137 FERC ¶ 61,114
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Union Electric Company Project No. 459-310

ORDER ON REHEARING AND AMENDING SHORELINE MANAGEMENT PLAN

(Issued November 10, 2011)

1. On July 26, 2011, Commission staff issued an order modifying and approving the Shoreline Management Plan (SMP) for the Osage Project No. 459,[1] located on the Osage River in Benton, Camden, Miller, and Morgan Counties, Missouri. The licensee, Union Electric Company (Ameren),[2] has sought rehearing of one aspect of that order, the treatment of encroachments within the project boundary, and has proposed an alternative approach. As discussed below, with the exception of Ameren's proposed filing deadlines, we grant its request for rehearing and amend the SMP accordingly.

2. We believe that the concern surrounding this proceeding is the result of misconceptions about the July 26 Order and the options Ameren failed to avail itself of prior to the issuance of that order. Thus, we want the following points, discussed in more detail below, to be clear.

- Nothing in the SMP, the July 26 Order or in this order has any impact on property rights. Whatever rights entities have in lands within the boundaries of the Osage Project -- whether conferred by deed, lease, easement, or other

[1] *Union Electric Co.*, 136 FERC ¶ 62,070 (2011) (delegated order) (hereinafter, July 26 Order). The Osage Project is located immediately downstream of the U.S. Army Corps of Engineers' Harry S. Truman Dam.

[2] Ameren Missouri filed the request for rehearing. Since 2010, Union Electric Company has done business as Ameren Missouri Company. Before that, it did business as AmerenUE.

conveyance -- have not been and will not be altered by action in these proceedings.

- Nothing in the July 26 Order or in this order affects any previously-issued valid permit authorizing a non-project use of project lands or waters.

- If an entity has built a structure on lands on which it has a right to do so, that structure is not an encroachment, and neither the July 26 Order nor this order suggests that it needs to be removed. Further, this Commission has no jurisdiction to rule on property rights, which are matters of state law. Any dispute regarding the rights granted by conveyance documents must be resolved in an appropriate court.

- A licensee may include within the boundaries of a licensed project only those lands that are needed for projects purposes, including power production, recreation, environmental protection, flood control, shoreline control, irrigation, and water supply. This order directs Ameren to file, by June 1, 2012, an application to revise the project boundary to remove any lands that are not needed for project purposes. Once the Commission approves the removal of any lands from a project boundary, the Commission will have no jurisdiction regarding them.

- This order further directs Ameren to determine which, if any, of the privately-built structures within the project boundaries are in fact encroachments, as opposed to structures that the builders had the right to construct. This will require Ameren to examine deeds and other relevant conveyances in order to ascertain the rights of individual property owners.

- Once Ameren has determined which structures are encroachments, we direct it to determine which, if any, of those encroaching structures interfere with project purposes. For example, if a structure has been built on Ameren's property within the project boundary, but the only project purpose served by the land is that Ameren may need to exercise flowage rights on it, the structure, although subject to Ameren's legal right to flood it, may well not interfere with project purposes. It will be up to Ameren to work with affected entities to propose a resolution for Commission consideration. Absent concerns about the protection of life, health, or property, the Commission would have no regulatory need to require their removal. We expect Ameren to be flexible in this process.

- Ameren represents that after the project boundary is revised, "the majority of encroachments (including residential dwellings) would be removed, thereby dramatically reducing the number and types of residential encroachments that would need to be managed under the SMP."[3]

- As to any encroaching structures that do impact project purposes (for example, a structure constructed in an area reserved for flood control or in an area designated for public recreation), we direct Ameren to work with the owners of the structures to determine whether there is a solution that can satisfy both project purposes and the needs of the structure's owner.[4]

- After Ameren has gathered all necessary information and consulted with affected stakeholders, it must file for Commission approval a plan for dealing with any encroachments.

3. While the Commission's responsibility in this proceeding is to be a steward of the public's resources, and to balance competing uses of hydropower projects, including power development, environmental protection, public recreation, flood control, and irrigation, Ameren's primary responsibility, as the licensee, is to properly implement the terms of its license. Over many years, Ameren failed to carry out its obligation to prevent the construction of unauthorized structures inside the project boundary and to take appropriate action to ensure that neither project purposes nor the expectations of structure owners were unduly affected. Ameren's repeated failure to properly implement the terms of its license has allowed matters to get to the point where it does not even know exactly what structures have been built within the project boundary and whether they were authorized. We recognize that Ameren's failures have left local property owners in an extremely difficult position. As ordered further below, we are directing Ameren in this proceeding to promptly gather necessary information and to propose a plan to resolve issues regarding encroachments in a thorough and thoughtful manner.

