

125 FERC ¶ 61,193  
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. 1490-048

ORDER ON CLARIFICATION

(Issued November 20, 2008)

1. On September 18, 2008, the Commission issued an order responding to a petition for declaratory order filed by the Brazos River Authority (Brazos) regarding the possible sales of lands within the boundary of Brazos' Morris Shepherd Dam Project No. 1490, located on the Brazos River, in Palo, Pinto, Young, and Stephens Counties, Texas.<sup>1</sup> The Possum Kingdom Lake Association, Custard/Pitts Land and Cattle Co., LP, and Costello Island, Inc. (Lessees), who lease lands in the project area, have filed a timely request for clarification or, in the alternative, rehearing of the September 18 Order. We clarify the order as discussed below.
2. In the petition for declaratory order, Brazos explained that it owns all land within the project boundary, including a 25-to-50 foot buffer strip around the project reservoir. Some of these lands are leased to the owners of lakeside cottages, and other lands within the project boundary are leased to the owners of commercial enterprises such as marinas RV parks, stores, and restaurants. Brazos stated that the Texas has previously considered, and may again consider, legislation requiring Brazos to divest itself of property it has leased to others, including lands within the project boundary, and asked the Commission whether it would approve an application to transfer those lands to the lessees.<sup>2</sup>
3. In response, we explained that we had previously determined that the buffer strip was needed to protect the scenic, recreational, and environmental values of the project. We stated that, while we had no application before us regarding the removal of lands

---

<sup>1</sup> *Brazos River Authority*, 124 FERC ¶ 61,253 (2008) (September 18 Order).

<sup>2</sup> *Id.* P 3-5.

from the project boundary, it appears unlikely that we would grant such an application, given our previous conclusions regarding the significance of the lands.<sup>3</sup>

4. The Lessees ask that we clarify several aspects of the order.

5. The Lessees first ask that we confirm that a determination under the Federal Power Act as to what lands are required for project purposes and what type of property ownership by a licensee is acceptable is case-specific. This is correct.

6. Second, the Lessees ask us to confirm that our statement that it “appears unlikely that we would grant an application to remove [leased] lands from the [project] boundary” was not based on a review of facts specific to the Lessees’ lands and is not a determination that those lands are needed for project purposes. While our statement does reflect our previous conclusion that a buffer strip is needed for project purposes, it was not based on facts or determinations regarding any specific parcels of land.

7. Third, the Lessees ask us to confirm that nothing in the license for Project No. 1490 prohibits Brazos from selling fee ownership of project lands, subject to retaining the rights necessary to maintain and operate the project as required by the Commission, and that Standard License Article 5 does not require fee ownership of all project lands. It is correct that Standard Article 5 does not require that all lands within the project boundary be held in fee. It is also the case that the project license does not specifically prohibit the sale of fee ownership of project lands. However, Standard Article 5 states that no project property “shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written permission of the Commission. . . .”<sup>4</sup> Thus, our authorization is required prior to the alienation of project lands.

8. Fourth, the Lessees ask that we confirm that nothing in the project license prohibits Brazos from continuing to renew or grant long-term leases for property within the project boundary, subject to Brazos maintaining the rights necessary to maintain and operate the project pursuant to Commission requirements. This is generally correct. However, as noted above, Standard Article 5 requires the prior written permission of the Commission before the lease of any project property. Moreover, as we explained in the September 18 Order, “[a]s a general matter, our policy is that lands used for private residential development should not be included within a project boundary, unless the

---

<sup>3</sup> *Id.* P 8-10

<sup>4</sup> *See id.* P 6.

lands are clearly needed for project purposes.”<sup>5</sup> Finally, if it appears that execution of a lease could raise questions about a licensee’s ability to satisfy project purposes or to control project property, it would be advisable for the licensee to seek guidance from the Commission or its staff prior to executing the lease.

9. Fifth, the Lessees ask us to confirm that the 25-foot buffer zone established by the project license is based on the project boundary as established in the 1980 license order and does not include lands above that boundary, regardless of modifications to the shoreline that have occurred subsequent to 1980. This question is difficult to answer in the abstract. The question implies that what was once a 25-to-50 foot buffer zone may now be narrower in some places due to increases in lake level. It is true that a change in lake level would not by itself give Brazos title to lands that it did not previously own or bring additional lands into the project boundary. However, if Brazos became aware that the required buffer zone had permanently shrunk, it would be under an obligation to inform the Commission that the lands within the project boundary no longer included the full buffer zone contemplated by the license. The Commission would then determine whether it was necessary for Brazos to bring new lands within the boundary (whether lands it already owned or new lands that it would have to acquire), in order to satisfy project purposes, including recreational and environmental needs.

10. Finally, the Lessees ask us to confirm that nothing in the project license prohibits Brazos from selling fee ownership in lands outside the project boundary. We grant the requested clarification. We have no jurisdiction over lands outside the project boundary, and no authority to impose requirements regarding their ownership.

The Commission orders:

The September 18, 2008 Order in these proceedings is clarified as discussed herein.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

---

<sup>5</sup> *Id.* P 7 (footnote omitted). Thus, if land is needed for project purposes, it is our preference that private residences not be developed there.