

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff

AmerenUE

Project No. 459-166

ORDER DENYING REHEARING

(Issued December 21, 2006)

1. In this order, we deny the request filed by AmerenUE for rehearing of the August 14, 2006 Order amending AmerenUE's license for the Osage Project No. 459 by removing certain lands from the project boundary.<sup>1</sup>

**Background**

2. The 176.2-megawatt Osage Project is located on the Osage River, in south central Missouri. The Commission is currently processing AmerenUE's application for a new license to continue operating the project.

3. On May 15, 2006, AmerenUE submitted for Commission approval a revised Exhibit G project map, reflecting the proposed change in status of 180.22 acres of project lands, located on the west bank of the Osage River below Bagnell Dam, which impounds the project reservoir. Of the 180.22 acres, 116.36 acres lie above 600 feet mean sea level (msl), the area below which is the flood plain below Bagnell Dam. The remaining 63.88 acres lie below 600 feet msl, and are therefore in the flood plain. In its filing, AmerenUE proposed to remove from the project boundary the 116.36 acres located above the flood plain, but to retain within the boundary the 63.88 acres located in the flood plain. However, AmerenUE requested Commission approval to sell all the lands at issue to Silver Star Development, LLC, for private development purposes. Thus, the 63.88 acres located in the flood plain would remain within the project boundary, but would be owned by Silver Star Development, rather than by AmerenUE.

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<sup>1</sup> 116 FERC ¶ 62,127.

4. The Environmental Assessment (EA) prepared by Commission staff in the Osage relicensing proceeding<sup>2</sup> included an analysis of the impacts of the proposed land sale. Staff concluded that the 116.36 acres located above the flood plain were not required for project purposes, and thus could be removed from the project boundary, with the exception of existing access roads that are necessary for public recreation access to the river and for AmerenUE's access to the west end of Bagnell Dam.<sup>3</sup> With respect to the lands below the 600-foot contour, the Commission staff concluded that such lands

(a) represent valuable riparian and aquatic habitat, (b) contribute to recreation opportunities downstream, and (c) are necessary for both operation of the project, itself, as well as contributing to the overall flood control of the lower Osage River. Therefore, we recommend that the lands at and below the 600-foot contour elevation below Bagnall Dam, on both sides of the river, be retained within the project boundary.[<sup>4</sup>]

5. The August 14, 2006 Order adopted the recommendations in the EA. Thus, the order authorized the removal from the project boundary of the 116.36 acres above the 600-foot contour, except that AmerenUE was not authorized to alienate or remove from the project boundary the lands on which the referenced access roads were located. As to the remainder of the lands at issue, the order stated: "Staff concluded in the [EA] that the lands below the 600-foot contour currently leased to the American Legion are necessary for project purposes because they provide recreation opportunities and access to the lower Osage River. Therefore, these lands will remain within the project boundary."<sup>5</sup>

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<sup>2</sup> Environmental Assessment, Osage Hydroelectric Project No. 459-128, Office of Energy Projects (August 8, 2006).

<sup>3</sup> See EA at 260.

<sup>4</sup> *Id.* The EA also specifically noted that removal of the lands below the 600-foot contour could deprive the public of access to a recreational area on those lands, currently managed by the American Legion, that are used for fishing, camping, and other recreational activities. *Id.* at 217.

<sup>5</sup> 116 FERC ¶ 62,127 at 64,414. The order further noted that public recreational access would not be affected by the approved action "since the portion of the American Legion's lease used for such purposes would remain within the project boundary." *Id.*

6. AmerenUE timely requested rehearing.

### **Discussion**

7. In its request for rehearing, AmerenUE states that it did not request that the 63.18 acres lying below the 600-foot elevation be removed from the project boundary because it recognized that those lands serve project purposes and thus must remain within the boundary. Rather, it explains, it wants to retain that acreage within the project boundary, while transferring the land to Silver Star Development, subject to AmerenUE's retention, through an easement (a draft of which is appended to the rehearing request), of property interests needed to preserve project purposes, including public recreation. AmerenUE states that Silver Star will use the lands solely for public recreation, including access to the Osage River, and will greatly enhance current recreation and access facilities, and that acquisition of land along the shoreline is a key element of Silver Star's development plans for the area.

8. The Commission's policy is to maximize recreational opportunities at licensed projects. This is reflected in our policy statement on recreational development at licensed projects,<sup>6</sup> which requires licensees, among other things, to acquire in fee and include within the project boundary enough land to assure optimum development of the project's recreational resources.<sup>7</sup> While, as a general matter, title to lands within the project boundary may be owned by someone other than the licensee, so long as the licensee holds the property interests necessary to carry out project purposes, we have generally not permitted licensees to sell or enter into long-term leases of project land that are needed for such purposes.<sup>8</sup> Although we permit, where appropriate, licensees to work with governmental agencies and private interests, such as operators of user-fee facilities, to

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<sup>6</sup> 18 C.F.R. § 2.7 (2006).