[3] Ameren request for rehearing at 25.

[4] For example, Ameren could find lands elsewhere within (or to be added to) the project boundary that could meet the project purpose such that a structure does not have to be removed.

Background

4. The Osage Project was originally licensed in 1926[5] and relicensed in 1981, with an expiration date of February 28, 2006.[6] In 2004, Ameren filed a relicense application for continued operation of the project.[7]

5. The project's reservoir, Lake of the Ozarks, is approximately 93 miles long, with about 1,150 miles of shoreline and a surface area of about 55,342 acres at a normal pool elevation of 660.0 feet Union Electric Datum (UED).[8] The lake has four major arms: Osage, Niangua, Gravois, and Grand Glaize.

6. The project boundary, which was established in the 1926 license and has not changed substantially since then, generally follows the full pool elevation of 662.0 feet, except in some areas where it follows higher contour elevations (ranging between 663.0 and 678.0 feet UED)[9] or irregularly shaped metes and bounds property lines.[10] Ameren explains[11] that in the 1920s and early 1930s, Union Land Development (Union Land) acquired entire tracts of property for the project and conveyed in fee portions of the property from the water to specified contour elevations on the shoreline (ranging from 662.0 to 678.0 UED) to its affiliate, Union Electric Light and Power (Ameren's predecessor). Union Land granted Ameren's predecessor flooding easements over the remaining property. In most cases, the flooding easement was given over the entire tract

[5] *See* 6th FPC Annual Report 243 (1925) (authorizing issuance of the license). The license was issued February 6, 1926, in an unpublished order.

[6] *See Union Electric Co.*, 15 FERC ¶ 62,038 (1981) (1981 Relicense Order).

[7] *See* Ameren's February 24, 2004 Application for License for Major Project-Existing Dam (February 24, 2004 Relicense Appliction).

[8] UED is 0.9 feet higher than mean sea level. All Lake of the Ozarks elevations referred to in this order are UED, unless otherwise noted.

[9] The project boundary contour generally increases in elevation proceeding upstream from the dam.

[10] Metes and bounds is a method of describing real estate that typically uses physical features of the local geography, along with directions and distances, to establish a parcel's boundary.

[11] *See* Ameren's March 31, 2006 Comments on the draft Environmental Assessment for relicensing the project, at 9-10, and Attachment 3.

of land owned by Union Land, even though only a small portion of the property was affected by the Osage Project.

7. The boundary along approximately 72 percent of the lake's shoreline is defined by contour elevations, and the remaining 28 percent is defined by metes and bounds.[12] About 32,000 acres of project lands surround the reservoir, with most of the acreage in areas where the project boundary is established by metes and bounds. These metes and bounds areas, which generally follow old property lines, are those that were originally acquired as flood easements only. In the ensuing years, the remaining rights in these lands were sold and resold. Currently, almost all are privately-held lands.[13] Ameren explains that most of these lands have been developed as allowed by the deeds and easements originally granted in the 1930s (when the project was being constructed).[14]

8. In its 2004 relicense application, Ameren proposed modifying the project boundary so that project lands currently defined by metes and bounds would be eliminated from the boundary, and the boundary instead would match the contour elevation project boundary of the adjacent properties.[15] This would have eliminated approximately 31,000 of the 32,000 acres of land within the project boundary.

9. In March 2007, the Commission issued a new 40-year license for the continued operation and maintenance of the project.[16] The license order denied Ameren's request to remove lands from the project boundary, explaining that Ameren had not provided sufficient information to support its request and that removal of the lands would be premature without an approved SMP. The order stated that Ameren could resubmit its request when it filed its SMP.[17] Article 417 of the license required Ameren to file, for

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[12] The metes and bounds parcels, which generally follow old property lines, are widely distributed throughout the project area.

[13] *See* Osage Project No. 459 Shoreline Management Plan (SMP), filed March 28, 2008, at 6-7. The State of Missouri holds title to some of the lands.

[14] *See id*.

[15] *See* February 24, 2004 Relicense Application, Vol. I, at G-1.

[16] 118 FERC ¶ 62,247 (2007) (March 2007 License Order).

[17] 118 FERC ¶ 62,247 at P 91-95. If Ameren resubmits a request to amend the project boundary it must, among other things, show the location of the lands proposed to be removed and their shoreline classification, including any wetlands designations, on a copy of the SMP's shoreline classification map. *Id.* P 95.

