ORDER DENYING REHEARING

(Issued November 16, 2017)

1. On August 28, 2017, and supplemented on September 19, 2017, Jeffrey Lake Development, Incorporated (Jeffrey Lake Development) filed a request for rehearing of a July 27, 2017 Commission staff letter (July 2017 Staff Letter), which found no issues of non-compliance with Central Nebraska Public Power and Irrigation District’s (Central Nebraska) operation of the Kingsley Dam Project No. 1417 (Kingsley Project). This order confirms Commission staff’s conclusions, finds that Jeffrey Lake Development’s arguments lack merit, and therefore denies rehearing.

Background

2. In 1998, the Commission issued a new license for the Kingsley Project. The 103.97-megawatt project is located on the North Platte and Platte Rivers in Garden, Keith, Lincoln, Gosper, and Dawson Counties, Nebraska. The project consists of two developments. The Kingsley Dam Development, located on the North Platte River, includes the Kingsley Dam, which impounds Lake McConaughy, Lake Ogallala, located below the dam, and generating facilities. This development is not implicated in this proceeding.

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1 On September 19, 2017, Jeffrey Lake Development filed a supplement to its request for rehearing. The supplement was filed after the thirty-day period for filing requests for rehearing specified in section 313(a) of the Federal Power Act, 16 U.S.C. §825l(a) (2012), and therefore will not be considered by this order. See, e.g., The Electric Plant Board of the City of Paducah, Kentucky, 121 FERC ¶ 61,091, at P 6 (2007).

2 Central Nebraska Public Power and Irrigation District, 84 FERC ¶ 61,079 (1998) (Relicense Order).
3. Fifty miles downstream, on the Platte River, the Central Supply Canal Development includes a diversion dam that diverts flows into a 75-mile-long supply canal, which traverses twenty-seven canyon lakes and three hydropower developments (Jeffrey Hydro, Johnson-1 Hydro, and Johnson-2 Hydro). The 575-acre Jeffrey Lake, in Lincoln County, Nebraska, is located along the supply canal. Jeffrey Lake has residential homes along the shoreline on lands owned by Central Nebraska and leased to Jeffrey Lake Development. Some of these homes are within the project boundary. Like most of the shoreline along the canal and around the lakes, Jeffrey Lake is available for public recreation.

4. Article 421 of the Relicense Order requires Central Nebraska to file and provide regular updates on a Land and Shoreline Management Plan (LSMP), which provides guidance on how Central Nebraska manages project lands and shoreline by identifying specific allowable uses and the procedures the licensee and the public follow to undertake these uses. On April 11, 2014, Commission staff approved Central Nebraska’s revised LSMP.

5. Article 422 of the license is the Commission’s standard land use article, which allows the licensee to authorize certain uses of project lands and waters without prior Commission approval. Under Article 422, Central Nebraska may, but is not required to, grant permission for entities to use embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. The current LSMP allows Central Nebraska to permit a variety of different erosion control structures at the project, but specifically prohibits the permitting of bulkheads and retaining walls where vegetation or riprap would be adequate.

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4 Central Nebraska Public Power and Irrigation District, 147 FERC ¶ 62,031 (2014).

5 The standard land use article has been included in Commission licenses issued since 1980, to reduce some administrative burden on the licensee and the Commission by allowing the licensee to permit relatively minor uses of project property. See Appalachian Power Company, 153 FERC ¶ 61,299, at P 3 (2015).

6 Relicense Order, 84 FERC ¶ 61,079 at 61,349-50.
6. On December 22, 2016, Jeffrey Lake Development filed a complaint pursuant to Rule 206, alleging that Central Nebraska was in violation of its license and requesting that the Commission issue an order directing Central Nebraska to stop its inference with Jeffrey Lake Development’s residential and recreational use of Jeffrey Lake. Specifically, Jeffrey Lake Development alleged that Central Nebraska was violating Articles 421 and 422 of its license by failing to provide for or allow measures to prevent the erosion of the shoreline around Jeffrey Lake and arbitrarily increasing the lake’s water level.

7. On January 10, 2017, Commission staff notified Jeffrey Lake Development that the complaint had been referred to the Commission’s Office of Energy Projects, Division of Hydropower Administration and Compliance (DHAC) and was being treated as an allegation of non-compliance with the project license. Jeffrey Lake Development filed supplemental information on January 17 and March 24, 2017, and Central Nebraska filed responses on January 11 and April 7, 2017.

