

144 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Utility District No. 2 of Grant County,
Washington

Project No. 2114-261

ORDER DENYING REHEARING

(Issued September 19, 2013)

1. The Crescent Bar Condominium Master Association and the Crescent Bar Recreational Vehicle Homeowners Association (Associations), jointly, and Pat Kelleher have requested rehearing of the Commission's April 18, 2013 order¹ approving a shoreline management plan (SMP) for the Priest Rapids Project No. 2114. Because these entities have shown no error in our order, we deny rehearing.

Background

2. The Priest Rapids Project, originally licensed by the Commission in 1955 to Public Utility District No. 2 of Grant County, Washington (Grant PUD),² is located on the mid-Columbia River in portions of Grant, Yakima, Kittitas, Douglas, Benton, and Chelan Counties, Washington. The project, which consists of the Wanapum Development and the Priest Rapids Development, has a combined authorized capacity of 1,893 megawatts, and occupies about 12,909 acres of land, excluding the reservoirs.

3. Project lands include a 160-acre area called Crescent Bar Island, situated along the shore of the Wanapum reservoir, approximately 20 miles upstream from Wanapum

¹ *Public Utility District No. 2 of Grant County, Washington*, 143 FERC ¶ 61,046 (2013) (April 18 Order).

² *Public Utility District No. 2 of Grant County, Washington*, 14 FPC 1067 (1955).

Dam.³ Grant PUD owns the island, but leased it to the Port of Quincy, Washington, in 1962 for a term that expired in June 2012. Portions of the island were subsequently sublet by the Port of Quincy to individuals, homeowner associations, and commercial enterprises.⁴

4. About 105 acres of the island have been privately developed with condominiums, recreational vehicle (RV) lots, related permanent infrastructure, and with commercial recreation facilities. Approximately 50 percent (52 acres) of this developed portion of the island is privately used by individuals who lease condominiums and RV lots. Many of the RV lots have been modified, with permanent fixtures built on or around the RV units. In addition, there are five commercial recreation areas on the island and mainland area that are open to the public: a day-use park, boat launch and fuel dock, beach, a campground with 35 tent sites, and a nine-hole golf course.

5. In its October 29, 2003 relicense application, Grant PUD elected to include a draft SMP.⁵ Grant PUD proposed to divide Crescent Bar Island into two types of areas -- Planned Development (55 acres) and Conservation (105 acres). Planned Development lands included those that had “intensive residential, vacation home, and/or commercial development” within or adjacent to the project,⁶ while the Conservation lands were “lands that contain fish, wildlife, scenic, historic and/or archaeological resources that have exceptional and specific value(s) that require special protection.”⁷ The primary use of Planned Development land would be “public recreation and conservation,” while the primary use of Conservation land would be “conservation and protection of fish, wildlife, scenic, historic, archaeological, and cultural values.”⁸

³ The area includes some lands along the reservoir shoreline, but these are not at issue here.

⁴ See *Public Utility District No. 2 of Grant County, Washington*, Order on Complaints, 88 FERC ¶ 61,012, at 61,031, *reh’g denied*, 89 FERC ¶ 61,177 (1999).

⁵ While in some instances, the Commission requires licensees to develop SMPs, that was not the case here, where Grant County developed an SMP on its own initiative.

⁶ Draft SMP at 42.

⁷ *Id.* at 32.

⁸ *Id.* at 15, 32.

6. The Commission issued a new 44-year license for the project in April 2008.⁹ Article 419 of the license required Grant PUD to file a final SMP by April 17, 2009,¹⁰ for Commission approval. As to Crescent Bar Island, the relicense order concluded that the area was necessary for the project purposes of flowage, public recreation, and aesthetic values¹¹ and that, based on the potential effects from further development, no further development on Crescent Bar Island should occur beyond the existing disturbed footprint, except for a proposed 5.5-mile-long public hiking trail.¹²

7. Grant PUD filed its proposed SMP on March 2, 2010. By letter dated March 10, 2010, Commission staff asked Grant PUD to provide additional information on Grant PUD's intended proposals with respect to Crescent Bar Island. Grant PUD responded on April 29, 2010, explaining that the Grant PUD Commissioners had voted not to renew the lease with the Port of Quincy when it expired in 2012 and that all residential uses would end with the expiration of the lease.

8. On May 26, 2010, the Commission issued a public notice of the SMP filing, soliciting comments and motions to intervene.¹³ The Associations and Mr. Kelliher intervened.

9. On June 23, 2011, Commission staff issued for public comment an environmental assessment (EA) analyzing the potential effects of the SMP on water quality, fisheries, terrestrial resources, threatened and endangered species, recreation, cultural resources, land use, and socioeconomics. Staff analyzed the SMP as proposed by Grant PUD, the SMP as modified by staff recommendations, and an alternative, termed the no-action alternative, under which the Priest Rapids Project would be managed without an SMP. Staff considered, but eliminated from further consideration, an alternative based on seven land use classifications (Grant PUD had originally proposed that number of classifications, but later reduced the number to three classifications) and an alternative proposed by the Associations in which the lease would be continued and various infrastructure and recreational facilities would be developed. On April 18, 2013, the

⁹ *Public Utility District No. 2 of Grant County, Washington*, 123 FERC ¶ 61,049 (2008).

¹⁰ *Id.* at 61,335.

¹¹ *Id.* P 127.

¹² *Id.*

¹³ 75 Fed. Reg. 30,807 (June 2, 2010).

