

168 FERC ¶ 61,164  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

Public Utility District No. 1 of Lewis County,  
Washington

Project No. 2833-110

ORDER DENYING REHEARING AND DISMISSING STAY

(Issued September 19, 2019)

1. On April 30, 2019, Commission staff issued an order amending the whitewater boating take-out site plan for the Cowlitz Falls Hydroelectric Project No. 2833.<sup>1</sup> On May 28 and 30, 2019, John Stormon and Pat Kelleher, respectively, filed requests for rehearing of the Amendment Order. As discussed below, the requests for rehearing are denied.

**I. Background**

2. On June 30, 1986, the Commission issued Public Utility District No. 1 of Lewis County, Washington (District or licensee) a license to construct and operate the 70.2-megawatt Cowlitz Falls Project, located on the Cispus River in Lewis County, Washington.<sup>2</sup> Construction of the planned project dam would impound water on the Cispus River, thereby eliminating whitewater rafting and kayaking opportunities in the project area. To preserve boating opportunities, Article 42 of the license required the licensee, after consultation with certain stakeholders, to construct a boat ramp take-out facility at the head of the reservoir to be created by the project.

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<sup>1</sup> *Public Utility District No. 1 of Lewis County, Wash.*, 167 FERC ¶ 62,074 (2019) (Amendment Order).

<sup>2</sup> *Public Utility District No. 1 of Lewis County, Wash.*, 35 FERC ¶ 61,431 (1986) (License Order).

3. The original whitewater take-out site developed by the licensee was accessible only by way of an approximately four-mile-long logging road through privately-owned lands, and was in use until the landowners closed the access road in 1995. Efforts by the licensee to reacquire easements for the access road were unsuccessful, and sections of the road were washed out due to severe floods in 1996, blocking access to the take-out site.

4. The Commission subsequently required the District submit a plan “for providing a take-out area, including public access thereto, on the lower Cispus River near the head of the project reservoir.”<sup>3</sup> The District spent several years developing a new whitewater take-out site (Copper Canyon Take-Out Site), the plans for which Commission staff approved, with modification, on June 22, 2006.<sup>4</sup> The site consists of a take-out area along the southern shore of the Cispus River, approximately one mile downstream from the previous take-out site. The Copper Canyon Creek Take-Out Site is accessible by an approximately 1,200-foot-long spur road (340 Road), rehabilitated by the licensee, that connects the take-out site to the 300 Road, a 4.7-mile-long private logging road used by Port Blakely Tree Farms LP (Port Blakely), which connects to the U.S. Forest Service’s Road 25. The licensee secured access to the take-out site through an agreement with Port Blakely which allowed access to the site via the 300 Road and 340 Road. Vehicular access, however, was limited to commercial users, provided they obtained an annual permit from Port Blakely and carried \$1 million in liability insurance. Further, a gate across the 340 Road prevented unauthorized vehicular access to the Copper Canyon Creek Take-Out Site. Non-commercial boaters could use the take-out site by parking their vehicles at a designated parking area on the shoulder of the 300 Road near the intersection with the 340 Road (located outside the gate), and walking to the site. These boaters were not required to obtain permits or carry liability insurance.<sup>5</sup> The agreement also allowed for Port Blakely to close public access to the 300 and 340 Roads as necessary for timber harvesting and management activities, and for other reasons deemed necessary to protect the public or its property. The Copper Canyon Creek Take-Out Site, and approximately 400 feet of the 340 Road immediately adjacent to the site are on lands owned by the District; the remainder of the 340 Road, shoulder parking area, and 300 Road are owned by Port Blakely.

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<sup>3</sup> *Public Utility Dist. No. 1 of Lewis County, Wash.*, 82 FERC ¶ 61,293, at 62,150 (1998).

<sup>4</sup> *Public Utility District No. 1 of Lewis County, Wash.*, 115 FERC ¶ 62,305 (June 22 Order), *order on reh’g*, 117 FERC ¶ 61,188 (2006) (November 16 Order).

<sup>5</sup> November 16 Order, 117 FERC ¶ 61,188 at PP 7-11.