Commission approval, an SMP to coordinate land-management activities along the project shoreline within the project boundary.[18] The plan was to include, at a minimum:

> (1) a classification, including maps, of land uses along the project shoreline (taking into account the need to protect public recreation, sensitive habitats, historic properties, and aesthetic resources) and a description of activities and uses that will be allowed on project lands in each classification;
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> (2) a description of the types of non-project uses and construction activities that will be allowed within the project boundary;
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> (3) a permitting program to address setbacks, size, density, and placement of docks, piers, and other in-water structures;
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> (4) a policy for dealing with encroachments; and
>
> (5) if Ameren filed, with its proposed SMP, an amendment to remove from the project boundary lands not needed for project purposes, it was to include maps showing the location of the lands proposed for removal, overlaid with its proposed shoreline classification maps.

A. Proposed SMP

10. An 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 environmental and public access. Not all projects require SMPs; these plans are generally required where it appears that the project's shoreline may be subject to competing developmental pressures such that public access or environmental resources are at risk.[19] 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.

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[18] March 2007 License Order, 118 FERC ¶ 62,247 at 64,735-36.

[19] *See, e.g.*, *Public Service Company of New Hampshire*, 119 FERC ¶ 61,170, at P 67 (2007).

11. In March 2008, Ameren filed its proposed SMP.[20] The SMP included classification maps, generally incorporated the permitting and management measures Ameren had undertaken over the years, and proposed certain types of non-project uses and construction activities that would be allowed within the project boundary. Although the SMP stated that Ameren intended to file an application to amend the project boundary to remove lands that are privately-held and not needed for project purposes,[21] it has never filed such an application. As discussed above, Ameren has suggested that as many as 31,000 of the 32,000 acres currently within the project boundary are not needed for project purposes. While we do not know if Ameren can make a showing that all of this acreage is unnecessary, because Ameren has not filed an application with supporting evidence, it would appear to be the case that if Ameren had made a timely filing, there would be many fewer encroachments at issue here, substantially lessening adjacent landowner concerns.

12. As required, Ameren also included a proposal regarding encroachments. Ameren states that a "considerable number" of structures have been located within the project boundary along the shoreline of the lake over the last 75 years, some prior to Ameren's adoption of formal permitting procedures and policies and some since. These structures:

> do not conform to current shoreline management standards . . . [and] could not be permitted under [Ameren's] current guidelines or license. Examples of such non-conforming structures include but are not limited to floating habitable enclosures, dwellings partially or wholly within the project, decks extending more than 3 feet over seawalls, and floating commercial businesses.[[22]]

13. Ameren proposed that owners of non-conforming structures would be required to register their structures with Ameren prior to January 1, 2012.[23] Ameren would then consider four options for the non-conforming structures:[24]

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[20] *See* Osage Project No. 459 SMP, filed March 28, 2008.

[21] SMP at 7.

[22] SMP at 43 and B-11.

[23] SMP at 43-44 and B-12 through B-15.

[24] These options would apply only to pre-existing structures, i.e., those in existence before March 28, 2008, the date Ameren filed its SMP. For non-conforming, unauthorized structures built after that date, it appears that Ameren would require their removal.

(1) seek a revision of the project boundary to exclude the structure and the land on which it is located (as the Commission had previously suggested Ameren do)[25];

(2) take action to affirm or secure rights necessary to manage and control the non-conforming structure, presumably with an eye to removal of the structure;

(3) convey an interest in project lands or otherwise authorize a structure to remain on project lands or waters, allowing the continued use of the structure; or

(4) require the owner to remove the structure, or part thereof, that is within the project boundary.

14. Ameren would file an annual report with the Commission of all non-conforming structures for which interests were conveyed under the guidelines, including information on the nature of the interest conveyed, the location of the non-conforming structure, and the nature of the use of the non-conforming structure.

B. July 26 Order

15. The July 26 Order modified and approved the SMP, in essence approving Ameren's proposal with some procedural changes. With respect to Ameren's proposal regarding non-conforming structures, the order stated that Ameren should:

> inspect and identify all lands within the project boundary; identify existing non-conforming structures and encroachments; identify the project purposes being served by the underlying lands, and take appropriate actions to resolve such non-conforming structures and encroachments with the goal of removing them from the project boundary. In the majority of cases, the existing non-conforming structure/encroachment should be removed in a timely manner and the site restored to pre-existing conditions. However, it may not always be feasible to remove the non-conforming structure/encroachment in the near term due to site-specific circumstances or hardship, and later removal of the encroachment may be warranted.[26]

16. To this end, the Order required Ameren, by May 1, 2012, to file for Commission approval a detailed report of each non-conforming structure and encroachment and

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[25] However, under Ameren's proposal the project boundary revisions would have been made on a structure-by-structure basis, rather than the comprehensive revision proposal that we require here: Ameren's proposal could have resulted in thousands of individual proceedings rather than one efficient proceeding.