Commission issued an order modifying and approving the SMP, as modified by staff's recommendations. With respect to arguments made by the Associations, we explained that we have not required licensees to permit private uses and, indeed, that long-term leasing of project lands for private purposes is at odds with our policy of maximizing public recreation at licensed projects.¹⁴ We found that whether Grant PUD must renew or extend a lease that allows the private entities to maintain facilities on project lands was outside the scope of our review. We also explained that we had neither required Grant PUD to renew the lease nor precluded it from doing so, nor had it requested authorization from us regarding its actions, but that Grant PUD had independently determined that not renewing the lease is in the best interest of it and its ratepayers.¹⁵ We also determined that there were no substantial errors in staff's environmental analysis.¹⁶

10. The Associations and Mr. Kelleher filed requests for rehearing.

Discussion

11. The Commission is authorized to license hydropower projects that

will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interest or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes.[¹⁷]

In deciding whether to issue a license, the Commission is to give equal consideration to power development and to energy conservation; fish and wildlife protection, mitigation, and enhancement; the protection of recreational opportunities; and the preservation of other aspects of environmental quality.¹⁸ As the Supreme Court has explained, "the test

¹⁴ April 18 Order, 143 FERC ¶ 61,046 at P 43.

¹⁵ *See id.* PP 75-76.

¹⁶ *Id.* PP 64-74.

¹⁷ 16 U.S.C. § 803(a)(1) (2012).

¹⁸ 16 U.S.C. § 797(e) (2012).

is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the ‘public interest. . . .’¹⁹ The aspects of the public interest that the Commission determines must be protected through license requirements constitute the “project purposes,” which may vary from project to project.²⁰

12. Project boundaries are used to designate the extent of the lands, water, 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.²¹

13. SMPs are developed at projects where the Commission determines it is necessary to resolve potentially competing uses of lands around a project reservoir.²² An SMP applies only to lands within a project boundary held by the licensee, and dictates what uses a licensee may permit in various areas. As we have previously explained,

[a]n 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 environment[] and public access. Not all projects require SMPs; these plans are generally required where it

¹⁹ *Udall v. Federal Power Commission*, 387 U.S. 428, 450 (1967).

²⁰ *See Wisconsin Public Service Corporation*, 104 FERC ¶ 61,295, at P 14 (2003). Different projects may have different purposes. For example, some projects provide flood control, water supply, or irrigation flows, while others do not.

²¹ *Id.* P 16.

²² *See Public Service Company of New Hampshire*, 119 FERC ¶ 61,170, at P 67 (2007) (explaining that “[w]hen considering whether to require additional shoreline protection at a project, we take into account the current level of shoreline development, the likelihood of developmental pressure in the future, the kind and degree of resource protection and enhancement needed, and project economics”).

appears that the project's shoreline may be subject to competing developmental pressures such that public access or environmental resources are at risk. It is important to note that an SMP is only applicable to lands owned or controlled by a licensee, and has no effect on shoreline areas in which a licensee has no interest.^[23]

14. In an earlier order dealing with Crescent Bar Island, the Commission stated that the “[l]ong-term leasing of project lands to private parties is at odds with our policy of maximizing public recreation at licensed projects” and that its “longstanding policy is to eliminate private residences from within a project’s boundary, but only upon a showing that the underlying lands are unneeded for project purposes.”²⁴ In the case of Crescent Bar Island, the Commission found that “all the lands in question are needed for the project purposes of flowage, public recreation, and aesthetic values.”²⁵ The Commission reaffirmed this holding when it relicensed the Priest Rapids Project in 2008, and no entity challenged the finding.²⁶

15. The Priest Rapids Project SMP states, as to Crescent Bar Island, that

measures to improve public recreation access and use while protecting and enhancing wildlife habitat and the scenic quality of Crescent Bar Island will occur after the existing lease with the Port of Quincy expires in 2012. Grant PUD will ensure that any future uses and/or land use agreements at Crescent Bar Island adequately fulfill these improvement measures, along with other relevant safety, health, project operation, and license-related objectives. Existing infrastructure and site conditions will be evaluated and

²³ *Union Electric Co.*, 137 FERC ¶ 61,114 at P 10 (2011).

²⁴ *Public Utility District No. 2 of Grant County, Washington*, 88 FERC ¶ 61,012, at 61,032-33 (1999). By “eliminate private residences,” the Commission meant to draw the project boundaries so as to exclude them, not to physically tear down the structures.

²⁵ *Public Utility District No. 2 of Grant County, Washington*, 89 FERC ¶ 61,177, at 61,549, *reh’g denied*, 89 FERC ¶ 61,177 (1999).

²⁶ *Public Utility District No. 2 of Grant County, Washington*, 123 FERC ¶ 61,049, at P 127 (2008).

addressed. Public involvement is also a key planning element.^[27]

The proposed SMP also states that

[v]arious “land use permit,” contracts, easements, leases, and agreements were made under the term of the original 50-year license for the Priest Rapids Project. Upon FERC approval of this SMP, Grant PUD will review all authorizations, permits, or use agreements issued prior to April 17, 2008. If an existing use or activity is determined to be compliant and consistent with license provisions, a new land use authorization may be issued.^[28]

In additional filings in this proceeding, discussed below, Grant PUD made clear that it did not intend to extend the City of Quincy lease, but did not ask Commission authorization to take any steps with regard to the private facilities on the island. Our April 18 Order recognized Grant PUD’s position, but was explicit in holding that the “disagreement between Grant PUD and private entities as to whether Grant PUD must renew or extend a lease that allows the private entities to maintain facilities on project lands . . . is outside the scope of our review. We have neither required nor precluded Grant PUD from renewing the lease, nor has it requested authorization from us regarding its actions. . . .”²⁹ Had Grant PUD proposed to continue the lease, we would have had to decide whether private use of Crescent Bar Island was consistent with project purposes. Because it elected not to do so, and because we have no right to impose such a requirement, that issue does not arise here. Nothing in our approval of the SMP dictates the result of the dispute over the lease or imposes any requirements – prescriptive or proscriptive – with respect to the disposition of private facilities on Crescent Bar Island.

