

Appendix D

Summary of Public Comments and Central's Consideration/Response

The Central Nebraska Public Power and Irrigation District

Final Project Boundary Review Report

Federal Energy Regulatory Commission Project No. 1417

December, 2020

The following is a brief summary of the public comments, by major topic or location of interest, and Central's consideration and response.

Property Rights

Several of the public comments relate in one way or another to the broad issue of the interaction between the Project boundary and private property rights, including understanding the difference between the Project boundary and land ownership boundaries, the reasons for setting or adjusting the Project boundary, and whether setting or changing Project boundary affects property rights. Central does not believe that the confusion regarding the relationship between a FERC Project boundary and property rights is unique to this Project, but is a common misunderstanding throughout the country. A Project boundary is not the same thing as a land-ownership boundary, though at times the latter may be used for the former. The establishment of a Project boundary is an administrative function for purposes of identifying lands or waters used or needed for Project purposes. The setting or changing of a Project boundary, even on lands not owned by the licensee (or even on which the licensee has no legal interests whatsoever, such as erosion or flowage easements) does not change property rights. To the extent that the Project needs to have rights within a designated Project boundary, it must acquire them. FERC's Guidance for Shoreline Management Planning at Hydropower Projects (FERC, 2012) and Compliance Handbook (FERC, 2015) provides as follows:

- “The Project boundary is an administrative marker to clearly delineate those lands necessary for operation and maintenance of the Project and for other Project purposes, such as recreation, shoreline control, or protection of environmental resources. The

boundary does not affect existing property rights.” Guidance for Shoreline Management Planning at Hydropower Projects (FERC, 2012)

- “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. A licensee is required to acquire and retain all interests in non-federal lands necessary or appropriate to carry out Project purposes.” Compliance Handbook (FERC, 2015)
- “Occasionally, lands outside a Project boundary must be used to serve a particular Project need or to satisfy a particular license requirement. In most of these cases, the licensee must apply for a change to the Project boundary to add those lands to the Project and bring the lands into the Project boundary. For example, if certain non-Project lands were determined to be necessary to accommodate the recreation facilities and activities included in a Project's approved recreation plan, proposed changes to the Project boundary would be approved to include those lands in the Project. Likewise, if it were determined that a Project licensee had ongoing license responsibilities in connection with lands not currently within the Project (e.g., facility operation and maintenance or resource management requirements), those lands would be brought into the Project through approved changes to the Project boundary.” Compliance Handbook (FERC, 2015)

Increased Regulation

Several public comments raised concerns that including additional lands inside the Project boundary could result in increased regulations or restrictions on private uses.

It is certainly possible that some additional regulation of uses and develop could result from land being inside the Project boundary. However, such regulation would be for purposes of managing and protecting Project resources consistent with FERC regulations and the Project license, including plans and procedures required, approved, or overseen by FERC. Additionally, any restrictions on landowner uses must be consistent with those rights that the licensee has or acquires.

Shoreline Erosion

Some commenters suggest that existing rights or conditions, or potential management activities, should preclude the need to adjust the Project boundary to account for erosion.

Some commenters, primarily at Lake McConaughy, suggest that the boundary need not be adjusted to include eroding lands if Central already has erosion rights. Other commenters,

again primarily at Lake McConaughy, suggest that the boundary should not be adjusted to include eroding lands, but that instead Central should prevent the erosion from occurring.

Finally, some commenters identify areas where they believe that the shoreline is experiencing little or no ongoing erosion, either because the conditions for erosion don't exist or because it is adequately controlled, and therefore little or no adjustment to the Project boundary is needed.

The presence of erosion rights, or someone's expectation that Central could or should do more to control erosion, does not negate the need to move the Project boundary in locations of active erosion. While existing erosion rights may permit Central's erosion of certain lands, it remains the case that Project's waters, as a result of erosion, will come to occupy those lands. Additionally, regardless of whether or not erosion rights currently exist, there will be places where stopping the erosion may be impractical when budgeting, scheduling, planning, permitting, and/or technical feasibility are taken into consideration.¹ Even in places where erosion control efforts by Central might be possible, Central will still need access to the shoreline as necessary to conduct this work. Whether erosion rights do or do not exist, and whether Central will implement measures to control erosion or will instead let it continue, the lands subject to erosion should be inside the Project boundary.²

Central does agree that at locations where the shoreline is experiencing little or no ongoing erosion, either because the conditions for erosion don't exist or because it is adequately controlled, then there may be little or no changes needed in the boundary³. Central reviewed those locations where commenters indicated that there was little or no active erosion, or where such erosion is adequately controlled, and did reduce the amount of land added to the Final Proposed Project Boundary in some locations.

