should be adjusted to exclude the lands that they own in fee.

⁴¹ See 118 FERC ¶ 62,247 at P 56. Article 416 of the license required Ameren to undertake a number of one-time capital improvements at the Lake of the Ozarks State Park, but does not require ongoing operation and maintenance. See 118 FERC ¶ 62,247, at 64,734-35. For this reason, the state parks need not be brought into, or remain within, the project boundary.

59. The inclusion of lands within a project boundary serves the function of indicating that the lands are used in some manner for project purposes. However, the mere inclusion of lands within a project boundary will not restrict landowner uses, since such inclusion does not itself create or alter property rights.⁴² A licensee must acquire and retain all interests in non-federal lands necessary or appropriate to carry out project purposes.⁴³ These interests can be obtained through easement, fee title, leases, and other types of conveyances. The instruments of conveyance define the extent of the licensee's right.⁴⁴ As discussed above, I conclude that the project boundary should generally track the 662' elevation, because the area below that level could be inundated by the project. It appears that Ameren already holds most, if not all, of the flowage and other rights it needs. If any further compensation is due landowners for Ameren's use of their lands, it must provide it to them.

D. Environmental Impact of Ameren's Proposal

60. In the August 6, 2006 Final Environmental Assessment (EA) that was prepared for the relicensing of the Osage Project (relicensing EA), Commission staff examined the potential environmental impacts of Ameren's earlier proposal to revise the project boundary, which is very similar to Ameren's current proposal. For the reasons discussed in the relicensing EA and as discussed below, I conclude that Ameren's proposed amendment to the project boundary, as revised by this order, is not a major federal action significantly affecting the quality of the human environment.

61. The project license and the many mitigation and enhancement plans required by the license ensure protection of the various resources at the project encompassed by the current project boundary. The proposed revision will remove 28,251 acres of land from the project boundary, with most of this land being flood easement lands well above the

⁴² See, e.g., *PacifiCorp, order on rehearing*, 80 FERC ¶ 61,334, at 62,113 (1997).

⁴³ See *id.*, and standard Article 5 of the Osage Project license, 118 FERC ¶ 62,247 at 64,739-40 (2007).

⁴⁴ Many adjacent landowners comment that Ameren should be required to quit claim the land in question (the land between the project boundary and the 660' elevation), asserting that they have deeds showing they, and not Ameren, own the land along the shore down to the 660' elevation and have been paying taxes on this property. However, Ameren asserts that it has earlier deeds showing that it owns the property in question. See Ameren's amendment application, Appendix F at 2-3. However, any disputes regarding property rights are not within the Commission's jurisdiction. Rather, they are matters for state courts to resolve. Moreover, property ownership by a third party is not, by itself, a sufficient reason to remove land from a project boundary.

662' contour proposed for the revised project boundary. As this land is away from the reservoir, there will be no impact on aquatic resources at the project. Moreover, as discussed below, there will be no impact to wildlife, wetlands, threatened and endangered species, and historic properties.

62. Ameren's project boundary proposal would not have an effect on wetlands or wildlife habitat. The most significant lakeshore area habitats, with respect to wetlands and wildlife, are primarily below the 662' elevation (i.e., low-lying areas around the impoundment shoreline).⁴⁵ Ameren is retaining those lands at 662' and below in the project boundary.⁴⁶ The only instances where such areas below the 662' contour will occur involve carve-out areas around existing structures. As these carve-out areas have already been disturbed by having structures built on them, no wetlands or wildlife would be impacted.

63. None of the historic properties identified in the relicensing surveys are located within parcels proposed for removal from the project boundary.⁴⁷ Because these sites will remain in the project boundary, they will continue to be protected as Ameren is required to protect historic properties pursuant to the June 12, 2009 order approving historic properties management plan within the project boundary.⁴⁸ There will be no effect on historic properties as a result of the proposed boundary revision.