A. The Associations’ Request for Rehearing

16. The Associations appear to agree with our conclusions regarding our lack of authority over matters of private contract, stating that they “are not asking the Commission to require the PUD to renew their lease [and] have repeatedly stated in their pleadings that the Commission is not the proper forum for resolution of state property law

²⁷ SMP at 4.

²⁸ *Id.* at 21.

²⁹ April 18 Order, 143 FERC ¶ 61,046 at P 2.

issues and that these issues must instead be resolved in the proper state or federal court forum.”³⁰ At the same time, they ask that the Commission “remand the SMP to the PUD for further consideration based on a corrected understanding and application of Commission policy”³¹ Aside from the fact, as discussed in the April 18 order and below, that there has been no misunderstanding of Commission policy, it is difficult to discern what relief the Associations are seeking, given that the Associations concur that the Commission cannot resolve the dispute between them and Grant PUD. Even were we to reverse course and conclude that our policies favor private development on project lands and waters, we would still lack legal authority to require a licensee to enter into a private contract. Accordingly, we could in no case require Grant PUD to extend or renew the Port of Quincy lease, and thus asking Grant PUD to revisit the SMP would give the Associations no relief. It therefore appears that the Associations have not made a claim as to which we can grant relief.

17. We now turn to the Associations’ specific arguments.

1. Commission Policy

18. Throughout their request for rehearing, the Associations allege that approval of the SMP is inconsistent with Commission policy, which they assert does not require the removal of private structures from project boundaries.³² Aside from the fact that the SMP and the April 18 order do not require or authorize the removal of private facilities from Crescent Bar Island, the Associations misunderstand our policy.

19. The Commission has never favored the existence of private facilities within project boundaries. Such facilities may result in disputes between a licensee and private landowners, and may interfere with project purposes. For example, there are instances where private residences and other facilities are located on lands as to which a licensee has flowage rights. This means that the licensee has the legal right to flood the lands. The owners of private structures may understandably become distressed when this occurs, yet it is within the licensee’s legal rights and may be necessary for project operation. Also, the existence of private facilities on project lands may interfere with public use of project lands and waters, and can result in adverse environmental impacts. The owners of private residences may feel that use of the shoreline by the public interferes with their enjoyment of their facilities, or may find environmental restrictions

³⁰ Associations Request for Rehearing at 18.

³¹ *Id.* at 25.

³² *See, e.g.*, Associations Request for Rehearing at 26-31.

burdensome. Accordingly, it is generally best if private development on project lands is kept to a minimum.

20. This is not to say that private development of lakeshore areas of project reservoirs does not and should not occur. A licensee may not own the entire shoreline, in which case it has no authority to encroach upon or otherwise restrict the use of lands held by others. Further, there are many instances in which private residences are constructed on private lands adjacent to, but outside of, a project boundary, and co-exist in harmony with project operations. In such cases, licensees, subject to Commission oversight, often allow private use of project lands – for example, the construction and maintenance of walkways leading to the shoreline or the building of small docks – under guidelines that preserve project purposes.³³

21. The Commission’s policy, then, is to avoid private use of project lands and waters that interferes with project purposes, and does not allow the interests of adjacent property owners to override the public’s use and enjoyment of project lands and waters.³⁴

22. The Associations rely upon *Union Electric Co.* for the proposition that the Commission has “repudiated the notion that its general policy of maximizing recreation favors the removal of preexisting structures within Project boundaries.”³⁵

23. As an initial matter, while the Commission’s policy has for some time been to avoid bringing preexisting structures within project boundaries,³⁶ for the reasons discussed above, nothing in *Union Electric* altered that policy, nor have we established a general policy concerning the removal of structures from project lands. Other than that, the two cases involve SMPs, *Union Electric* is completely distinguishable from this case. *Union Electric* involved a situation where, because of confusion over property rights

³³ So, for example, the licensee, to protect environmental values and public recreation, will limit the size of private docks, and may allow private homeowners to construct walkways, but limit their width, preclude paving and other disturbances of the environment, and forbid the construction of fences or other barriers to public use.

³⁴ *Union Electric Co.*, 137 FERC ¶ 61,114 at P 32, n.48.

³⁵ Associations Request for Rehearing at 26.

³⁶ See 18 C.F.R. § 4.41(h)(2) (2013) (stating that “[existing residential, commercial, or other structures may be included in the [project] boundary only to the extent that the underlying lands are needed for project purposes (e.g., for flowage, public recreation, shoreline control, protection of environmental resources”).

dating back to the 1920s, as well as a lack of diligence by the licensee, a large number of private residences and other structures had been built within the project boundary, some of which might be deemed to be encroachments on project lands. The Commission explained, among other things, that: nothing in its orders altered property rights; structures that had been built on lands in which the structure owner had an interest that allowed it to do so were not encroachments that were subject to being removed; issues regarding land rights were to be decided in an appropriate court; the licensee must determine what lands were needed for project purposes and seek authorization to remove from the project boundary those that were not; the licensee must determine which structures within project boundaries were encroachments and which were not; the licensee must determine whether structures that were encroachments interfered with project purposes; and the licensee must work with the owners of any encroaching structures to try to reach mutually-agreeable resolutions.³⁷

24. Here, there is no issue concerning confusion about land ownership or encroachments. No party disputes that Grant PUD has sole ownership of Crescent Bar Island or asserts that they believed that they owned land on the island. Further, no party disputes the existence of the Port of Quincy lease, so no structures here are considered encroachments for our purposes.³⁸ Any rights that the Associations' members may have had to construct facilities on the island, and the term of any such rights, are determined by the Port of Quincy lease, not, as was the case in *Union Electric*, by hundreds of disputed land documents. It appears that the only matter that the Associations dispute is the term of the lease and whether Grant PUD has carried out its obligations in good faith. These issues, all parties agree, should be determined by a court, not the Commission. In addition, the Commission has held that Crescent Bar Island is necessary for public recreation, so there is no uncertainty as to whether the lands at issue are needed for project purposes. Further, the SMP in *Union Electric* and, accordingly, the resultant order approving it, specifically proposed the removal of encroaching structures.³⁹ Neither the SMP nor our order here do so. *Union Electric* is not on point.⁴⁰

³⁷ *Union Electric Co.*, 137 FERC ¶ 61,114 at P 2.