¹ This is particularly the case at Lake McConaughy, where wave sizes and forces can be quite significant.

² Of course, simply including these lands inside the boundary does not automatically give Central the right to take or erode these lands, and Central may have to acquire rights in those lands depending on the Project needs and whatever rights Central may already have.

³ Provided that there are no other Project needs that justify boundary adjustments at the locations in question.

Keep the Public Informed

Some commenters indicated a desire to be kept informed as this process moves forward.

Additionally, though not stated in written comments, Central is aware that several members of the public desire to provide comments directly to FERC, either in addition to or instead of providing comments to Central.

Central will be posting this non-capacity amendment application on its website, and will make an effort to inform local stakeholders through a press release, social media, and direct contacts. Additionally, Central requests that FERC use its discretion as described in § 2.7.2.3 of the Compliance Handbook to issue a 30-day public notice seeking comments; should FERC do so, Central will also post that notice to its website and make an effort to inform local stakeholders.

Jeffrey Dam Flood Study

Central received several comments related to the Jeffrey Dam Flood Study. Most of these comments were from Central's tenants and subtenants, as well as some adjacent landowners, at Jeffrey Lake; this is reasonable, given that the study is specific to, and the consequences for the boundary review are greatest at, Jeffrey Lake.

Several commenters indicated that they did not believe that a flood of the magnitude described in the Jeffrey Dam Flood Study is possible. Central understands that extreme flood events, such as that used in the Jeffrey Dam Flood Study, can be difficult to imagine. The return periods of

even small flood events, such as a 100-year flood, exceed an average American's lifespan, and are not typical of most people's personal experiences. However, such floods are possible, and can be estimated by field experts using industry-accepted methodologies. In the case of the Jeffrey Dam Flood Study, the flood assumed was determined using a site specific approach, and is less than the "probable maximum flood." As such, not only is the flood used in the Jeffrey Dam Flood Study possible, it is not even the largest that is possible for that location.

Several commenters mentioned that the results of the Jeffrey Dam Flood Study appear to conflict with FEMA flood maps for Jeffrey Lake. Central understands the confusion, as the general public may not recognize the purposes and limitations of FEMA flood maps. FEMA flood mapping is done as a part of the National Flood Insurance Program, and identifies the relatively small 100-year floodplain⁴, but it is reasonable to expect that the resultant flooding would be greater than that indicated on a FEMA flood map.

At least one commenter suggested that the reason the reservoir would go higher during a flood was because of sediment accumulation in the reservoir. However, this is not correct. While there has been substantial accumulation of sediment in the reservoir over the years, this accumulation is in the bottom of the reservoir, and does not occupy the space above the normal operating level where all of the flood surcharge would occur. Indeed, if anything, to the

⁴ According to FEMA: "Flood hazard areas identified on the Flood Insurance Rate Map are identified as a Special Flood Hazard Area (SFHA). SFHA are defined as the area that will be inundated by the flood event having a 1-percent chance of being equaled or exceeded in any given year. The 1-percent annual chance flood is also referred to as the base flood or 100-year flood." (<https://www.fema.gov/flood-zones>, accessed May 6, 2020)

extent that some of the sedimentation is the result of erosion of material located at and above normal operating levels, such erosion increases the space available in the surcharge area, slightly decreasing the elevation to which the reservoir would surcharge for any floods small enough to not overtop the dam.

At least one commenter pointed out what they believed to be a mistake on the amount of surcharge and risk to properties assumed by Central, stating that the Jeffrey Dam Flood Study indicates the failure of the dam would result in an incremental rise of 2' on downstream structures rather than the 14' referenced in the meeting. Even with all the unlikely scenarios, Mead & Hunt stated "Results of the dam failure analysis show that all structures below the dam experience an incremental rise of two feet or less. Mead and Hunt concluded that the IDF for Jeffrey Reservoir is equal to 10,725 cfs and that failure during the IDF does not present a hazard to human life or cause significant property damage."