8. On July 27, 2017, DHAC issued a staff letter informing Jeffrey Lake Development that staff found no issues of non-compliance with the project license or the approved LSMP.

9. On August 28, 2017, Jeffrey Lake Development filed a request for rehearing of the July 2017 Staff Letter. On rehearing, Jeffrey Lake Development reiterates its allegations and contends that Central Nebraska has violated the terms of its license by: (1) not providing or allowing for bank stabilization; (2) arbitrarily increasing the lake water level; and (3) interfering with Jeffrey Lake Development’s residential and recreational use and enjoyment of Jeffrey Lake. Jeffrey Lake Development contends that Commission staff erred in finding no acts of non-compliance by Central Nebraska under either the project license and/or the approved LSMP.

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8 See Pacific Gas and Electric Co., 115 FERC ¶ 61,324, at 62,155 (2006) (Chairman Kelliher concurring) (“It would be inconsistent, and a waste of administrative effort, for us to treat differently those allegations of license non-compliance that are styled “formal complaint” and those that are not. It is only those complaints that raise substantial legal or policy issues that warrant immediate Commission consideration as formal complaints, rather than being handled at the initial stage by our compliance staff. Therefore, I believe that, as a general matter, allegations regarding compliance with hydroelectric licenses should be handled in the first instance by our compliance staff.”).

9 Letter from Robert Fletcher (DHAC Land Resources Branch) to Mr. Terry K. Barber (counsel for Jeffrey Lake Development).
Discussion

10. Jeffrey Lake Development’s arguments regarding bank stabilization are an untimely collateral attack on the 2014 order approving the LSMP, as well as on the 1998 license order. Those orders respectively established the environmental and operational requirements for the project and approved Central Nebraska’s plan for managing the project shoreline in a manner that protects environmental and public recreation resources, including addressing erosion and shoreline integrity at Jeffrey Lake. If any party objected to those requirements, or felt that the licensee should be required to undertake additional measures, they had the opportunity to raise those issues on rehearing; Jeffrey Lake Development did not do so. Jeffrey Lake Development does not raise any new circumstances or facts that have changed since issuance of the license and approval of the LSMP. Accordingly, we deny rehearing on this issue.

11. In any event, we disagree with Jeffrey Lake Development’s argument that Central Nebraska is violating its project license and the LSMP by failing to provide or allow bank stabilization. Jeffrey Lake Development contends that, in the past, pursuant to permits from Central Nebraska, Jeffrey Lake Development voluntarily provided shoreline stabilization for the westerly shoreline of Jeffrey Lake by using cement bags to form a seawall along those stretches that appeared the most vulnerable to erosion. However, in 2005, Commission staff conducted an environmental compliance inspection of the project and specifically identified the cement bag seawall on the west side of the Jeffrey Lake as an example of the type of shoreline protection that should not be permitted under Central Nebraska’s license. Although Central Nebraska originally allowed and participated in the cost of the Jeffrey Lake Development’s shoreline stabilization efforts, the licensee withdrew its support for these undertakings in the summer of 2006, following Commission staff’s report. The last permit for Jeffrey Lake Development’s “bagging project” was issued in June, 2006, and Central Nebraska has not allowed Jeffrey Lake Development to maintain or enhance the seawall structure since that time.

12. During the LSMP proceeding, Jeffrey Lake Development requested that language be added to the LSMP to allow the use of cement bags for shoreline stabilization. However, the

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10 Environmental Inspection Report by Chicago Regional Office for Central Nebraska Public Power and Irrigation District's Kingsley Dam Project at 40 (September 9, 2005) (“Seawall construction should generally not be permitted under the current license.”).
Environmental Assessment (EA) issued on May 11, 2011 for the revised LSMP reiterated Central Nebraska’s obligation to make permitting decisions based on environmental, wildlife, and aesthetic considerations, not leaseholder interests, and accepted the licensee’s recommendation to use natural or biotechnical methods for erosion control. The approved LSMP, filed pursuant to Article 421, allows Central Nebraska to permit certain erosion control structures at the project, as does Article 422 (Standard Land Use Article), but neither the LSMP nor Article 422 require the licensee to do so. Further, allowing cement bags would be contrary to Commission staff’s findings.