[26] July 26 Order, 136 FERC ¶ 62,070 at P 40.

Ameren's proposed course of action.[27] The Order further required that, "for each encroachment identified in the report that cannot be authorized pursuant to the current requirements of the license, the report shall include a proposed plan and schedule for removing or otherwise resolving the encroachment."[28]

17. On August 25, 2011, Ameren filed a request for rehearing of the July 26 Order.[29]

Discussion

18. On rehearing, Ameren objects to the requirement that it file by May 1, 2012, a comprehensive report that reviews and analyzes every encroachment and proposes a resolution for each.[30] Ameren states that the current project boundary includes over 4,000 possible encroachments, and the detailed assessment of each one that is required by the July 26 Order is infeasible in the time given.[31] Ameren explains that, although a preliminary review of geographic information system (GIS) mapping indicates that many structures may be located on project lands, GIS mapping can be used only as a general indicator and must be followed up with field inspections and in many cases legal surveys to determine the precise location of the structures. Moreover, Ameren contends, in many instances the structures at issue are homes and small businesses, which makes any permitting discussions emotionally charged. Thus, Ameren is concerned that working with the owners of these and other encroaching structures will take time and, in some cases, dispute resolution or court action.

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[27] July 26 Order, 136 FERC ¶ 62,070, Ordering Paragraph (E). The report must, for each structure/encroachment: (1) describe its type, size, and location; (2) include a detailed map or drawing showing its location in relation to the project boundary and shoreline; (3) describe Ameren's ownership or other rights to the lands underlying the encroachment; (4) describe the specific project purposes served by the underlying lands and any adverse impacts the encroachment may have on those purposes; and (5) describe Ameren's plan for authorizing or removing the structure.

[28] July 26 Order, 136 FERC ¶ 62,070, Ordering Paragraph (E).

[29] Many individuals and entities filed comments in support of Ameren's rehearing request.

[30] Rehearing Request at 19-21.

[31] Rehearing Request at 16-17. Ameren estimates that on property that it owns in fee there are 1,260 residential dwellings; 700 decks, patios, gazebos, and similar structures; and 550 small outbuildings and boat houses. Ameren estimates that there are approximately 1,500 structures on property where it has easement rights only.

19. Instead, Ameren proposes that, before addressing individual encroachments, it would first revise the project boundary to include only those lands needed to support project purposes, and then address the encroachments that exist within the new boundary. Ameren proposes to file, by September 1, 2013, an application to amend the project boundary to remove property that is not necessary to achieve or support a project purpose.[32] According to Ameren, "by revising the project boundary, the majority of encroachments (including residential dwellings) would be removed, thereby dramatically reducing the number and types of residual encroachments that would need to be managed under the SMP."[33]

20. For the reasons discussed below, we agree that, before requiring Ameren to address encroachments on its project property, we must first ensure that the project boundary encompasses only those lands needed for project purposes. In fact, recognizing that Ameren's project boundary might indeed include excess lands that are not necessary for project purposes, the March 2007 License Order invited Ameren to submit, with its proposed SMP, an application to amend its project boundary to remove lands not needed for the project.[34] Had Ameren done so, we would have been able to consider it along with Ameren's SMP and its proposal regarding non-conforming structures. We order them to do so now.

21. In addition, we clarify that "encroachments" mean those structures built by entities on or over Ameren's property in violation of Ameren's property rights and without Ameren's consent. It does not include structures built by an entity on its own land in accordance with the property rights granted to the entity in the relevant land conveyance.[35] Moreover, we not only support Ameren's proposal to work with the owners of affected structures, but we require it to do so, as necessary to a proper exercise of its responsibilities. This is consistent with the July 26 Order, where, at Ordering Paragraph (E), we required Ameren to first identify non-conforming structures and encroachments (which, by definition, would not include structures that the owners had the right to build) and then to develop a plan for "removing or otherwise resolving" them.

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[32] Property proposed for removal would include property owned in fee by Ameren as well as property over which Ameren holds an easement.

[33] Rehearing Request at 25.

[34] March 2007 License Order, 118 FERC ¶ 62,247 at P 95, and Article 417(4) at 64,735.

[35] The Commission has no jurisdiction to rule on property rights, which are matters of state law.