5. As a result of the modifications to the Copper Canyon Creek Take-Out Site, the Commission required the District to file a revised project boundary which included “all lands and facilities comprising the project’s take-out site and access to the take-out that serve project purposes.”<sup>6</sup> On June 24, 2016, as supplemented on December 8, 2016, and February 14, 2017, the District filed a revised project boundary, adding the entire Copper Canyon Creek Take-Out Site, including the 340 Road and the shoulder parking area.<sup>7</sup> Commission staff approved the revised project boundary on February 23, 2017.<sup>8</sup>

6. In January 2018, the District renegotiated an access agreement with Port Blakely to address concerns raised by the boating community regarding site access and use. The renegotiated access agreement grants all users ungated access to the Copper Canyon Creek Take-Out Site through the 340 Road and eliminates the permit and liability insurance requirements. On March 1, 2018, as supplemented on March 2, June 14, and September 6, 2018, the licensee filed an application to amend the whitewater boating take-out site plan, incorporating the provisions of the renegotiated access agreement and proposing specific modifications to the Copper Canyon Creek Take-Out Site, including expanding the parking area, providing more up-to-date road closure information, and developing two alternate take-out sites for use when the Copper Canyon Creek Take-Out Site is closed. As a result of the improved site access included in its amended whitewater boating take-out site plan, the District also proposed to modify its project boundary to remove a majority of the 340 Road<sup>9</sup> and the shoulder parking area, as they were no longer needed to serve project purposes.<sup>10</sup> On April 30, 2019, Commission staff approved the licensee’s request to amend the whitewater boating take-out site plan, and found that the

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<sup>6</sup> *Id.* P 20.

<sup>7</sup> The District filed its revised project boundary pursuant to a March 7, 2016 letter from Commission staff which, in responding to complaints from the boating community regarding whitewater boating access, noted that the District had failed to file an updated project boundary as required by the November 16 Order, and directed the licensee to do so within 60 days of the date of the letter.

<sup>8</sup> *Public Utility District No. 1 of Lewis County, Wash.*, 158 FERC ¶ 62,128 (2017).

<sup>9</sup> Four hundred feet of the 340 Road on lands owned by the District remain in the project boundary.

<sup>10</sup> The revised access agreement also allows Port Blakely to terminate the access agreement in the event the 340 Road was not removed the project boundary.

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revised project boundary was consistent with Article 42 of the license, Form L-4 Standard Articles 5 and 17, as well as the public interest.<sup>11</sup>

7. On May 28, 2019, John Stormon filed a request for rehearing of the Amendment Order. Mr. Stormon argues that the order based its decision on the District's false and misleading statements regarding the proposed use of an alternative take-out site, erred in omitting the 300 Road and 340 Road from the project boundary, and did not take into account boater comments received.<sup>12</sup> Mr. Stormon also alleges that the District has not complied with certain provisions of its license, including Article 42.<sup>13</sup> On May 30, 2019, Pat Kelleher filed a request for rehearing of the Amendment Order, generally raising concerns over the exclusion of the 300 Road and 340 Road from the project boundary.<sup>14</sup>

## **II. Discussion**

### **A. Reliance on False and Misleading Statements**

8. Mr. Stormon contends that the Amendment Order was based on "false and misleading statements" from the District regarding the proposed use of an alternative take-out site (the North Boat Launch) when the Copper Canyon Creek Take-Out Site is unavailable.<sup>15</sup> Specifically, Mr. Stormon states that the District falsely stated in its June 14, 2018 supplement to its Amendment Application that the North Boat Launch "could be used during reservoir drawdowns."<sup>16</sup> Mr. Stormon alleges that the District "intended to mislead [the Commission] and the boating community" because at the District's annual meeting with the boating community, held April 30, 2019, the District

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<sup>11</sup> Amendment Order, 167 FERC ¶ 62,074 at PP 44, 58.

<sup>12</sup> See John Stormon's May 28, 2019 Rehearing Request at 1 (Stormon Rehearing Request).

<sup>13</sup> *Id.*

<sup>14</sup> See Pat Kelleher's May 30, 2019 Rehearing Request.

<sup>15</sup> Stormon Rehearing Request at 1-2.

<sup>16</sup> *Id.* at 2 (citing the District's June 14, 2018 Proposed Development of Alternate Whitewater Takeout Sites and Improvements to Copper Canyon Creek Takeout Site at Appendix 1).

