

124 FERC ¶ 61,253  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Brazos River Authority

Project No. 1490-047

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 18, 2008)

1. The Brazos River Authority (Brazos), licensee for the Morris Shepherd Dam Project No. 1490, has asked the Commission to issue a declaratory order with respect to the possible sale by Brazos of project lands. We explain our conclusions on this matter below.

**Background**

2. The Morris Shepherd Dam Project is located on the Brazos River, in Palo Pinto, Young, and Stephens Counties, Texas. The project, which was relicensed in 1989, includes a reservoir, Possum Kingdom Lake, with a normal maximum water surface area of 17,700 acres and approximately 310 miles of shoreline.<sup>1</sup>

3. According to Brazos, while it owns all land within the project boundary, it leases approximately 95 miles of the reservoir shoreline to owners of cottages constructed adjacent to or partially within the project boundary. In these areas, the project boundary includes a buffer strip of 25 or 50 feet from the edge of the reservoir at its maximum normal elevation of 1,000 feet mean sea level; in areas reserved for future cottage site leases, the boundary is 50 feet from the reservoir edge.<sup>2</sup> Many of the leases include the buffer strip.<sup>3</sup> The amount of project lands within the buffer strip currently covered by cottage site leases is approximately 310 acres and the amount of lands within the buffer strip in areas reserved for future cottage development is approximately 20 acres.<sup>4</sup> Brazos

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<sup>1</sup> See *Brazos River Authority*, 48 FERC ¶ 62,190 (1990), and Brazos' petition for declaratory order (filed August 27, 2008) at 1-2.

<sup>2</sup> Petition for declaratory order at 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2-3.

also leases approximately 550 acres of lands within the project boundary to entities operating commercial enterprises such as marinas, RV parks, stores, and restaurants.<sup>5</sup>

4. On August 27, 2008, Brazos filed a petition for a declaratory order. Brazos states that it anticipates that the Texas State legislature will in its next session consider legislation requiring Brazos to sell its leased property, including lands within the project boundary, around Possum Kingdom Lake to the cottage and commercial lessees.<sup>6</sup> Brazos states that it is willing to comply with state-required divestiture, and is exploring options for the voluntary sale of the lands at issue.<sup>7</sup> It also recognizes, however, that its license requires it to possess project lands in fee or retain the right to use those lands in perpetuity, and that the sale of project lands would require Commission approval.<sup>8</sup>

5. Brazos poses three questions. First, would the Commission approve an application to transfer fee ownership of 330 acres of project land in the buffer strip to cottage site owners? Second, would the Commission approve an application to transfer fee ownership of 550 acres of project lands to commercial lessees? Third, what actions should Brazos take if the Commission answers the first two questions in the negative and the Texas legislature nonetheless enacts legislation requiring Brazos to transfer the property in question?

### **Discussion**

6. Part I of the Federal Power Act (FPA) directs the Commission, when issuing a license for a hydropower project, to require the licensee to undertake appropriate measures to promote both developmental (power) and non-developmental uses of a waterway.<sup>9</sup> These public interest uses, identified by the Commission in its licensing orders, constitute the “project purposes.” Standard license Article 5<sup>10</sup> requires the licensee to acquire and retain all interests in non-federal lands necessary or appropriate to carry out project purposes. Article 5 specifies that the licensee “shall, during the period of the license, retain the possession of all project property covered by the license . . . and

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<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 3-4.

<sup>8</sup> *Id.* at 4-5.

<sup>9</sup> *See* FPA section 10(a)(1), 16 U.S.C. § 803(a)(1) (2000), and 4(e), 16 U.S.C. § 797(e) (2000).

<sup>10</sup> Standard license Article 5 appears in the Commission’s “L-Forms,” which are published at 54 FPC 1792-1928 (1975), and are incorporated into project licenses, as appropriate, by an ordering paragraph. *See* 18 C.F.R. § 2.9 (2008).

none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written permission of the Commission . . . .” With respect to lands used for recreation at licensed projects, section 2.7 of the Commission’s regulations requires licensees to “acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project.”<sup>11</sup> We have stated that “[a]s a general matter, we consider it contrary to the public interest to allow a licensee that holds in fee lands needed for project purposes to transfer those lands to a third party . . . .”<sup>12</sup>

7. Project boundaries are used to designate the geographic extent of the lands, waters, works and facilities that the license identifies as comprising the licensed project and for which the licensee must hold the rights necessary to carry out project purposes. When a licensee wishes to remove lands from a project and transfer them, it must file an application to amend the project license to delete the lands from the project boundary. Any application to remove lands from a project boundary will be approved only if the Commission determines that the lands are no longer necessary or appropriate for project purposes, and that all project purposes will continue to be satisfied in the absence of the lands. If the Commission makes that finding, the lands will be removed from the project boundary, after which the licensee is free to sell or otherwise dispose of the lands.<sup>13</sup> As a general matter, our policy is that lands used for private residential development should not be included within a project boundary, unless the lands are clearly needed for project purposes.<sup>14</sup> However, we often require licensees to retain an undeveloped buffer strip between the project reservoir and any areas that are to be developed, in order to protect public recreation and other environmental values.