22. Ameren further contends that the July 26 Order suggests a preference for the removal of encroachments and the restoration of project lands.[36] That certainly was not our intent. As noted above, the July 26 Order first required Ameren to determine which structures within the project boundary were not authorized and then develop a plan to remove or "otherwise resolve" issues regarding them. We in fact prefer that the licensee properly ascertain in the first instance the appropriate project boundaries necessary for the safe operation of the project and fulfillment of project purposes, which will both minimize potential encroachments and responsibly manage the essential project properties so that encroachment does not occur. Ameren has done neither in this case. Given that neither of these required actions has yet been done, once an appropriate project boundary has been established, Ameren must examine existing structures within the revised boundary and determine which ones in its judgment are encroachments and whether any encroaching structures interfere with project purposes. If, for example, a residence has been built on Ameren's property, which Ameren needs for flowage purposes, the structure, although subject to Ameren's legal right to flood it, may not interfere with project purposes.[37] Thus, absent concerns about life, health, and property,[38] the Commission would have no regulatory need to require its removal.[39] If, on the other hand, an encroaching structure does impact project purposes (e.g., restricts

[36] Rehearing Request at 18. On rehearing, Ameren also alleges that the July 26 Order (136 FERC ¶ 62,070 at P 39) states that some of the provisions of Ameren's non-conforming structures plan are inconsistent with the requirements of standard Article 5 of the license, but does not explain why. Standard Article 5 requires Ameren to acquire, and retain through the term of the license, all property rights necessary for the construction, operation, and maintenance of the Osage Project. Article 5 further provides that none of these rights may be transferred without the prior written approval of the Commission. March 2007 License Order, 118 FERC ¶ 62,247 at 64,739-40. Ameren's proposal was inconsistent with Article 5 because it did not provide for Commission review and approval of Ameren's conveyance of property interests and its decisions regarding the treatment of non-conforming structures that remained in the project boundary.

[37] *See Union Electric Co.*, 115 FERC ¶ 62,008 (2006) (resolving encroachment by authorizing Ameren to issue permit to allow a porch to overhang the project boundary).

[38] For example, a structure, such as an unauthorized wall, could prevent project flood control procedures from operating as designed. Section 10(c) of the FPA, 16 U.S.C. § 803(e) (2006), requires licensees to "conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property."

[39] Ameren would have to work with the affected owner to come to some resolution of the matter, and we encourage Ameren to be flexible in this regard.

public access or is in an area designated for public recreation), Ameren will work with the owner of the structures to determine whether there is a solution that can satisfy both project purposes and the needs of the structure's owner (e.g., finding other lands that could meet the project purpose).[40]

A. Need for Revised Project Boundary

23. Pursuant to Part I of the Federal Power Act (FPA), the Commission, when issuing a license for a hydropower project, requires the licensee to undertake appropriate measures to promote both developmental (power) and non-developmental uses (e.g., scenic, recreational, environmental) of a waterway.[41] These public interest uses, identified by the Commission in its licensing orders, constitute the "project purposes."

24. Our regulations provide that:

> A project boundary must enclose only those lands necessary for the operation and maintenance of a project and for other project purposes such as recreation, shoreline control, or protection of environmental resources . . . . Existing residential, commercial, or other structures may be included in the boundary only to the extent that underlying lands are needed for project purposes (e.g., for flowage, public recreation, shoreline control, or protection of environmental resources).[42]

25. The inclusion of lands within a project boundary serves the function of indicating that the lands are used in some manner for project purposes. However, the mere inclusion of lands within a project boundary will not restrict landowner uses, since such inclusion does not itself create or alter property rights.[43] A licensee is required to acquire and retain all interests in non-federal lands necessary or appropriate to carry out project purposes.[44] These interests can be obtained through easement, fee title, leases, and other

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[40] *See Union Electric Co.*, 127 FERC ¶ 62,195 (2009) (resolving encroachment by requiring Ameren to perform certain mitigation measures as a condition for authorizing it to convey property interests to private entities to allow eight buildings to remain in project boundary).

[41] *See* FPA section 10(a)(1), 16 U.S.C. § 803(a)(1) (2006), and 4(e), 16 U.S.C. § 797(e) (2006).

[42] Section 4.41(h)(2) of the regulations, 18 C.F.R. § 4.41(h)(2) (2011).

[43] *See, e.g., PacifiCorp, order on rehearing*, 80 FERC ¶ 61,334, at 62,113 (1997).