³⁸ We do not opine as to whether the Associations' members had the authority under the lease to build the structures in question, another matter beyond our jurisdiction.

³⁹ *See Union Electric Co.*, 137 FERC ¶ 61,114 at PP 13, 15.

⁴⁰ The Associations also cite *Brazos River Authority*, 11 FERC ¶ 61,162 (1980), for the proposition that "any policy against long-term leasing for private residential purposes has never been consistently applied." Associations Request for Rehearing at 29.

(continued...)

2. **Grant PUD's Decision with Respect to Private Use of Crescent Bar Island**

25. The Associations review at length the history of the Crescent Bar Island, contending that the Commission at no time, up through the issuance of the project's new license in 2008, suggested that the structures constructed pursuant to the lease were required to be removed.⁴¹ They contend that Grant PUD then changed its position, perhaps based in part on a request for information sent to the licensee by Commission staff in connection with staff's review of Grant's PUD's draft SMP.⁴² In the request, staff asked for information about Grant PUD's plans for Crescent Bar Island with respect to improving public recreation access and use and enhancing wildlife habitat and scenic quality after the expiration of the lease in 2012. Staff noted that "the Commission does not condone residential development and occupancy of project lands, since such residential use is inconsistent with the Commission's policy of maximizing public recreational development. Consequently, your [SMP] must demonstrate compliance with the Commission's policies on this issue."⁴³ The Associations cite to an earlier filing in which they allege that they demonstrated that staff's statement was elicited by Grant PUD's counsel.⁴⁴ They further contend that Grant PUD failed to make a good faith effort to obtain Commission approval of a lease term extending until 2023 or to work with Association on proposed solutions.⁴⁵

26. None of the history recited by the Associations demonstrates any infirmity in our April 18 Order or any reason to reverse our decision. As noted above, the Commission

Even setting aside the fact that we have not been asked by Grant PUD here to approve any lease, as was the case in *Brazos River*, the Commission in *Brazos River* explained that "the cottage site lease lands do not appear to be needed now or in the foreseeable future for hydroelectric generation, public recreation, or other purposes except shoreline control." *Brazos River Authority*, 11 FERC ¶ 61,162, at 61,347 (1980). Crescent Bar Island has been found necessary for public recreation and other project purposes.

⁴¹ Associations Request for Rehearing at 3-12.

⁴² *Id.* at 13-14.

⁴³ Letter from Robert J. Fletcher (Commission staff) to Ms. Kelly Larimer (Grant County), dated March 10, 2010.

⁴⁴ Associations Request for Rehearing at 13, n.20.

⁴⁵ *Id.* at 15-16.

has made clear several times that Crescent Bar Island is needed for project purposes. It is also the case that, as noted, our general policy is that private development should take place outside of project boundaries. Nonetheless, nothing in the project license or our April 18 Order requires Grant PUD to remove the existing structures from the island.

27. The Associations contend that Grant PUD's decision not to permit continued private residential use was influenced by the PUD's understanding, based on Commission staff's March 10, 2010 additional information request, that the Commission would require the PUD to end residential use of the island.⁴⁶ This is simply not supported by the record.

28. The Associations themselves filed with the Commission electronic correspondence between counsel for Grant PUD and counsel for the Associations, in which Grant PUD's counsel stated that Grant PUD "understands the [additional information request] is not a decision on the fate of non-project uses and is not a predisposition of any non-project uses."⁴⁷ Indeed, the Associations themselves have correctly argued to Grant PUD that "[the] March 10th letter was an additional information request ("AIR"), not a decision on the fate of future non-project uses Language in that letter, commenting on the inconsistency of residential uses with project uses was not intended and did not operate as FERC predisposition of any or all non-project uses that could be brought forward consistent with the SMP."⁴⁸

29. Grant PUD's filings with the Commission also make clear that the PUD made an independent decision with respect to its treatment of private facilities on Crescent Bar Island and had a number of substantial concerns that militated against continuing to allow private control of Crescent Bar Island. A report appended by Grant PUD to an April 29, 2010 filing, states that

A key factor in determining future plans and actions is to fully understand current health and safety issues and the scope of compliance measures and anticipated costs required

⁴⁶ See Associations Request for Rehearing at 13-15; 22-26.

⁴⁷ See electronic mail from Mitchell Delabarre (Grant PUD counsel) to Markham A. Quehrn (counsel to Crescent Bar Condominium Master Association) (April 13, 2010), Association Comments Regarding Proposed Shoreline Management Plan (filed June 25, 2010) at Appendix 5.

