

143 FERC ¶ 61,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Utility District No. 2 of Grant County,
Washington

Project No. 2114-257

ORDER DENYING REHEARING

(Issued June 20, 2013)

1. Mr. Pat Kelleher has filed a timely request for rehearing of Commission staff's December 17, 2012 letter denying his request that Public Utility District No. 2 of Grant County, Washington (Grant PUD) be required to provide public vehicular access to the Airstrip Site, a site at Grant PUD's Priest Rapids Project No. 2114 that is reserved for future recreation development. Because this issue was resolved on relicensing and again in post-licensing proceedings, and because Mr. Kelleher's arguments otherwise lack merit, we deny rehearing.

Background

2. The Priest Rapids Project is located on the mid-Columbia River in portions of Grant, Yakima, Kittitas, Douglas, Benton, and Chelan Counties, Washington. The project, which consists of the Wanapum Development and the Priest Rapids Development, was relicensed by the Commission in 2008.¹

3. Lands within the Wanapum Development include the Airstrip Site – so named because there is an abandoned private airstrip on the upper west section of the property – an 80-acre piece of property owned in fee by Grant PUD and located on the west bank of Wanapum Reservoir. A single-lane boat launch, a dock, and two jetties lie at the north end of the Airstrip Site. The adjacent inland property is private, and Grant PUD does not have permission to allow public access across this private property, meaning the Airstrip Site is only accessible to the public by boat. Grant PUD accesses the Airstrip Site by crossing the neighboring inland private property over an easement. The easement allows Grant PUD to access the Airstrip Site only for purposes of controlling noxious weeds and

¹ *Public Utility District No. 2 of Grant County, Washington*, 123 FERC ¶ 61,049 (2008) (Relicense Order).

maintaining the property.² The Airstrip Site is included in the project boundary as a potential future recreation site, as discussed below.

4. In the course of the relicensing proceeding, Grant PUD filed a proposed recreation plan. Among other things, Grant PUD proposed to develop the Airstrip Site for public recreation. Mr. Kelleher filed comments recommending that Grant PUD be required to provide public access road rights to the Airstrip Site across lands owned by the Washington Department of Transportation (Washington DOT).³

5. Article 418 of the license, *Priest Rapids Recreation Resource Management Plan*, modified and approved Grant PUD's recreation plan. Article 418 did not include the Airstrip Site among the recreation sites the licensee was required to develop immediately, because the site included significant waterfowl and riparian habitat,⁴ but instead required Grant PUD, in consultation with the U.S. Fish and Wildlife Service (FWS) and Washington Department of Fish and Wildlife (Washington DFW), to evaluate the site and file recommendations regarding whether it should be developed for recreation.⁵

6. Mr. Kelleher did not seek rehearing of the license order.

7. Thereafter, Grant PUD consulted with FWS and Washington DFW as required by Article 418 and filed, on October 15, 2009, a project facilities assessment report that included discussion of the Airstrip Site. Grant PUD's conclusion was to "[c]onsider using the Airstrip Site for future recreation development if the use of adjacent facilities is regularly exceeding their capacity on peak and non-peak weekends" but to "[c]onsider seasonal restrictions to promote fall and winter waterfowl concentration" and to

² See Grant PUD October 15, 2009 Facilities Assessment Report, Appendix A, at 3-6.

³ Relicense Order, 123 FERC ¶ 61,049 at P 122.

⁴ The environmental impact statement prepared by Commission staff with respect to the relicensing of the Priest Rapids Project concluded that "[p]roposed recreation development at the Airstrip Site could result in an unavoidable adverse impact on wildlife because the area is a fall and winter waterfowl concentration area and riparian habitat occurs in the area." See Final Environmental Impact Statement, Priest Rapids Hydroelectric Project, Washington, FERC Project No. 2114 (issued November 17, 2006) at 363. Also, the Washington Department of Fish and Wildlife has designated the area as a fall and winter waterfowl concentration area and as high quality riparian habitat. Relicense Order, 123 FERC ¶ 61,049 at P 116.

⁵ *Id.* P 117 and 61,334-35. Grant PUD was also to study another potential recreation site, the Wanapum Recreation Area, which is not at issue here.