[44] *See id.*, and standard Article 5 of the Osage Project license, March 2007 License Order, 118 FERC ¶ 62,247 at 64,739-40 (2007).

types of conveyances. The instruments of conveyance define the extent of the licensee's right.[45]

26. As explained above, when the project boundary was first established in 1926, it included lands up to certain contour elevations held in fee by the licensee. The boundary also included entire tracts of privately-owned land over which the licensee held flooding easements, even though only a small portion of the tract would be affected (i.e., flooded) by the Osage Project. Over the years, these privately-held parcels have been developed as allowed by the deeds and easements granted in the 1930s.[46] Assuming the structures built on these lands were built as allowed by the underlying deeds, such structures are not encroachments.

27. Since at least 2004, Ameren has claimed that the Osage Project boundary includes lands that are not needed for project purposes, but it has never filed an acceptable application to delete unnecessary lands. Although the March 2007 License Order stated that Ameren could file such an application with its proposed SMP, it did not. Instead, it essentially put the cart before the horse by proposing to deal with such determinations on a piecemeal basis. In response to the July 26 Order, Ameren now proposes that, before dealing with encroachments, it first will file an application to establish an appropriate project boundary for the Osage Project. This makes sense, and we approve Ameren's proposal, with one exception. Ameren wants until September 2013 to file its amendment application. We do not think that it should take two years to gather the necessary information and prepare and file an application, especially in light of the concerns and uncertainty expressed by many homeowners with residences currently within the project boundary. Instead, we are requiring Ameren to file its boundary amendment application by June 1, 2012.

B. Ameren's Project Boundary Amendment Application

28. To ensure that the project boundary amendment application has the information necessary for expeditious Commission action, we encourage Ameren to work with Commission staff in its preparation. The application must include a precise description

[45] Any disputes regarding property rights are not within the Commission's jurisdiction. Rather, they are matters for state courts to resolve. Indeed, each license with a project boundary states that the project consists of "All lands, *to the extent of the licensee's interests in those lands*," enclosed by the project boundary shown" in the Exhibit G (Project Boundary) maps. *See, e.g.*, the 2007 license order, 118 FERC ¶ 62,247 at 64,725 (2007). The extent of the project boundary is indicated on maps referred to as Exhibit G drawings. The current Exhibit G drawings for Project No. 459 were approved on February 13, 2009. *Union Electric Co.*, 126 FERC ¶ 62,116 (2009).

[46] SMP at 6-7.

of the nature of the licensee's property rights in the lands that would remain in the project boundary, as well as those lands proposed for removal from the project boundary. It must also describe the project purpose that the lands served in the past as well as the project purposes that the lands currently serve.

29. Ameren must provide sufficient information regarding lands it proposes to remove from the project to support a finding that they are not needed for project purposes. In this regard, we note that Ameren's proposal in its February 24, 2004 Relicense Application to shrink the boundary by excluding all lands above the 662.0 foot contour would have resulted in a narrower shoreline buffer zone along about 30 percent of the lake's shoreline. However, the project's SMP makes clear the lands that are owned and controlled by Ameren below the various contour elevations that represent the project boundary will be managed as a vegetative buffer for the lake.[47] Therefore, the portions of the project boundary that serve as a buffer zone, even to the extent that they are established by contour elevations above 662.0, should not be removed from the project boundary, if they serve this important project purpose. In addition, the amendment application must include maps that depict the locations of all structures located within the current and the proposed project boundary.

C. Resolution of Remaining Encroachments

30. As noted above, certain encroachments may interfere with project purposes, but the interference could be mitigated by various means. Thus, for example, the licensee could propose to include additional lands at another location to mitigate for an encroachment. Ameren expects that, with the revision of its project boundary to exclude lands not needed for project purposes, the number of encroachments (including residential dwellings) will be greatly reduced. This will be a positive result. Ameren then will have to address any remaining matters.

31. Accordingly, this order requires Ameren, within one year of a future Commission order on Ameren's application to amend its project boundary, to file a comprehensive report that identifies and assesses each encroachment and proposes a plan for addressing each one (individually or in categories, as appropriate). For each encroachment, the filing must include the following detailed descriptions: (1) the type, size, and location of the site, including all facilities and structures; (2) a detailed map or drawing showing the location of the encroachment in relation to the project boundary, project reservoir

[47] SMP at 39-41. The shoreline buffer zone consists of trees, shrubs, and ground cover of native plants and understory. *Id.* at 40. On properties where Ameren has only an easement interest, it recommends maintenance of a 25 foot buffer zone and reserves the right to "suspend, revoke and/or limit other requested facilities (i.e., dock slips) for developments that violate the provisions of this policy." *Id.* at 41.

shoreline, and any nearby project features; (3) the licensee's current ownership or rights to the lands underlying the encroachment; (4) any property rights the licensee previously held but conveyed to another entity and the date and nature of the right(s) conveyed; (5) the property rights held by the owner of the encroachment; (6) the specific project purposes served by the underlying lands; (7) any adverse impacts the encroachment may have on specific project purposes or resources; and (8) a proposed resolution. We emphasize that this report will not include structures built where the structure owners had the right to construct them, or those that have been previously permitted by Ameren or its predecessors. Thus, the report will only need to address unpermitted structures built without authorization from Ameren and without an appropriate property right.