13. As stated in staff’s July 2017 letter, the record supports staff’s conclusions regarding this matter. Erosion control measures and shoreline integrity were specifically analyzed in the EA and again during the LSMP proceeding. The placement of cement bags along the shoreline was expressly dismissed as an allowable practice along the shoreline because staff found it detracted from the scenic values of the lake. Furthermore, unlike other locations within the project boundary, the shoreline area in question was not identified as requiring erosion prevention to protect any environmental, cultural, or recreation resource under the license. There is no new evidence in the record that would alter this analysis.

14. Jeffrey Lake Development also argues that Central Nebraska has failed to comply with its project license and the LSMP by arbitrarily increasing the lake level in 2016, resulting in increased erosion and excessive silting of the reservoir. According to Jeffrey Lake Development, “the higher water level is exacerbating the erosion of steep banks and cliffs on the west shore [of Jeffrey Lake], is causing tree lines and bushes to fall into the water, and has caused virtually constant plumes of muddy water that are so substantial as to be visible without the aid of an aerial view.”

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11 See Kingsley Dam Project: Land and Shoreline Management Plan Environmental Assessment at 6 (May 2011).

12 Id. at 24.

13 The 2014 order approving Central Nebraska’s LSMP specifically addressed, and rejected, Jeffrey Lake Development’s recommendation to include cement bag seawalls for shoreline stabilization. Central Nebraska Public Power and Irrigation District, 147 FERC ¶ 62,031 at PP 46-48. Jeffrey Lake Development did not file a rehearing request objecting to Commission staff’s conclusion.

14 Id. P 48.

15 Jeffrey Lake Development, August 28, 2017 Request for Rehearing at 5.
15. We disagree that the matters Jeffrey Lake Development describes constitute a violation of Central Nebraska’s obligations under either its license or the LSMP. Jeffrey Lake Development’s request for rehearing states that prior to the summer of 2016, “Central [Nebraska] raised the water level in Jeffrey Lake on the order of 15” to 18” higher than its historic high levels.”\(^{16}\) However, as was true of the allegations addressed in staff’s July 2017 letter, the complainant provides no actual data to support this claim. In any case, the license allows an operating elevation up to 2760.0 feet\(^ {17}\), and Central Nebraska never exceeded this elevation. According to Central Nebraska’s January 11 and April 7, 2017 filings, the reservoir level reached a high point 2758.9 feet (below the maximum authorized level) twice in 2016. Therefore, we agree with staff’s conclusion that Central Nebraska violated neither the operating terms of its license nor of the LSMP, which does not prescribe lake levels.

16. Finally, Jeffrey Lake Development on rehearing argues that Central Nebraska has interfered with its residential and recreational use and enjoyment of Jeffrey Lake in the summer of 2017 through the actions described above. However, Jeffrey Lake Development does not specify any activity that is hindered by Central Nebraska’s operation of the Kingsley Project. Further, actions during the past summer are beyond the scope of the complaint, which was filed in December 2016.

17. Although the lakeside lands that are the subject of Jeffrey Lake Development’s complaint are within the project boundary and subject to our jurisdiction, nothing in the project license or the LSMP requires Central Nebraska to provide public recreation or to permit the placement of cement bags on those lands. In fact, as noted above, staff has determined that the use of these bags should not be allowed. Further, the lands leased by Central Nebraska to Jeffrey Lake Development do not include the reservoir shoreline, are outside of the project boundary, and are governed by a contract that the Commission lacks authority to enforce. As we have previously explained, if there is a dispute concerning specific property rights as defined in a conveyance document, it must be resolved in an appropriate court, not before the Commission.\(^ {18}\)

18. Based on the foregoing, we deny Jeffrey Lake Development’s request for rehearing.

\(^{16}\) Id. at 4-5.

\(^{17}\) Central Nebraska Public Power and Irrigation District, 120 FERC ¶ 62,093, at 64,369 (2007).

The Commission orders:

The request for rehearing filed by Jeffrey Lake Development, Incorporated on August 28, 2017, is denied.

By the Commission.

( SEAL )

Kimberly D. Bose,
Secretary.