64. The 2007 license order indicated that the following federally listed species may occur in the area of the Osage Project: pink mucket pearly mussel, scaleshell mussel, gray bat, Indiana bat, bald eagle,⁴⁹ pallid sturgeon, and Niangua darter.⁵⁰ No critical habitat for any listed species occurs in the area.

⁴⁵ See relicensing EA at 122.

⁴⁶ These lands are depicted on the Detail Maps attached to the amendment application as Appendix C.

⁴⁷ Ameren included in Appendix D of its amendment application maps showing historic properties in relation to the proposed boundary. This part of the application was filed as "privileged" to protect archeological site locations from public disclosure.

⁴⁸ See Order Approving Historic Properties Management Plan issued June 12, 2009, at 127 FERC ¶ 62,206 (2009).

⁴⁹ While the bald eagle is no longer listed, it continues to receive federal protection under the Bald Eagle Protection Act.

⁵⁰ Relicensing EA at 21.

65. Of these listed species, the pink mucket pearly mussel, scaleshell mussel, pallid sturgeon, and Niangua darter are aquatic species and would not be impacted by a change in project boundary. As explained in the relicensing EA, Ameren's proposal to revise the project boundary would have no effect on rare, threatened or endangered species or their habitat.⁵¹ While it is known that a large number of threatened gray bats live within a cave in the project area, the location of this cave will remain in the project boundary, so they would continue to receive the same protection under the project license as they currently have. The same would be true for any Indiana bats that may reside within the project boundary.

66. Bald eagle nests and bald eagle habitat features (perch trees) are known to occur along the lake shore. Provisions in Ameren's approved shoreline management plan, including permitting policies and wildlife protection measures, should minimize any potential effects of development within the project boundary.

E. Other Issues

67. In its comments, the City of Osage Beach asks that: (1) the project boundary be set at a reasonable level to provide the maximum public safety for the lake, to promote efficient and reliable energy production, and to encourage the recreational use of the lake while respecting adjacent landowners; (2) structures that lie within the new project boundary be permitted to continue as a prior use so long as that structure does not create risk of imminent harm to others; (3) Ameren and FERC not charge or impose any new or additional fees, charges, or rents not previously imposed upon any party or structure; and (4) in every instance where there is a question of title to any real property, Ameren respect the title of the adjoining owner consistent with the principles of adverse possession and the reasonable expectations of the owner of the property consistent with the last transfer of title to that property.

68. The approval of Ameren's amendment application, as modified by this order, strikes the proper balance of competing uses of the reservoir and meets the Commission's comprehensive development/public interest standard of section 10(a)(1) of the FPA. Structures that remain in the project boundary will be addressed in Ameren's Encroachment Report that will be filed within a year from this order. Moreover, Ameren's proposal neither imposes nor modifies fees on any entity or structure within the project boundary. Finally, as explained above, this order does not change the property rights of private lands that are being removed from the project boundary or that will remain within the revised boundary.

⁵¹ Relicensing EA at 160.

69. The Missouri Department of Natural Resources comments that there appears to be no obvious environmental impacts associated with the proposal, but expresses concern regarding potential problems with septic infrastructure for structures remaining in or near the project boundary and its potential to impact water quality.

70. As licensee, Ameren is responsible for ensuring that any permits it allows within the project boundary protect the scenic, recreational, and environmental values of the project. Before it grants a permit for any structure that remains in the project boundary, Ameren should ensure that such structure meets, and will continue to meet, all applicable state and local codes applicable, including those for septic infrastructure. As for structures outside the project boundary, the Commission would have no jurisdiction over the matter.

F. Exhibit G Drawings

71. With the exception of the proposed boundary in the area of the state parks and in the Duncan Point area as identified above, the proposed boundary, including the “carve-out” areas, encompass those lands needed for project purposes. Ordering paragraph (D) requires the licensee to file revised Exhibit G drawings, which must include all project features within the project boundary and be prepared in accordance with sections 4.39 and 4.41(h) of the Commission’s regulations, 18 C.F.R. §§ 4.39 and 4.41(h) (2011).