<sup>7</sup> 18 C.F.R. § 2.7(a) (2006).

<sup>8</sup> See, e.g., *Great Northern Paper, Inc.*, 77 FERC ¶ 61,066 at 61,247-48 (1996) (rejecting proposed conservation easement to state for licensee-owned lands outside the existing project boundary because the lands were needed for project purposes and licensee would have retained no authority to carry out project purposes, and requiring lands to be brought into project boundary); *Central Maine Power Co.*, 75 FERC ¶ 61,052 at 61,192 (1996) (requiring licensee to amend recreation plan consistent with policy against long-term leasing of project lands to private parties for recreational residences); *East Bay Municipal Utility District*, 64 FERC ¶ 61,043 at 61,366-67 (1993), *reh'g denied*, 66 FERC ¶ 61,199 (1994) (approving removal from project boundary of trailer parks with long-term leases and requiring licensee to discontinue long-term residential leases within the remaining project boundary).

assist in carrying out plans for public recreation, the licensee is ultimately responsible for the construction, operation, and maintenance of the project's recreation facilities.<sup>9</sup>

9. As noted above, the EA and the August 14, 2006 Order stated that the lands below the 600-foot contour provide valuable riparian and aquatic habitat, afford public recreational opportunities, and are necessary for operation of the project and flood control below the dam. We affirm these findings, and conclude that the public interest would not be served by conveyance of the 63.86-acre tract to a private developer.

10. As a general matter, we consider it contrary to the public interest to allow a licensee that holds in fee lands needed for project purposes to transfer those lands to a third party, thus taking the lands away from an entity over which we have jurisdiction and giving them to one over which we do not. The end result of such a transaction would be to make it much more difficult for us to ensure that project purposes are served.

11. In this case, AmerenUE's proposal appears designed to vest future responsibility for recreational development of the tract wholly in the hands of the developer. As noted above, while the Commission does not object to licensees using public or private entities to assist in providing public recreation, the primary responsibility lies with the licensee. The proposed easement is not sufficient to allay our concerns regarding potential future use of the lands. While AmerenUE would retain necessary flowage and right-of-access easements, it would not retain any rights with respect to the construction, operation, and maintenance of recreation facilities. Silver Star Development could undertake actions on the land that might be inconsistent with future public recreational development. While we could, in such a case, ultimately require AmerenUE to reacquire the lands, it is far simpler to require it to retain the lands, and thus our authority over them, in the first instance.<sup>10</sup>

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<sup>9</sup> See *Northeast Generation Co.*, 109 FERC ¶ 61,217 at P 28 (2004) (rejecting local government agency's request for decisional role in shoreline and recreation management); *California Dept. of Water Resources*, 68 FERC ¶ 61,358 at 62,448-49 (1994) (affirming licensee's responsibility to fund all required recreation facilities); *Smith Falls Hydropower*, 56 FERC ¶ 61,279 at 62,091 (1991) (rejecting argument that Forest Service should be responsible for maintenance of project recreation facilities on Forest Service lands); *City of Seattle*, 57 FERC ¶ 61,228 at 61,738 (1991) (rejecting argument that licensee's recreation obligation was limited to funding of agencies' construction of facilities).

<sup>10</sup> We note that AmerenUE is free to contract with Silver Star Development, or any other entity, to undertake recreational development that is authorized or required by the project license.

12. In sum, AmerenUE has not demonstrated that the public interest supports sale of the lands in question,<sup>11</sup> and we therefore deny rehearing.

The Commission orders:

The request for rehearing filed by AmerenUE on September 13, 2006, is hereby denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>11</sup> AmerenUE's application stated that it has consulted with the Missouri Departments of Natural Resources and Conservation and the U.S. Fish and Wildlife Service to ensure the plan of development would not adversely affect any resources, but it provided no documentation of such consultation, except as to cultural resources. Indeed, it would have been difficult for resource agencies to comment, as the description of the proposed development accompanying the application consisted of a single letter-sized conceptual drawing and a page of text claiming that development of the tract would economically benefit the area. Letters opposing the amendment application were filed by American Legion Post 229 and individuals, including a City of Lake Ozark Alderman and member of the Planning and Zoning Commission. *See* letters to the Commission from Kerry Gray, filed June 14, 2006; Carol Colvin, filed July 6, 2006; and American Legion Post 229, filed August 22, September 7 and 11, 2006.