“[c]onsider altering [the] concept site plan to address reducing impacts on riparian habitat.”⁶ Grant PUD also explained that, in the recreation facilities assessment process, it had acquired Getty's Cove campground, an existing facility located near the Airstrip Site.⁷ Grant PUD explained that Getty's Cove might serve as a possible replacement for the Airstrip Site recreation expansion.⁸

8. On November 18, 2009, Mr. Kelleher filed comments asking the Commission to immediately provide public access to the Airstrip Site.

9. On June 14, 2011, the Commission staff approved the project facilities assessment.⁹ The order noted that, while the consulting entities had concluded that the Airstrip Site was suitable for recreation facility development, as well as habitat enhancement, the site was currently only accessible to the public from the water.¹⁰ Commission staff concluded that the specific recreation facilities to be developed at the site would be determined during the development of a required five-year update to Grant PUD's recreation plan, due in 2015.¹¹

10. On July 1, 2011, Mr. Kelleher filed a motion to intervene and request for rehearing of the order approving the project facilities assessment.

11. On August 3, 2011, the Commission issued a notice denying Mr. Kelleher's motion to intervene and rejecting his request for rehearing on the grounds that the post-license proceeding regarding the facilities assessment report was not one in which Mr. Kelleher was entitled to intervene.¹² Mr. Kelleher did not seek rehearing of the notice.

⁶ Grant PUD October 15, 2009 Facilities Assessment Report at 8.

⁷ *Id.* at 6.

⁸ *Id.*

⁹ *Public Utility District No. 2 of Grant County, Washington*, 135 FERC ¶ 62,216 (2011).

¹⁰ *Id.* P 5. The order also explained that the acquisition of the Getty's Cove Campground has expanded public recreational opportunities. *Id.* P 9.

¹¹ *Id.*

¹² *Public Utility District No. 2 of Grant County, Washington*, 136 FERC ¶ 61,078 (2011).

12. On September 27, 2012, Mr. Kelleher filed what he styled a “joint use application of Pat Kelleher for non-project use of land and waters.” The pleading stated that Grant PUD and the Ellensburg Boat Club were able to gain access to the Airstrip Site through exclusive easements with Washington DOT and with the boat club itself. Mr. Kelleher asserted that the public “has unrestricted recreational access to all lands at the Airstrip project recreation site per Article 18 of the project license.” Mr. Kelleher appeared to request that the Commission require Grant PUD to give Vantage Bay, a private, 290-lot proposed community which he has an option to buy,¹³ access to the roads used by Grant PUD and the Ellensburg Boat Club.

13. On December 17, 2012, Commission staff responded to Mr. Kelleher’s filing, explaining that the Airstrip Site was not a project recreation facility, so that Grant PUD has the right to restrict access to it. Staff explained that Mr. Kelleher could, however, request access to the site from Grant PUD.

14. On January 14, 2013, Mr. Kelleher timely requested rehearing of the December 17, 2012 letter.¹⁴

Discussion

15. The so-called “joint use” article is a standard provision that the Commission includes in hydropower licenses. In the case of the Priest Rapids Project, it is standard License Article 13.¹⁵ The joint use article provides, in pertinent part, that,

[o]n the application of any person, association, corporation, federal agency, state, or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses.

16. By the terms of the joint use article, Mr. Kelleher’s petition was deficient in two respects. First, Grant PUD does not own the private lands over which Mr. Kelleher seeks to be granted access: as noted above, they are owned by Washington DOT and the

¹³ See Mr. Kelleher’s January 14, 2013 Request for Rehearing at 2.

¹⁴ Part of Mr. Kelleher’s pleading is a motion to intervene. Since the matter at hand was initiated by his September 27, 2012 pleading, there is no need for the motion.

¹⁵ See Relicense Order, 123 FERC at 61,339-40.

Ellensburg Boat Club. Accordingly, the Commission cannot require Grant PUD to authorize Mr. Kelleher to use them. Second, the joint use article refers to uses “for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses.” A typical joint use is when a town seeks to withdraw flows from a project reservoir for municipal water supply or a power plant seeks to use water for cooling. The joint use article makes no mention of recreational use, which is the purpose of Mr. Kelleher’s petition. Accordingly, staff correctly informed Mr. Kelleher that he was not entitled to the relief he requested.