However, the commenter is taking these results out of context. The original purpose of the study was to evaluate the impacts of such a flood, and the resultant failure of the dam, on people and property downstream from the dam; and it is to these downstream people and properties that the results cited by the commenter apply. In the Jeffrey Dam Flood Study, the water level in the reservoir is shown to exceed the top of the dam, ultimately causing the dam to fail due to overtopping.

Some commenters raised concerns that including lands in the Project boundary on the basis of flood surcharge could result in elevation restrictions for future construction, and suggested that sirens or phone-notification systems could be used in lieu of including those lands in the

boundary. However, Central believes that the potential for rapid surcharge puts lives at risk, thereby necessitating the inclusion of these lands within the Project boundary, regardless of whether that risk is then mitigated through construction restrictions, alert systems, or other means.

Finally, several commenters state that, even if such a flood and surcharge is possible, it is too unlikely of an event to be considered for purposes of setting the Project boundary. On this point, Central agrees that the probability of such an event is low, and it is not Central's intent to include in the Project all lands that have even a remote chance of being inundated; Central has decided to significantly reduce the magnitude of flooding considered for setting flood surcharge buffers in the Final Boundary Review.

Notwithstanding Central's disagreement with most of the comments regarding the Jeffrey Dam Flood Study, Central has decided against basing flood surcharge considerations on the Jeffrey Dam Flood Study because of the extremely low probability of such an event, and utilizing flood surcharge assumptions of significantly smaller magnitudes in the Final Boundary Review.

Improper Motivations

Some commenters suggest improper motivations on the part of Central, describing Central boundary review efforts and Project boundary proposals in such terms as "power grab", "land grab", "overreach", and "harassment". Central disagrees with such characterizations, and

asserts that its efforts and recommendations are done for purposes of establishing a Project boundary that is appropriate to Project purposes.

Lakeshore, Albee's, and A&R Subdivisions

The Lakeshore, Albee's, and A&R subdivisions are located along the north side, western half, of Lake McConaughy. These subdivisions consist of privately-owned lots, and the shoreline in this area is subject to erosion. Central has erosion rights on substantial portions, but not all, of these lands. These subdivisions were included as part of the "Area 2" discussion in the McConaughy Boundary Review Report, which states that "[t]he current Project boundary does not include adequate buffers in the vicinity of active erosion or for purposes of shoreline maintenance. In some areas of active erosion, the shoreline, beach, and water surface (at certain reservoir elevations) lie outside of the current Project boundary. Within this area there are conflicts between private land ownership and use of the beach for public recreation and management for environmentally sensitive species."

Public comments related to Lakeshore, Albee's, and A&R Subdivisions generally are against the expansion of the boundary onto privately-owned property in these locations; raising concerns about moving the boundary further than necessary, adequacy of existing erosion agreements, impacts on private property rights, and other issues discussed earlier in his section.

Central stated in the McConaughy Boundary Review Report that "Central recommends that the Project boundary be adjusted to include all of the beach and shoreline, plus buffer areas for

erosion, shoreline maintenance, and controlling access to Project lands and waters. In the area of Lakeshore Albee's, and A&R subdivisions, where the shoreline consists of irregular small eroding lake-ward projections, the Project boundary would be described in metes and bounds capturing the eroding points of land.” Additionally, Central believes that the several public comments that discuss past and ongoing erosion actually support Central’s contention that erosion should be one of the primary considerations for setting the boundary in this area. Central further reviewed the rates of past erosion, its estimates for future erosion in this area, and did adjust the Final Proposed Project Boundary to be closer to the shoreline and including fewer privately owned lands throughout much of this area.

Mako-Ch-Mni Subdivision

The Mako-Ch-Mni subdivision is located along the south side, eastern half, of Lake McConaughy. This subdivision consists of privately owned lots. Certain of the lots sit atop a bluff adjacent to the main body of the reservoir, while some others are located adjacent to a bay of the reservoir. By virtue of the orientation with respect to the direction and fetch of the primary wave producing winds, the shoreline along the main body of the reservoir is subject to significant erosive forces. Conversely, the shoreline in the bay is somewhat sheltered and subject to far less erosion. Central has erosion rights on some of the shoreline-adjacent lots both on the main body of the reservoir and in the bay, and owns one of the lots along the main body of the shoreline. This subdivision was included as part of the “Area 2” discussion in the McConaughy Boundary Review Report, which states that “the shoreline has already eroded close to or beyond the current Project boundary, and future erosion is expected to continue

this process, resulting in more and larger areas where the beach and shoreline would extend beyond the current Project boundary.”