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clarified that the North Boat Launch would not be available during reservoir drawdowns.<sup>17</sup>

9. The Amendment Order found that it was in the public interest for the District to develop the Laydown Site and North Boat Launch site as alternate take out sites during times when the approved take-out site is closed or when access to the site is closed.<sup>18</sup> The Amendment Order further approved the District's "conceptual plan for the development of the Laydown Site and North Boat Launch site as alternate take-out sites."<sup>19</sup> In approving these conceptual plans, the Amendment Order requires the District to file, for Commission approval, final design plans for the alternate take out sites, which include, among other information, "a description of the site location, layout, road access, and availability."<sup>20</sup> The Amendment Order further requires the District to develop these final design plans in consultation with several parties, including Mr. Stormon, and to include in the plans "the licensee's response to any comments and recommendations from the consulting parties."<sup>21</sup> Accordingly, any concerns Mr. Stormon has regarding the availability of the North Boat Launch site during reservoir drawdowns are premature at this time, and may be raised during the development of the final design plans.

#### **B. Project Boundary Modifications**

10. Mr. Stormon alleges that the Amendment Order erred by not requiring the 300 Road and 340 Road be included in the project boundary, as they are necessary for the public to access the Copper Canyon Creek Take-Out Site.<sup>22</sup> Mr. Stormon states that because the Commission's regulatory authority is limited to the project boundary, the boundary should be revised to include the 300 Road and 340 Roads, so that the Commission can enforce the licensee's compliance with Articles 5 and 15 of its license, which, Mr. Stormon states, "require [the District] to provide, or arrange for, public access

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<sup>17</sup> *Id.*

<sup>18</sup> Amendment Order, 167 FERC ¶ 62,074 at PP 26-32.

<sup>19</sup> *Id.* P 33.

<sup>20</sup> *Id.* P 34.

<sup>21</sup> *Id.* at Ordering Paragraph (C).

<sup>22</sup> Stormon Rehearing Request at 3; *see also* Mr. Kelleher's Request for Rehearing at 5-11.

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to the takeout sites for the life of the project.”<sup>23</sup> In addition, Mr. Kelleher seems to suggest that the Amendment Order erred in not including Roads 300 and 340 within the project boundary, however Mr. Kelleher’s rehearing request fails to state with any specificity the alleged error or errors in the Amendment Order. We nonetheless address his arguments below as we construe them.

11. As discussed in the Amendment Order, adequate access to the Copper Canyon Creek Take-Out Site is provided by the District’s amended whitewater boating take-out site plan, even with the removal of the 300 Road and 340 Roads from the project boundary.<sup>24</sup> As a result of the revised access agreement with Port Blakely, all boaters have vehicular access to the Copper Canyon Creek Take-Out Site without needing to secure permits or obtain liability insurance. Previously, non-commercial users of the Copper Canyon Creek Take-Out Site were required to walk approximately 1,200 feet from the take-out site to a parking area on the shoulder of the 300 Road near the intersection of the 340 Road. Therefore, the Amendment Order determined that even with the removal of the 340 Road from the project boundary, the District’s modifications to the Copper Canyon Creek Take-Out Site would “significantly improve” boater access.<sup>25</sup> We affirm this determination.

12. With respect to Mr. Stormon’s assertion that the roads necessary to access the Copper Canyon Creek Take-Out Site must be included in the project boundary, the Commission has previously found it appropriate to exclude roads from project boundaries “‘primarily serving other purposes and only incidentally providing access to project facilities...’”<sup>26</sup> In determining whether or not such a road primarily serves other purposes, the Commission has examined factors including what the roads are used for, and whether or not the roads would be used and maintained in absence of the project.<sup>27</sup> Here, use of the 300 and 340 roads to access project facilities is incidental to the roads’

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<sup>23</sup> Stormon Rehearing Request at 3.

<sup>24</sup> See Amendment Order, 167 FERC ¶ 62,074 at PP 37-46.

<sup>25</sup> *Id.* P 43.

<sup>26</sup> *Pacific Gas and Elec. Co.*, 129 FERC ¶ 61,026, at PP 9-11 (2009) (quoting *Portland General Elec. Co.*, 117 FERC ¶ 61,112, at P 45 (2006)).