17. Mr. Kelleher also errs in several other respects. He asserts that the Airstrip Site is a project recreation facility because it is listed in the recreation resource management plan filed by Grant PUD during the relicensing proceeding, and because the Commission subsequently approved the plan.¹⁶ As discussed above, however, the Commission specifically considered whether to include the Airstrip Site as a recreation facility in the relicensing order and decided instead to require Grant PUD to file a post-license report making recommendations as the status of the site. After Grant PUD filed the report, Commission staff specifically decided to defer further consideration of making the Airstrip Site a project recreation area until the next resource management plan update in 2015. In essence, Mr. Kelleher is mounting improper collateral attacks on the relicense order and the order on the facilities assessment report.

18. Mr. Kelleher contends that, under standard License Article 18, the licensee is required to provide him access to the Airstrip Site and that “[t]here is no linkage between ‘project recreation facility’ and public access requirements in the standard license article.”¹⁷ Standard Article 18 provides that “the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and water for navigation and for outdoor recreational purposes”¹⁸ Grant PUD has done nothing to prevent the public from obtaining access to the site via water. Given that the Commission has not yet made the site a project recreation area, it would not be reasonable now to require the licensee to acquire additional property rights that would be needed to provide public access to it by land (indeed, given the environmental sensitivity of the area, encouraging widespread public use of the Airstrip Site without also providing protective measures might well be environmentally irresponsible). Standard Article 18 cannot fairly be read

¹⁶ Request for Rehearing at 2.

¹⁷ *Id.* at 2-4.

¹⁸ *See* Relicense Order, 123 FERC at 61,340.

to require a licensee to develop new vehicular access to an area that Commission has explicitly declined to make a current recreation site.¹⁹

19. Mr. Kelleher asserts that the public has access to the Airstrip Site boat launch and that the road access he requests is diminutive and is already used by Grant PUD for environmental protection purposes.²⁰ The fact that the public has access to the site by water does not mean that Grant PUD must provide access by road, and the fact that Grant PUD uses the road leading to the site to perform environmental and maintenance activities does not mean that it should be required to obtain additional rights for Mr. Kelleher's benefit.²¹

20. Mr. Kelleher has failed to demonstrate any error in staff's conclusion that Grant PUD is not required to grant him access by road to the Airstrip Site.²² His request for rehearing is therefore denied.

¹⁹ Mr. Kelleher cites *AER NY-Gen, LLC*, 139 FERC ¶ 62,132 (2012), as an instance where the Commission required the licensee to expand a project boundary to include an access road. That case, however, involved an instance where a third party had blocked a road that the project license required to be available to allow access to a project recreation facility. Here, there is no project recreation facility involved, and the Commission has not ordered Grant PUD to provide access to the Airstrip Site.

²⁰ Request for Rehearing at 5.

²¹ Mr. Kelleher makes several other unfounded arguments. He alleges that an unspecified recreational enhancement encroaches on Vantage Bay's property. Request for rehearing at 5. This is not only unproven, but irrelevant to the issue at hand. He further asserts that Grant PUD has "a long history" of conveying easements only to the privileged few. *Id.* This allegation is also unproven and has no bearing on the Commission's prior determinations that the Airstrip Site should not currently be a project recreation site. Mr. Kelleher references Standard License Article 5, which requires a licensee to obtain title to project property within five years of license issuance. *Id.* at 6. Given that the Commission has not made a road accessing the Airstrip Site part of the project, Standard Article 5 is not germane here.

²² We also note that Mr. Kelleher has access to sites that are project recreation facilities, including boat launch facilities at the Kittitas and Wanapum recreation areas. Both the Kittitas and Wanapum recreation areas are less than three shoreline miles from the Airstrip Site, and Mr. Kelleher does not allege that these facilities are in any way insufficient to meet public recreational needs.

The Commission orders:

The request for rehearing filed by Mr. Pat Kelleher, on January 14, 2013, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose
Secretary.