D. Accessory Structures

32. In the SMP, Ameren proposed to continue to allow the construction of accessory structures such as decks, walkways, gazebos, and patios. The July 26 Order concluded that such accessory structures along the shoreline have the potential to restrict a significant area of project lands and waters from public access.[48] Consequently, in order to protect public access and recreational use of project lands and waters, the July 26 Order prohibited future construction of these accessory structures within the project boundary.[49] Ameren now states that it will no longer issue permits for new construction of decks, patios, gazebos, and similar structures located within the project boundary.

33. In reviewing existing accessory structures (e.g., decks, walkways, gazebos, and patios) to determine whether they constitute an encroachment, Ameren proposes to use March 28, 2008 (the date it submitted its SMP to the Commission), as a "grandfather" date from which to consider these structures. Accessory structures that conform to Ameren's permitting guidelines as set forth in Appendix B to the SMP and that were constructed prior to March 28, 2008, would be allowed to remain in their current location provided that the owners of such facilities: (a) already have a permit; or (b) apply for and

[48] As a general policy, the Commission does not allow the interest of adjacent property owners to override the public's use and enjoyment of project lands and waters. *See, e.g.*, *AmerenUE*, 129 FERC ¶ 61,027, at P 6 (2009) and *AmerenUE*, 116 FERC ¶ 61,045 at P 19 (2006) (discussing need to prevent obstructions on public walkway); *West Penn Power Company*, 81 FERC ¶ 61,362, at 62,736 (1997), *reh'g denied*, 83 FERC ¶ 61,225 (1998).

[49] July 26 Order, 136 FERC ¶ 62,070 at P 46 and 64,232 (Ordering Paragraph (F)) (2011). Ameren did not seek rehearing of this requirement.

obtain a permit prior to July 26, 2016.[50] We agree that these structures should be grandfathered and left undisturbed, absent concerns about the protection of life, health, and property.

34. According to Ameren's proposal, structures in existence on March 28, 2008, that are not properly registered and issued permits by July 26, 2016, and unauthorized accessory structures installed after March 28, 2008, would be deemed to be non-conforming and subject to enforcement action by the company, including removal.

35. Ameren states that the above timeframe would allow it to provide to stakeholders adequate public notice of the registration deadline and to properly process permit applications. We generally agree with this approach, but we believe that the 2016 deadline is too far into the future, and that stakeholders deserve a quicker resolution of these issues. Consequently, we are requiring Ameren to address these accessory structures in the encroachment report discussed in Paragraph 30, above, and to include in the report only those structures that have not been issued a permit. This would include those unauthorized accessory structures built after March 28, 2008, which are deemed to be non-conforming structures.

36. Ameren also proposes that all existing accessory structures that have permits properly issued by Ameren and/or the U.S. Army Corps of Engineers[51] will be considered authorized and such permits will remain in full force and effect. We agree. Authorizations that complied with then-existing permitting conditions remain valid, and those who received such permits following the procedures in place at the time may continue to rely on their validity.[52]

Conclusion

37. Licensees are responsible for operating and maintaining their projects in accordance with license requirements and project purposes. Consistent with these responsibilities, a licensee may, with prior Commission approval, authorize specific uses and occupancies of project lands and waters that are not related to hydroelectric power

[50] Ameren will be able to determine if such structures were constructed prior to March 28, 2008, through GIS mapping it conducted while preparing its SMP.

[51] Prior to 1983, the Corps issued permits for non-project uses of the Osage Project lands and waters. SMP at 6. In 1983, Ameren began managing shoreline development using a permit program developed under Article 41 of its 1981 license. *Union Electric Co.,* 15 FERC ¶ 62,038, at 63,041 (1981).

[52] However, changes in or replacements of these structures may require new permits, if required by the SMP and if consistent with underlying property documents.

production or other project purposes (non-project uses). However, authorization of such non-project uses must ensure that shoreline development activities that occur within the project boundary are consistent with license requirements, purposes, and operations.