<sup>27</sup> See *Pacific Gas and Elec. Co.*, 129 FERC ¶ 61,026 at P 11; *Portland General Elec. Co.*, 117 FERC ¶ 61,112 at P 46.

primary purpose of supporting Port Blakely's logging operations. The record demonstrates that the roads are still actively used and maintained by Port Blakely,<sup>28</sup> and would still be used in the same manner by Port Blakely if they were not necessary to access project facilities. Thus, we find that the 300 Road and 340 Road were appropriately omitted from the project boundary.

13. Mr. Stormon's assertion that the 300 Road and 340 Road must remain within the project boundary so that the Commission retains the authority to require the District to comply with its license, particularly Standard Articles 5 and 17, is also unfounded. As an initial matter, the Amendment Order discussed the nature of Standard Articles 5 and 17 explaining:

[a]rticles 5 and 17, respectively are standard license articles that require the licensee to acquire and maintain all the property rights/lands necessary to construct, operate, and maintain the licensed project, including the rights needed to carry-out license-required projects purposes, and to provide reasonable free public access to project lands and waters for recreational purposes.<sup>29</sup>

As the District owns the land on which the Copper Canyon Creek Take-Out Site is located, it possesses the rights necessary to construct, operate, and maintain the Copper Canyon Creek Take-Out Site. Further, as discussed in greater detail above, the District's updated access agreement with Port Blakely provides the public adequate access to the Copper Canyon Creek Take-Out Site. Therefore, the District is in compliance with Standard Articles 5 and 17 of its license.

14. Contrary to Mr. Stormon's assertion, the fact that the 300 and 340 Roads are outside the project boundary does not mean that the Commission lacks the authority to ensure that the District maintains adequate public access to the Copper Canyon Creek Take-Out Site. A project boundary "enables the Commission to identify the lands on which project-related activities will occur"<sup>30</sup> and is "used to designate the geographic

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<sup>28</sup> For example, the updated access agreement between Port Blakely and the District provides that Port Blakely would give notice before road closures that were necessary as a result of "timber harvest operations" and road maintenance activities."

<sup>29</sup> See Amendment Order, 167 FERC ¶ 62,074 at P 57 (citing *Standardized Conditions for Inclusion in Preliminary Permits and Licenses Issued Under Part I of the Federal Power Act*, 54 F.P.C. 1792, 1824-1832 (1975)).

<sup>30</sup> *PacifiCorp*, 80 FERC ¶ 61,334, at 62,113 (1997).

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extent of the lands ... that the license identifies as comprising the licensed project.”<sup>31</sup> Therefore, while the project boundary is intended, as a matter of administrative convenience, to define those lands, waters, and facilities that comprise a project, it does not set the limit of the Commission’s authority or limit the Commission’s authority to require a licensee to provide reasonable access to recreation facilities provided for in the license.<sup>32</sup> As noted above, we find that the District’s access agreement with Port Blakely provides reasonable free public access to the Copper Canyon Creek Take-Out Site. However, in the event of an unforeseen circumstance resulting in a failure on behalf of the licensee to provide reasonable free public access to the Copper Canyon Creek Take-Out Site, the Commission has the authority to require the licensee to acquire necessary rights to ensure such access is maintained.<sup>33</sup>

15. Last, Mr. Stormon argues that, throughout the license term, the District has failed to comply with the conditions of its license to provide public access to the Copper Canyon Creek Take-Out Site.<sup>34</sup> In 2016, Commission staff addressed complaints, including those by Mr. Stormon, regarding public access to the Copper Canyon Creek Take-Out Site and concluded, among other things, that the District was in compliance with its license.<sup>35</sup> Since then, the District has continued to work with interested stakeholders to address the operation and access to the Copper Canyon Creek Take-Out Site, ultimately leading to the amended whitewater boating take-out site plan, which is the subject of this rehearing. As discussed above, the amended plan improves public access to the recreation facilities and is consistent with the requirements of Standard Articles 5 and 17, and Article 42 of the license.

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<sup>31</sup> *N.Y. Power Auth.*, 118 FERC ¶ 61,206, at P 51 (2007).