⁴⁸ Letter from Nancy Polky (Crescent Bar Condominium Master Association) to Grant PUD Commissioners at 4 (April 10, 2010). *Id.* at Appendix 2.

to remedy the issues. As a landowner and licensee, Grant PUD takes these matters seriously. To address health and safety deficiencies on the island, Grant PUD must consider local ordinances, state codes and regulations, and License Article 420, which requires that “The licensee shall also ensure . . . that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements.” The facilities and infrastructure developed under the terms of the Crescent Bar Island lease and subsequent subleases are in need of substantial upgrades due to the age of the facilities and deferred maintenance. Key health and safety concerns arise from development densities within the RV parks. Fire safety and emergency access, wastewater treatment, and wastewater disposal and adequacy of the water supply system are issues that must be addressed. . . . The sheer number of RV residences has created safety hazards, including fire conflagration (fire spreading between structures due to inadequate separation) and inability of emergency vehicles to access the RV parks (inadequate vehicle access corridor width and intersection radii for fire trucks and ambulances). Expansion of RVs with decks, room additions, sheds, etc. has reduced interior road widths and fire lane areas, encroached upon open space areas designated for common use and parking areas and diminished structure setbacks required by county development code. Moreover, permanent structures have been built below the Project surcharge elevation necessary for operation of the Project, which may result in property damage. . . . Preliminary cost estimates are not available at this time but are anticipated to be significant. . . . The existing wastewater treatment facility, which operates under Wastewater Discharge Permit #ST-5277, is in need of significant upgrades. Peak season flows to the wastewater facility currently exceed the design of the system. The Department of Ecology requires an engineering report to assess if the plant is protective of water quality based on its history of non-performance on certain parameters. . . . Depending on the preferred treatment type and peak flow design level, preliminary cost estimates for initial capital improvements range from \$3,000,000-\$6,000,000. Annual operation and maintenance costs are estimated from \$130,000-\$160,000, and the 20 year life cycle costs are expected to range from \$6,500,000-\$9,300,000. A specific

concern noted is that additional land (2 to 20 additional acres) will be required for wastewater treatment within the existing disturbed footprint of Crescent Bar Island. . . . The Grant County Fire Marshal expressed concern that the hydrants on the island do not possess adequate flow to effectively fight fires. More hydrants and/or higher flow will likely be required to ensure the safety of lessees and the recreating public. An engineering report will be required to evaluate the treatment efficacy of the system and determine if it is providing the level of treatment necessary to protect the receiving environment and ground water. Preliminary cost estimates for initial upgrades to the water system start from \$1,200,000. In addition, little is known about the potable water supply on the island. An evaluation of the potable water system will be required and would need to look at composition and condition of the current potable water system.^{49]}

30. Grant PUD confirmed its concerns in an October 27, 2010 filing. The PUD explained that the original lease, meant to inure to the benefit of the public, had evolved to something else: “This original lease was developed with the intent to provide for public recreation facilities and commerce; however, subsequent subleases have resulted in private development and use occurring on nearly half of the developed portion of Crescent Bar Island.”⁵⁰ Grant PUD stated, among other things, that

the high costs associated with necessary facility upgrades (wastewater, water system), achieving fire and building code compliance, property mitigation, and substantial increases in fair market rent values would have been necessary to allow short term private use and was deemed inconsistent with Grant PUD’s core mission to generate and deliver low-cost power to Grant PUD customers.^{51]}

⁴⁹ Grant PUD April 29, 2010 filing, Preliminary Compliance Analysis and Recommendation Report on the Development of a Plan for the Future of Crescent Bar Island at 3-4.

⁵⁰ Grant PUD October 27, 2010 Filing at 1.

⁵¹ *Id.* at 2.

31. As the foregoing demonstrates, Grant PUD made its own decision, based on its interests and those of its ratepayers, not to continue to allow private residential use of Crescent Bar Island. The PUD correctly recognized that the Commission's general policy is that project lands and waters be available for public recreation to the extent possible, but has not suggested in any pleading before us that it believed that the Commission was ordering it to take any particular action with respect to the existing private facilities on Crescent Bar Island. Grant PUD could have proposed to allow continued private use of Crescent Bar Island, accompanied by a showing of how that was consistent with the public interest.⁵² It elected not to do so. It is telling that, following our April 18 Order, which made clear that it was Grant PUD's decision, and not a Commission mandate, not to continue to allow private residential use of Crescent Bar Island, the PUD has not expressed any desire to revisit the matter.

32. As we explained in the April 18 Order, we have no authority to require Grant PUD to enter into or extend private contracts. If Grant PUD were to decide to extend the lease, it would have to obtain our approval to do so, because the lands at issue are project lands. However, we cannot order a licensee to enter into a private contract nor can we control how it elects to carry out the terms of such a contract. As all parties to this case appear to recognize, how to construe the lease and whether Grant PUD has further obligations under it are a matter for a court, not the Commission, to decide.

3. Article 419

33. The Associations reiterate their previous argument that the SMP is inconsistent with license Article 419, because that article stated that the SMP should include seven land use classifications, while the SMP, as filed and approved, only included three classifications. They also argue that Article 419 contemplates that the existing residential development on the island would remain. According to the Associations, Grant PUD must file an amendment application in order to request a change from the provisions of Article 419.⁵³

34. We fully responded to these arguments in the April 18 Order,⁵⁴ and the Associations add nothing to cause us to revisit our conclusions. We note, however, that

⁵² For example, Grant PUD could have asserted that continued private use of the island was not inconsistent with project purposes and that the project provided sufficient public recreation in the absence of the additional facilities on the island.

⁵³ See Associations Request for Rehearing at 31-39.

