

137 FERC ¶ 61,053  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Upper Yampa Water Conservancy District

Project No. 9202-177

ORDER DENYING REHEARING

(Issued October 20, 2011)

1. The Upper Yampa Water Conservancy District (the District) has filed a request for rehearing of a September 12, 2011, Commission staff order<sup>1</sup> denying the District's application to variously remove from the project boundary, lease, and sell lands within the boundary of the District's 800-kilowatt Stagecoach Project No. 9202, located on the Yampa River, in Routt County, Colorado. For the reasons discussed below, we deny rehearing.

**Background**

2. On March 31, 1987, the Commission issued the District a 50-year, minor, original license to construct, maintain, and operate the Stagecoach Project.<sup>2</sup> The project includes a 145-foot-high, 450-foot-long dam, impounding the 777-acre Stagecoach Reservoir, with a storage capacity of 33,738 acre-feet.<sup>3</sup> Article 403 of the license required the licensee to construct, among other things, a hiking trail along the south shore of the reservoir, while Article 404 required the licensee to file a detailed management plan for using project buffer zone lands.<sup>4</sup>

3. On June 15, 2009, in connection with an application for approval of an amendment to raise the project spillway and increase the elevation of the reservoir, the

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<sup>1</sup> *Upper Yampa Water Conservancy District*, 136 FERC ¶ 62,217 (2011).

<sup>2</sup> *Upper Yampa Water Conservancy District*, 38 FERC ¶ 62,343 (1987).

<sup>3</sup> *Id.* at 63,625.

<sup>4</sup> *Id.* at 63,627.

District filed an Exhibit G map depicting the project boundary. The map depicts a buffer zone running around the reservoir, as well as other features, including the Elk Run hiking trail, which generally runs along the reservoir's southern border. The District explained that the project boundary

was delineated to include the project works including the dam, reservoir, steel pipeline, penstock, powerhouse, 1.5 mile long transmission line, and appurtenant facilities. The project boundary also contains the wildlife mitigation facilities and newly proposed wetland mitigation areas; recreation facilities (i.e., campgrounds on the north shore, picnic areas with associated parking, convenience center, swim area, potable water and sanitary facilities, hiking trail, north shore marina, site for self-contained recreational vehicles (campground), day use park at the west end of the reservoir; buffer zone lands delineated pursuant to Article 404 (i.e., campsite campground, the area on the north side of the reservoir east and west of the campgrounds between the high water line and County Roads 14 and 15, the area on the south side between the high water line and the hiking trail, 672 acres of big game habitat north of County Road 15, the 50-acre Wetland Aquatic Habitat Preserve at the west end of the reservoir, and the dam and powerplant); Landscape Preservation and Restoration areas; the Yampa River downstream from the powerhouse to include the boulder aeration structure and the USGS streamflow gage monitoring site; and, the fish habitat enhancement structures.<sup>[5]</sup>

4. On June 23, 2011, the District filed a request for the Commission to approve a change in the project boundary and related easements. The District stated that, prior to receiving the project license, it had entered into an agreement in which a landowner (referred to hereafter as "the Stahls") conveyed to the District, without compensation, 94.5 acres of land now used for and in connection with the reservoir.<sup>6</sup> In exchange for the land, the District agreed to give the grantor a non-exclusive right to use the surface of the reservoir for recreational purposes and to use a portion of the shoreline for commercial purposes, including a marina, restaurant, bar, and retail sales facilities. Following negotiations regarding this agreement, the District said that it had agreed with the grantor to convey to it 0.75 acres in fee simple, 5.25 acres via lease, as well as additional easements. The District proposed to remove the conveyed and leased acreage

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<sup>5</sup> District June 15, 2009 Filing at 5.

<sup>6</sup> Brian T. Stahl, Robert B. Stahl, and Virginia Stahl are the successors to MountainAir Company, the entity that transferred the land to the District.

from the project boundary, asserting that the lands “are not needed for project purposes as they would not adversely affect the operation and maintenance of the Project.”<sup>7</sup>

5. The District stated that it would retain a 25-foot buffer between the normal reservoir maximum operating level and the project boundary, except along the 0.75 acres to be sold, which would include land extending to the reservoir, and would retain flowage rights for all conveyed lands beyond the 25-foot buffer that were within the 100-year floodplain. The District said that it would maintain the entire hiking trail for the time being, but that when the Stahls developed the 6 acres to be conveyed to them, the Stahls would relocate and maintain approximately 2,000 linear feet of trail located on that acreage.<sup>8</sup>

6. In addition to the lands to be conveyed, the District proposed to grant the Stahls an easement on 4.76 acres of the reservoir, for construction of two boat docks, easements to allow access to the reservoir from the conveyed property, and miscellaneous utility, trail, and drainage easements. The District stated that it was currently seeking only authority to grant the easements, and that it would later seek Commission authorization with respect to on-water construction.

7. On September 12, 2011, Commission staff issued an order denying the application. Staff concluded that the lands at issue were needed for project purposes, specifically, maintenance of the hiking trail and flowage, and that they therefore should not be removed from the project boundary. Staff explained, however that the District could file an application for authorization (through leases or easements) to allow the lands to be used for non-project purposes.

8. On September 27, 2011, the District filed a request for rehearing. The District asserted that the easements it intends to retain with respect to the trail, flowage rights, and buffer zones will give it “absolute control over the areas subject to the easements for the project purposes.”<sup>9</sup> Accordingly, the District says, it is not necessary for it to own these lands in fee. The District notes that its proposal is in settlement of a pre-licensing contractual obligation.