8. There is some history with respect to the lands within the project’s buffer strip. In 1980, the Commission acted on a proposal by Brazos to remove from the project all lands designated as present or future cottage sites. Brazos proposed to retain within the project boundary a 7-foot buffer strip in those areas. We for the most part approved Brazos’ proposal, noting our policy that residential, commercial, and other structures should be included within project boundaries only to the extent that underlying lands are needed for

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<sup>11</sup> 18 C.F.R. § 2.7 (2008).

<sup>12</sup> *AmerenUE*, 117 FERC ¶ 61,301, at P 10 (2006).

<sup>13</sup> *See Wisconsin Public Service Corporation*, 104 FERC ¶ 61,295, at P 14-20 (2003).

<sup>14</sup> *See, e.g., South Carolina Electric & Gas Company*, 106 FERC ¶ 61,086, at P 10 (2004). The project purpose for which residential lands would most likely be required to be retained in a project boundary would be if the lands were needed for flowage.

project purposes.<sup>15</sup> However, we did not approve Brazos' proposal for a 7-foot buffer strip. Instead, we determined that Brazos must maintain a buffer strip of at least 25 feet in all areas where development had already occurred, and a buffer strip of at least 50 feet in areas reserved for future development. We concluded that a narrower strip "would not provide adequately for control and protection of the reservoir and shoreline."<sup>16</sup> We specifically decided to retain within the boundary areas in which residences had been built closer than 25 feet from the edge of the reservoir, because removing those lands from the project boundary would make it difficult for the licensee and Commission staff to administer the license and, moreover, would not be sufficient to ensure the adequate protection of "the scenic, aesthetic, public recreation, and other environmental values of the reservoir shoreline."<sup>17</sup>

9. When the project was relicensed, we retained the buffer strip requirement. Article 409 of the project license requires the licensee to maintain a buffer strip along the shoreline at the cottage sites.<sup>18</sup> As explained in the environmental assessment (EA) prepared by Commission staff in the licensing proceeding, "[t]o protect the scenic, recreational, and environmental values at the project reservoir, [Brazos] maintains a 25-foot-wide . . . buffer strip along the shoreline at developed cottage site areas and a 50-foot-wide buffer strip along the undeveloped shoreline that is reserved for future cottage site development."<sup>19</sup> The EA states that Brazos should, along with other measures, provide the buffer strip to "serve the [recreation] needs of the public in the project area."<sup>20</sup>

10. Given that Brazos has not presented us with an application to remove any lands from the project boundary, we cannot state with absolute certainty how we would react to any arguments that Brazos would make with respect to whether specific lands are needed for project purposes. However, given that we have repeatedly concluded that it is necessary to retain at least a 25-foot buffer strip in areas subject to cottage leases in order to meet recreational and other environmental needs, it appears unlikely that we would grant an application to remove such lands from the boundary. While we have not

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<sup>15</sup> *Brazos River Authority*, 11 FERC ¶ 61,162 at 61,345, *citing South Carolina Public Service Authority*, 7 FERC ¶ 61,148 at 61,236 (1979).

<sup>16</sup> *Id.* at 61,346.

<sup>17</sup> *Id.*

<sup>18</sup> 48 FERC at 63,238.

<sup>19</sup> *Id.* at 63,254.

<sup>20</sup> *Id.* at 63,255.

previously been asked to address the buffer zone issue with respect to commercial leases, there is no reason to believe that our answer would be different.<sup>21</sup>

11. The Commission cannot, as Brazos requests, suggest a course of action for Brazos should the Texas legislature require it to transfer the cottage site and commercial lands, notwithstanding the requirements of Brazos' license. However, we note that the Supreme Court has held that, in passing the FPA, Congress enacted a federal scheme for the complete and orderly development of the nation's water power resources that preempts conflicting state regulation.<sup>22</sup> Any state attempt to require a licensee to divest itself of lands that we have determined are needed for project purposes would accordingly be preempted. The Commission puts Brazos on notice that the transfer of project lands without prior Commission approval would be a violation of the license of the Morris Shepherd Dam Project and could subject Brazos to enforcement action, including civil and criminal penalties.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>21</sup> We also note that Brazos lacks authority to allow the construction of commercial facilities within project boundaries, except to the limited extent allowed by its license. We understand that Brazos is working with Commission staff to determine whether existing commercial structures were lawfully constructed, and to take appropriate action with respect to any that were not.

<sup>22</sup> See *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946).