⁵⁴ See April 18 Order, 143 FERC ¶ 61,046 at PP 45-48.

the seven land use classifications set forth in Article 419 simply reiterated those proposed by Grant PUD in its draft SMP, and did not represent a substantive decision by the Commission that seven classifications were a necessity. When Grant PUD suggested three classifications instead, we duly considered that proposal. Moreover, even were it the case that Grant PUD needed to obtain an amendment in order to propose three classifications, the SMP proceeding is an amendment proceeding. We issued a May 26, 2010 public notice of the proposed SMP as a “notice of application for amendment of license,” prepared an environmental assessment, and issued the April 18 Order. The Associations fully availed themselves of the opportunity to participate in the proceeding. Thus, the purpose of a publicly-noticed amendment proceeding – to make the public aware of a proposal and give it the chance to comment on it – has been satisfied here.⁵⁵

4. Article 418

35. The Associations claim that the April 18 order is inconsistent with Article 418 of the license, which approved Grant PUD’s proposed recreation resource management plan. They argue that nowhere in the recreation plan is there a proposal to terminate existing residential use of Crescent Bar Island, remove existing structures, and replace them with public recreation facilities.⁵⁶

36. While the SMP order does approve Grant PUD’s land classifications on Crescent Bar Island, it does not authorize Grant PUD to remove any structures or to build any new ones. As we have explained, to the extent that Grant PUD makes such a proposal, it will

⁵⁵ The Associations contend that Article 419 authorized continued residential use of project lands, that if the Commission had not intended to allow continued residential use of Crescent Bar Island it would have so stated, and that the Associations’ members acted in reliance on that determination. Associations request for rehearing at 37-38. The Associations’ premises are not correct. Article 419 provided that there should be no disturbance to Crescent Bar Island beyond what had already occurred. Neither that article nor anything else in the new license approved (or disapproved) continued residential use of project lands. That issue was not posed to the Commission during relicensing, and the Commission did not opine on it. To the extent that the Commission previously revealed any thoughts on the matters at issue, it was in the Commission’s 1999 orders, issued in response to the Associations’ complaint seeking to have the lands at issue removed from the project boundary, where, as noted above, the Commission found the lands necessary for project purposes and declined to find that they should be removed.

⁵⁶ See Associations Request for Rehearing at 40-43.

have to seek Commission authorization to do so, and we will consider any necessary amendments to the recreation plan at that time.⁵⁷

5. Balancing of Interests

37. The Associations maintain that the Commission failed to properly balance the interests of hydropower licensees and other stakeholders, raising again their claims that the Commission has tacitly approved residential use of Crescent Bar Island and arguing that Grant PUD developed the SMP behind closed doors, rather than through a public process.⁵⁸

38. As we explained in the April 18 Order, we approved the SMP after a determination that it was “in the public interest because it comprehensively manages the project shoreline in a manner that protects environmental and public recreation resources, preserves historic and cultural resources, and protects scenic quality and aesthetic resources.”⁵⁹ This finding is amply supported by the order, the EA prepared by Commission staff, and the record as a whole. The statute requires the Commission to balance public interests, not private ones, and we have done so here.⁶⁰ As we explained elsewhere in this order and in the April 18 Order, the Commission never approved

⁵⁷ We recently dealt with revisions to the recreation plan that clarified the distinction between that plan and the SMP. *See Public Utility District No. 2 of Grant County, Washington*, 138 FERC ¶ 62,114, *reh’g denied*, 140 FERC ¶ 61,201 (2012). In that proceeding, the Commission approved a request by Grant PUD to amend certain provisions of Article 418 and to remove recreation measures involving Crescent Bar Island from Article 419 and to add them to Article 418. The order did not change any substantive requirements for recreation development at Crescent Bar Island or modify any other aspect of the SMP requirements, but simply allowed Grant PUD (1) to implement all recreational provisions for Crescent Bar Island and the rest of the project under Article 418 in order to keep all recreation requirements coordinated; and (2) to keep all shoreline project-wide policy development and guidance under the Article 419 SMP. *See Public Utility District No. 2 of Grant County, Washington*, 140 FERC ¶ 61,201 at PP 6, 8. The orders did not deal in any way with current or future private use of Crescent Bar Island.

⁵⁸ *See* Associations Request for Rehearing at 43-45.

⁵⁹ April 18 Order, 143 FERC ¶ 61,046 at P 1.

⁶⁰ The Associations cite *City of Hamilton, Ohio*, 82 FERC ¶ 61,144, at 61,531 (1998), for the proposition that license amendments require “consideration of all public

(continued...)

residential use of Crescent Bar Island, tacitly or otherwise, and has not in this proceeding either approved or disapproved such use. Whether to propose such continued use was a matter that in the first instance rested with Grant PUD, and it has chosen not to do so. As to the SMP process, we do not control the manner in which a licensee prepares such a plan (other than the extent to which we specify, as we did in Article 419, the entities with whom the licensee must consult in developing the plan).⁶¹ We provided public notice of the SMP proceeding and several opportunities for public comment, so the Associations cannot fairly contend that they were denied the ability to participate.⁶²

6. Compliance with NEPA

39. As an initial matter, we note that, because the SMP and our approval of it do not authorize Grant PUD to take any actions regarding existing structures on Crescent Bar Island or in any way dictate the PUD's future activities in this respect, nothing in our environmental analysis adversely affects the interests of the Associations. The Associations assert that the Commission "is required to take a hard look at the environmental consequences of the PUD's proposal to terminate residential use and remove the residential structures on Crescent Bar Island."⁶³ As we have explained, this is simply incorrect. Grant PUD has not proposed a plan for removing residential structures, and we are therefore under no obligation to study the environmental consequences of such a plan. To do so now would be pure speculation. If Grant PUD files a plan that includes removing residential structures, we will thoroughly review it, including its

interest factors . . . and to protect private property owners from unauthorized actions of Commission licensees." That case is inapposite. In *City of Hamilton*, the Commission was dealing with a licensee that, without Commission authorization, relocated its transmission line across lands including private property. Here, Grant PUD has properly requested Commission approval of its proposed SMP. While the Associations may disagree with the results of this proceeding, they have not shown that Grant PUD took any action without first obtaining our approval.