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<sup>7</sup> District Application at 3.

<sup>8</sup> From the map appended to the filing, it appears that the lands to be conveyed include approximately 2,000 feet of shoreline.

<sup>9</sup> Request for Rehearing at 1.

## Discussion

9. 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>10</sup> These public interest uses, identified by the Commission in its licensing orders, constitute the “project purposes.” Standard license Article 5<sup>11</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 none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written permission of the Commission . . . .”

10. 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. In addition to lands required for particular project works and facilities, 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.

11. 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>12</sup>

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<sup>10</sup> See FPA sections 10(a)(1), 16 U.S.C., § 803(a)(1) (2006), and 4(e), 16 U.S.C. § 797(e) (2006).

<sup>11</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).

<sup>12</sup> See *Wisconsin Public Service Corp.*, 104 FERC ¶ 61,295, at P 14-20 (2003).

12. The Commission's Policy Statement on Recreational Development at Licensed Projects<sup>13</sup> explains that the Commission will seek the ultimate development of the recreational resources of hydropower projects and that it expects licensees

to acquire in fee and include within the project boundary enough land to ensure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other lands specified in any approved recreational use plan for the project.

Consistent with the policy statement, the Commission has stated that “[a]s a general matter, we consider it contrary to the public interest to allow a licensee that holds in fee simple lands needed for project purposes to transfer those lands to a third party . . . .”<sup>14</sup> This is because the Commission has jurisdiction only over its licensees: if lands needed to fulfill project purposes are transferred to a non-licensee, it can become much more difficult, if not impossible, for the Commission to ensure that the lands are used for their intended purpose.

13. As discussed above, the land that is proposed to be alienated by the licensee is within the project's buffer zone, includes portions of the hiking trail required by the license, and is needed for flowage. The District has not provided any evidence that these lands are not required for project purposes. It does not explain why it is appropriate that the buffer zone near the lands in question should be restricted to 25 feet (and that there should be none at all on the 0.75 acres that it would sell), nor does it assert that the hiking trail is no longer needed for public recreation or contend that other lands are no longer needed for flowage. Rather, the District acknowledges that the lands serve project purposes, but argues in essence that it will still be able to perform necessary activities after the lands are alienated. This is not the same as demonstrating that the lands are not needed for project purposes.<sup>15</sup>

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<sup>13</sup> 18 C.F.R. § 2.7 (2011).

<sup>14</sup> *AmerenUE*, 117 FERC ¶ 61,301, at P 10 (2006).

<sup>15</sup> Moreover, it is not clear that the District's certainty that it would continue to be able to carry out project purposes is well-founded. For example, the District proposes that the Stahls will own and maintain the portion of the hiking trail that would be within the lands at issue. Should the Stahls or a future owner decline to maintain the trail, or preclude public access to it, it is not clear what, if any, remedy would be available.

14. The District's desire to resolve the contractual dispute between itself and the Stahls is understandable. At the same time, however, we note that the District did not raise this matter when it applied for its license, and did not ask the Commission to condition its license in any way to take account of the land agreement. Such off-license agreements are solely between the parties, and the Commission can neither be bound by them, nor, long after the fact, disturb the balancing of public interest considerations in the project license to accommodate private arrangements. Private interests cannot overcome the right of the public to obtain recreational access to project lands and waters.<sup>16</sup>

15. Based on the foregoing, we conclude that the District has not shown that the lands in question are no longer needed for project purposes, and we deny rehearing.

16. Leasing or granting easements on project lands is a separate matter. Licensees with some frequency request Commission authorization to permit non-project use of project lands, including the construction of features such as boat docks, marinas, and other amenities. The Commission reviews such proposals under the Federal Power Act's comprehensive development/public interest standard, as informed by any project shoreline management plans and by any agency or public comments, to examine the environmental impacts of the proposed use and determine whether it would be consistent with project purposes.<sup>17</sup>

17. Nothing in this order, or Commission staff's underlying order, precludes the District from proposing to lease lands or to grant easements to the Stahls, provided that such uses are consistent with project purposes and that the District retains sufficient rights to comply with the license and other Commission requirements.<sup>18</sup> The District may refile its request to issue an easement authorizing the Stahls to construct the boat docks referred to, and may make similar requests as to other lands. The District should be aware that, as discussed above, the Commission will have to determine whether proposed uses are consistent with project purposes. Thus, we will not grant authorization with respect to the boat docks without being provided details as to their extent and construction. Similarly, we will not simply authorize the District to grant easements or leases to construct unspecified commercial facilities on project lands along the reservoir.

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<sup>16</sup> See, e.g., *Hydro Development Group, Inc.*, 115 FERC ¶ 61,191, at P 11(2006); *West Penn Power Company*, 81 FERC ¶ 61,362, at 62,736 (1997).

<sup>17</sup> See, e.g. *Alabama Power Co.*, 136 FERC ¶ 61,043 (2011).

<sup>18</sup> See *Upper Yampa Water Conservancy District*, 136 FERC ¶ 62,217 at P 12. See also Standard License Article 5, *supra* n.11.

18. We encourage the District to work with the Stahls to reach agreement on a proposal that will allow reasonable non-project use of project lands and waters, while protecting the public interest in those sites.

The Commission orders:

The request for rehearing filed on September 27, 2011, by the Upper Yampa Water Conservancy District is denied.

By the Commission. Commissioner Spitzer is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.