38. Since 1981, when the Commission first relicensed the Osage Project, Ameren has been able to act on relatively routine shoreline matters (e.g., non-commercial boat docks, retaining walls, bulkheads) without Commission approval.[53] For other non-project uses, in order to ensure that such use will not interfere with project purposes and that the project will continue to meet the comprehensive development/public interest requirements of section 10(a)(1) of the FPA,[54] Ameren must seek prior Commission approval before authorizing such use.[55] By allowing matters to get to the point where Ameren does not even know exactly what structures have been built within the boundaries of the Osage Project and whether or not they were authorized, Ameren has left local property owners in an untenable position. To rectify this problem, we expect Ameren to promptly gather necessary information and to resolve issues regarding encroachments in a thorough and thoughtful manner, fully respecting the rights of all property owners.

The Commission orders:

(A) The request for rehearing filed by Ameren Missouri, on August 25, 2011, is granted in part, as provided below.

(B) Ordering Paragraph (E) of the July 26, 2011 Order Modifying and Approving Shoreline Management Plan, 136 FERC ¶ 62,070, is replaced with the following:

> (E) (1) *Project Boundary Amendment* By June 1, 2012, Ameren shall, after consulting with its stakeholders, file with the Commission, for approval, an application for an amendment to the project boundary that includes a proposal to remove property currently located in the project

[53] *See* Article 41 of the 1981 Relicense Order, 15 FERC ¶ 62,038 at 63,048-50 (1981), and Article 419 of the 2007 Relicense Order, 118 FERC ¶ 62,247 at 64,736-39 (2007) (giving licensee authority to grant permission for certain types of use and occupancy of project lands and waters, and to convey certain interests in those lands and waters, without prior Commission approval).

[54] 16 U.S.C. § 803(a)(1) (2006).

[55] The Commission's authority to regulate these uses is inherent in Congress' grant to the Commission of the responsibility for ensuring that the project be used for the beneficial public purposes specified in section 10(a)(1) of the FPA.

boundary that is not necessary to achieve or support a project purpose, such as power production, recreation, environmental protection, flood control, shoreline control, public access, irrigation, and water supply. The application shall include:

(a) a description of how the proposed project boundary will be defined, including an identification of the various buffer widths around the reservoir;

(b) a description of the ownership or rights to the underlying lands held by the licensee or by others;

(c) maps that depict the locations of all structures located within the current and proposed project boundary and that contain detailed information (i.e., parcel maps) showing the structure in relation to the current and the proposed project boundary;

(d) a description of why the land is no longer needed for project purposes (the description should detail the licensee's ownership or rights to the parcels of underlying lands that are proposed for removal);

(e) a description of any wetlands and other sensitive areas within the current project boundary and how such wetlands or sensitive areas will be retained within the project boundary or, in areas where such lands are partially within the current project boundary, a proposal as to whether the portion of these lands that is outside the current boundary will be brought into the project boundary;

(f) identification of those lands needed for flowage and a description of the basis for the level of flowage to be contained in the project boundary (e.g., normal maximum water level, 100-year flood, 500-year flood); and

(g) an identification of the total cumulative acreage of project lands to be removed from the project, such that the acreage can be verified.

(2) *Encroachment Report Within* one year of a Commission order acting on the licensee's project boundary amendment application, Ameren shall, after consulting with stakeholders, file for Commission approval a comprehensive report describing each encroachment, including each unauthorized accessory structure, within the revised project boundary and proposing a plan for addressing each encroachment. For each encroachment, the report shall include:

(a) a description of the type, size, and location of the site, including all facilities and structures;

(b) a detailed map or drawing showing the location of the encroachment in relation to the project boundary, project reservoir shoreline, and any nearby project features;

(c) a description of the licensee's current ownership or rights to the lands underlying the encroachment;

(d) a description of the specific project purposes served by the underlying lands; and

(e) a description of any adverse impacts the encroachment may have on specific project purposes or resources.

The report shall also include location point data representative of each encroachment site. The location point must be positionally accurate to comply, at a minimum, with National Map Accuracy Standards for maps at a 1:24,000 scale. The location point must include latitude/longitude, in decimal degrees, based on the horizontal reference datum of the North American Datum of 1983 (NAD 83).

If the licensee finds an encroachment is consistent with the allowable uses and occupancies of Article 419 (i.e., standard land use article) and the project's approved resource management plans, the licensee shall identify its plans to grant permission for the existing use in accordance with the applicable license requirements. If the licensee finds the encroachment is consistent with the approved resource management plans for the project, but not within the scope of the types of uses and occupancies allowed under Article 419, the licensee shall file an application for Commission approval to authorize the existing use.

For each encroachment identified in the report that cannot be authorized pursuant to the current requirements of the license, the report shall include a proposed plan and schedule for resolving each encroachment.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.