⁶¹ The Associations were not listed in Article 419 as a party to be consulted, but did not seek rehearing of Article 419, and thus have waived any objection to not being included.

⁶² In addition, examination of the record, and the Associations' pleadings in particular, reveals extensive information regarding not only the Commission's open, public process, but also public records documenting Grant PUD's actions, including transcripts of public meeting and other public material.

⁶³ Associations Request for Rehearing at 47.

potential environmental impacts. Notwithstanding the Associations' faulty premise, we will nonetheless address the Associations' arguments regarding our environmental analysis.

40. The Associations repeat their previous arguments that the Commission failed to comply with NEPA. They first contend that the EA improperly identified the environmental baseline and the no-action alternative as being the project with the private facilities removed from Crescent Bar Island. While recognizing that the Commission agreed with them that the correct starting point for analysis should be the status quo – the project, including Crescent Bar Island, as it currently exists,⁶⁴ -- the Associations maintain that the Commission erred by not requiring additional analysis.⁶⁵

41. The fact that we acknowledged a mistake in the EA does not by itself require revisions to that document. It is our orders, and to the extent that we accept them, staff's environmental analyses, that constitute the entire environmental record.⁶⁶ The Associations fail to show what new analysis they feel is required or how conducting it would provide the Commission with more of a hard look at the environmental consequences of approving the SMP than the EA already provides. Nor do the Associations explain how further analyzing the status quo would have led the Commission to select the result they prefer – not approving the SMP. In the April 18 order, we concluded that maintaining the status quo would result in no environmental impacts.⁶⁷ In fact, upon review of the record (in particular the Grant PUD report cited above), it appears likely that maintaining the status quo would result in health and safety risks and the need to build new water supply and sanitary system infrastructure, which might well have environmental consequences, thus rendering the status quo less environmentally desirable than the EA recognized. In any case, recognizing that the no-action alternative constitutes maintaining the status quo does not cause us to revise the alternative we have selected, approving the SMP, which, as the EA concluded, is a reasonable plan for protecting the project's environmental, recreational, historic, and scenic values, while providing increased opportunities for public access to project lands and waters.

⁶⁴ See April 18 Order, 143 FERC ¶ 61,046 at P 68.

⁶⁵ Associations Request for Rehearing at 45-47.

⁶⁶ See, e.g., *Idaho Power Co.*, 110 FERC ¶ 61,242, at P 96 (2005).

⁶⁷ April 18 Order, 143 FERC ¶ 61,046 at P 68.

42. The Associations argue that the Commission cannot defer review of the termination of the lease and removal of residential structures simply by labeling such matters as speculative. They also contend that the Commission must study the cumulative impacts of approving the SMP.⁶⁸

43. We disagree. While Grant PUD has clearly indicated that it does not intend to extend the lease, it has not asked for authorization to remove existing structures.⁶⁹ Grant PUD could propose to retain the structures, to remove some part of them, or to remove them all, and could select a wide variety of methods for accomplishing these ends.⁷⁰ There is simply no way for us to predict what Grant PUD may propose, and there is no way for us to study unknowns.⁷¹

44. The Associations repeat their contention that the Commission was required to prepare an environmental impact statement (EIS) in this case. We explained in the April 18 order that an agency need not prepare an EIS where, as here, it concludes that a

⁶⁸ Associations Request for Rehearing at 47-50.

⁶⁹ See April 18 Order, 143 FERC ¶ 61,046 at P 71.

⁷⁰ See Grant PUD filing of October 27, 2010, in which Grant PUD states that it is exploring a number of options for increasing public recreational use, public access, and protection and enhancement of wildlife habitat on the island, and recognizes that such measures will require amendments to its license. Grant PUD also acknowledges in the filing that proposed future measures and timelines for implementing them are preliminary, will require additional environmental analysis, and “are contingent upon the successful close out of the lease with the Port of Quincy and acceptable site conditions, upon return of the property to Grant PUD.” *Id.* at 1.

⁷¹ See, e.g., *Safeguarding the Historic Hanscom Area’s Irreplaceable Res., Inc. v. FAA*, 651 F.2d 202, 218 (1st Cir. 2011) (stating that “[f]or NEPA purposes, an agency need not speculate about the possible effects of future actions that may or may not ensue”). To the extent that the Associations are arguing that the Commission has improperly segmented its environmental review, NEPA does not require analysis at the outset of a phased plan. See *National Committee for the NEW River v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004); *National Wildlife Federation v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990). This is particularly true where, as here, there is no information whatsoever about possible future actions. Likewise, while the Commission addresses cumulative impacts in its environmental documents whenever they are an issue, it cannot do so with respect to purely hypothetical actions by Grant PUD.

proposed action will not significantly affect the environment,⁷² and need address the matter no further here.

45. The Associations again assert that the Commission improperly declined to consider in detail alternatives involving long-term residential use.⁷³ As we stated in the April 18 order, the range of alternatives to be considered is within an agency's discretion and decreases as the environmental impact of a proposed action becomes smaller.⁷⁴ Commission staff in fact considered the Associations' proposed alternative, but reasonably eliminated it from further consideration because, among other things, Grant PUD has chosen not to extend the lease, and the Commission lacks authority to require it to do so.

46. In sum, the Associations have shown no error in the April 18 Order, and we deny their request for rehearing.

B. Mr. Kelleher's Request for Rehearing

47. It is not easy to discern from Mr. Kelleher's request for rehearing the exact nature of the errors he alleges in the April 18 order. Moreover, Mr. Kelleher does not make clear how he is aggrieved by the order and so may lack standing to contest it. We will nonetheless address his concerns as we understand them.