G. Encroachment Report

72. In its amendment application, Ameren explains that, with the approval of its project boundary proposal, all commercial buildings and residential dwellings will be removed from the project boundary. The remaining structures consist of gazebos, piers, boat docks, etc. Ameren states that it will address these structures in the Encroachment Report required by the November 10 order. Ameren will work with owners of encroaching structures to determine which structures can be permitted under the approved SMP. Ameren will prepare a report that addresses how it proposes to remedy each encroaching structure. The report must be filed within one year of the issuance of this order.

73. As required by the November 10 order, the report must identify and assess each encroachment and propose a plan for addressing each one (individually or in categories, as appropriate). The report must also include, for each encroachment: (1) a detailed description of the type, size, and location of the site, including all facilities and structures; (2) a detailed map or drawing showing the location of the encroachment in relation to the project boundary, project reservoir shoreline, and any nearby project features; (3) the licensee’s current ownership or rights to the lands underlying the encroachment; (4) any property rights the licensee previously held but conveyed to another entity and the date and nature of the right(s) conveyed; (5) the property rights held by the owner of the encroachment; (6) the specific project purposes served by the underlying lands; (7) any

adverse impacts the encroachment may have on specific project purposes or resources; and (8) a proposed resolution. This report will not include structures built where the structure owners had the right to construct them, or those that have been previously permitted by Ameren or its predecessors. Thus, the report will only need to address unpermitted structures built without authorization from Ameren and without an appropriate property right.

74. If the licensee finds an encroachment is consistent with the allowable uses and occupancies of Article 419 (i.e., standard land use article) and the project's approved resource management plans, the licensee shall identify its plans to grant permission for the existing use in accordance with the applicable license requirements. If the licensee finds the encroachment is consistent with the approved resource management plans for the project, but not within the scope of the types of uses and occupancies allowed under Article 419, the licensee shall file an application for Commission approval to authorize the existing use. For each encroachment identified in the report that cannot be authorized pursuant to the current requirements of the license, the report shall include a proposed plan and schedule for resolving each encroachment.

The Director orders:

(A) The application to amend the boundary of the Osage Project No. 459, filed by Union Electric Company (Ameren), on January 31, 2012, is modified and granted, as provided below.

(B) To ensure adequate public access is provided along the waterfront in the area of the Duncan Point Subdivision and the Pebble Creek Development (i.e., allowing residents of Duncan Point to access the shoreline all the way to Daniel R. Duncan Park at the back of Lick Creek Cove), Ameren must amend the project boundary in this area to: (1) incorporate the 664' contour along the entire Duncan Point Subdivision and along the Pebble Creek Development, and (2) include all the lands at the back of Lick Creek Cove that are part of Daniel R. Duncan Park. These revisions shall be included in the Exhibit G drawings required by ordering paragraph (D) below.

(C) Ameren shall review the project boundary in the area of the Ha Ha Tonka State Park and Lake of the Ozarks State Park and revise the project boundary to be consistent with only those lands needed for project purposes (e.g., the 662' contour as needed for project operations, and other lands needed for project purposes other than recreation) since the recreation facilities in these areas are not required by the license and thus are not required to be brought into the project boundary. These revisions shall be included in the Exhibit G drawings required by ordering paragraph (D) below.

(D) Within 60 days of the issuance date of this order, the licensee shall file, for Commission approval, Exhibit G drawings showing the project boundary as amended by this order, including ordering paragraphs (B) and (C) above. The Exhibit G drawings must comply with sections 4.39 and 4.41 of the Commission's regulations.

(E) Within one year of the date of this order, Ameren shall file its encroachment report required by ordering paragraph (E)(2) of the November 10, 2011 Commission order.

(F) This order constitutes final agency action. Any party to this proceeding may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2006), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2011). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

Jeff Wright
Director
Office of Energy Projects