<sup>32</sup> *PacifiCorp*, 80 FERC at 62,113 (stating that property need not be located within the project boundary in order for the Commission to require a licensee to acquire additional interests in said property).

<sup>33</sup> *Id.*

<sup>34</sup> *See Stormon Rehearing Request* at 1.

<sup>35</sup> November 30, 2016 Letter Order at 8.

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### C. Failure to Address Comments

16. Mr. Stormon also states that the Amendment Order “recognizes that [the licensee] did not address all submitted comments,” and alleges that the order “erred by not addressing comments submitted by the boating community.”<sup>36</sup>

17. While Mr. Stormon is correct that the Amendment Order stated that the District adequately responded to “*some* of the concerns raised by the commenters,”<sup>37</sup> the Amendment Order also identified concerns that were not addressed by the District and addressed them. For example, the Amendment Order took into the account the various concerns raised regarding the amended project boundary,<sup>38</sup> the proposed alternate take-out sites,<sup>39</sup> and the proposed new parking area,<sup>40</sup> ultimately determining that the proposed project boundary modifications, alternate whitewater take-out sites, and new parking site were acceptable.<sup>41</sup> All comments were considered in this process.

18. Regarding comments requesting recreation use monitoring,<sup>42</sup> collaboration between the District and interested parties in the final Copper Canyon Creek Take-Out Site design,<sup>43</sup> and increased notification of 300 Road closures,<sup>44</sup> the Amendment Order requires all of these. Ordering Paragraph (E) requires the District to file annual reports in 2020, 2021, and every six years thereafter, including, among other information, the number and type of vehicles and the percentage of total parking capacity occupied at the

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<sup>36</sup> Stormon Rehearing Request at 4.

<sup>37</sup> Amendment Order, 167 FERC ¶ 62,074 at P 17 (emphasis added).

<sup>38</sup> *Id.* P 40.

<sup>39</sup> *Id.* PP 28, 30.

<sup>40</sup> *Id.* PP 21-22.

<sup>41</sup> Amendment Order, 167 FERC ¶ 62,074 at PP 26-46.

<sup>42</sup> *See* Michael Deckert’s August 22, 2018 Comments at 2.

<sup>43</sup> *See* American Whitewater’s August 21, 2018 Comments at 2; Mr. Stormon’s August 21, 2018 Comments at 2-3; Rebecca Post’s August 21, 2018 Comments at 2-3; David Van Cleve’s August 21, 2018 Comments at 1.

<sup>44</sup> *See* American Whitewater’s August 21, 2018 Comments at 2; Michael Decker’s August 22, 2018 Comments at 3-4; Rebecca Post’s August 21, 2018 Comments at 2; Margie Van Cleve’s August 21, 2018 Comments at 1.

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Copper Canyon Creek Take-Out Site.<sup>45</sup> Ordering Paragraph (E) also requires the District to record instances of closures of either the 300 Road or 340 Road and the types of advance notification provided.<sup>46</sup> Last, Ordering Paragraphs (B) and (C) require the District to develop final design plans for the Copper Canyon Take-Out Site and the alternate take-out sites after consultation with several parties, including American Whitewater, Michael Deckert, and Mr. Stormon.<sup>47</sup> We are therefore satisfied that the Amendment Order considered, and sufficiently addressed, the comments and concerns that were raised.

**D. Request for Stay**

19. In addition to his request for rehearing, Mr. Kelleher also requests a stay of Ordering Paragraph (F) of the Amendment Order, which requires the District to file revised Exhibit K drawings reflecting the updated project boundary, until the Commission addresses the rehearing requests.<sup>48</sup> As we have denied the requests for rehearing, Mr. Kelleher's request for a stay of Ordering Paragraph (F) is dismissed as moot.

The Commission Orders:

(A) John Stormon's May 28, 2019 and Pat Kelleher's May 30, 2019 request for rehearing are denied, as discussed in the order.

(B) Pat Kelleher's request for a stay of Ordering Paragraph (F) of the Amendment Order is dismissed as moot.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>45</sup> Amendment Order, 167 FERC ¶ 62,074 at Ordering Paragraph (E).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at Ordering Paragraphs (B), (C).

<sup>48</sup> *See* Mr. Kelleher's Rehearing Request at 1.