48. Mr. Kelleher asserts that the Commission erred "by not requiring Grant PUD to acquire 105 acres of mitigation land for the loss of 35 acres of public access under Article 18 of the project license, on Crescent Bar island, as required under the Federal Power Act 10(a)(1)."⁷⁵ This appears to relate to Mr. Kelleher's assertion that, in the April 18 order, "the Commission placed Grant PUD on notice that it has yet to comply with Article 5 of the license concerning the 'lease' to maintain facilities on project lands [citing to private facilities located on Crescent Bar island]."⁷⁶

⁷² April 18 Order, 143 FERC ¶ 61,046 at PP 64-66. *See also Duncan Point Lot Owners Association v. FERC*, 522 F.3d 371 (D.C. Cir. 2008); *LaFlamme v. FERC*, 945 F.2d 1124 (9th Cir. 1991).

⁷³ Associations Request for Rehearing at 52-53.

⁷⁴ *See* April 18 Order, 143 FERC ¶ 61,046 at 72-75.

⁷⁵ Kelliher Request for Rehearing at 8.

⁷⁶ *Id.* at 3.

49. We are unable to find the reference in the order to which Mr. Kelleher cites or indeed any mention of Article 5. In any event, the April 18 Order found that Grant PUD's proposed SMP, as modified "would allow for the protection of the project's scenic, recreational, and environmental resources while providing adequate opportunities for access to project lands and waters"⁷⁷ Moreover, it may be that in the future the 35 acres on Crescent Bar Island that are currently occupied by private facilities will be made available for public use. Finally, nothing in the FPA, our regulations, or our policies requires us to order licensees to acquire lands to mitigate for the loss of public access or other impacts. We do so when we deem it to be in the public interest; here, there is no showing that the public interest necessitates such an action, given that we have found that the SMP and the recreation plan will provide adequate recreational opportunities.

50. Mr. Kelleher maintains that the Commission improperly approved landowner and classification maps that "did not include all 12,909 acres of project lands but did include lands not included in the project."⁷⁸ There is no reason for the SMP maps to include all project lands. The SMP applies to a limited subset of project lands – those around the shoreline – and SMP maps need not include lands that are not subject to the plan. In fact, the Commission is currently reviewing the Exhibit G maps, which are required to include all project lands and which Grant PUD filed as required by the project license. Mr. Kelleher also alleges that the SMP maps are not of sufficient scale to allow resolution of issues relating to public access to project recreation sites. On the contrary, ordering paragraph G of the April 18 Order requires, in some detail, that Grant PUD file GIS data compliant with national map accuracy standards. The Exhibit G maps and those filed in connection with the SMP should be sufficient to deal with any issues that arise. We nonetheless can always require additional informational, should it prove necessary.

51. Mr. Kelleher asserts that the Commission erred by not setting a new deadline for Grant PUD "to acquire . . . project property sufficient to accomplish all project purposes such as the prohibition of agricultural use in all land use classification, for all project lands as required by Article 5 of the License."⁷⁹ Standard Article 5 requires licensees, within five years of license issuance, to acquire lands and waters necessary for project purposes.⁸⁰ There is no evidence in the record that Grant PUD is not complying with this

⁷⁷ April 18 Order, 143 FERC ¶ 61,046 at P 76.

⁷⁸ Kelleher Request for Rehearing at 7, 8.

⁷⁹ Kelleher Request for Rehearing at 8-9.

⁸⁰ See *Public Utility District No. 2 of Grant County, Washington*, 123 FERC ¶

requirement or that there is a need to set a new deadline. Further, there is no statutory or policy requirement to prohibit agricultural use on project lands and waters.

52. Finally, Mr. Kelleher contends generally that the Commission erred “by allowing the SMP to be a collateral attack on Article 18 of the project license concerning the right the public has to hunt, fish and recreate on license owned land.”⁸¹ Article 18 of the project license provides that the licensee shall, to the extent consistent with project operations, “allow the public free access, to a reasonable extent, to project waters and adjacent public lands, for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting.”⁸² The SMP, which establishes a regime for the comprehensive management of the project shoreline for all public interest purposes, including recreation, is consistent with Article 18.⁸³

Conclusion

53. The Priest Rapids Project SMP provides a reasonable method for Grant PUD to manage the project shoreline in a manner consistent with project purposes and the public interest. As discussed in our initial order in this proceeding, the one substantive objection to the SMP – that it does not require the licensee to allow the continued leasing of its property – is beyond our jurisdiction: while we can require licensees to undertake measures we deem to be in the public interest, we have no authority to require a licensee to permit private use of its property or to extend a private contract. Given this

61,049 at 61,338.

⁸¹ Kelleher Request for Rehearing at 9.

⁸² *Public Utility District No. 2 of Grant County, Washington*, 123 FERC ¶ at 61,340.

⁸³ Mr. Kelleher states that there is no public land access to certain project sites and that certain access roads are not within the project boundary. Kelleher request for rehearing at 7. This issue is not relevant to this proceeding, which is limited to the SMP, but should have been raised either in the relicensing proceeding or in the proceeding dealing with the project recreation plan. In any case, as discussed in a prior order dealing with Mr. Kelleher’s concerns about recreational access, we do not require licensees to provide access by land to all portions of the project shoreline. *See Public Utility District No. 2 of Grant County, Washington*, 143 FERC ¶ 61,243 (2013). Further, not all roads leading to project facilities are included in project boundaries.

conclusion, and our determination that the other arguments raised by the Associations and Mr. Kelleher lack merit, we deny rehearing.

The Commission orders:

The requests for rehearing filed on May 17, 2013 by the Crescent Bar Condominium Master Association and the Crescent Bar Recreational Vehicle Homeowners Association, and by Mr. Pat Kelleher are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.