Public comments related to the Mako-Ch-Mni subdivision generally are against the expansion of the boundary onto privately-owned property in these locations. Several owners of lots along the main body of the reservoir mention the significant past and ongoing erosion at this location, as well as their opinion that Central has failed to adequately control this erosion. Conversely, owners of lots adjoining the bay point to the relatively limited amount of erosion taking place in support of not adjusting the boundary at that location.

Central stated in the McConaughy Boundary Review Report that “Central recommends that the Project boundary be adjusted to include all of the beach and shoreline, plus buffer areas for erosion, shoreline maintenance, and controlling access to Project lands and waters. In areas of active erosion, primarily the lake-ward Projections of lands, the Project boundary would be enclosed by appropriate metes and bounds.” Additionally, Central believes that the comments regarding significant past and ongoing erosion of the bluff along the main body of the reservoir actually support Central’s contention that erosion should be one of the primary considerations for setting the boundary at this location. Central further reviewed past rates of erosion, modified its estimates for future erosion in this area, and did adjust the Final Proposed Project Boundary to be closer to the shoreline and including fewer privately owned lands throughout much of this area.

Jeffrey Lake Tenants/Subtenants

Central received many comments from tenants/subtenants that use land owned by Central for private recreational and residential purposes, subject to a May 1, 1980 lease agreement. All Jeffrey Lake tenant/subtenant commenters indicated opposition to the proposed boundary modifications, or otherwise make arguments in support of minimizing the amount of Central's leased land to be included within the Project boundary.

Several Jeffrey Lake commenters raised concerns about the potential for increased regulation. See Central's earlier discussion of public comments regarding increased regulation.

Several commenters raised objections to Central's use of the Jeffrey Dam Flood Study and consideration of the risks of rapid flood surcharge. See Central's earlier discussion of public comments regarding the Jeffrey Dam Flood Study.

Some Jeffrey Lake commenters suggest improper motivations on the part of Central. Central disagrees; see Central's earlier response on the topic of improper motivations.

Several Jeffrey Lake commenters contend that the boundary need not be adjusted because they believe that there is little or no ongoing erosion of the shoreline and/or the shoreline erosion is adequately controlled. Central agrees that there is little erosion, or that it is adequately controlled, throughout most of the Jeffrey Lake leased areas; however, erosion is not a primary consideration for Central's proposed Project boundary at those locations.⁵

⁵ There are some locations at Jeffrey Lake where erosion is occurring and is a consideration.

Several commenters proposed various alternatives to the proposed boundary adjustments, including not changing the boundary at all, using an elevation of only 2762 feet, using a setback of 30 feet from the shoreline, or using the very shoreline itself as the Project boundary. However, Central does not believe that these alternatives adequately satisfy Project needs for management of access, management of development, flood surcharge, and manageable boundaries; nor does Central believe that these alternatives would be consistent with Project boundary treatment with other Central-owned and Project-adjacent leased areas.

Some commenters assert that an easily identifiable boundary in this location is unnecessary, suggesting instead that Central can rely on GPS and GIS technologies in cases where the boundary location may be in question. However, Central's experience both here and throughout the Project suggests otherwise – people forget to check first regarding boundary location, or believe they know the location but are incorrect; GIS maps and aerial photographs can be inaccurate; GPS and mobile reception is problematic in the highly variable rural terrain at Jeffrey Lake; and Central staff find it much easier to apply permitting requirements consistently and correctly when individual leased lots are not “split” by the Project boundary.

One commenter suggests that the inclusion of the leases areas within the Project boundary is in contradiction with a November 6, 2000, letter from FERC to Central, which stated in part “The LMSP shows that there are many areas of private residential development, with long term leases from CNPPID, in the Project boundary. In general, the Commission asks licensees to

remove such development when not needed for Project purposes.” It appears that the commenter has construed this as a direction from FERC that Central is to exclude residential development, including specifically the Jeffrey Lake leased area, from the Project boundary. Central, on the other hand, understands this to simply be a reminder to Central of FERC’s general policy preference for removing such residential areas where possible, subject to there not being other Project purposes for the lands to be included. Where Central has included residential development within the Final Proposed Project Boundary, including those at Jeffrey Lake, it has done so because there are Project purposes for doing so. That there are several locations where residential development must be included within the Project boundary, it is not because Central is trying to include unneeded lands within the Project boundary, but rather because such development is located on lands in close proximity to and needed by the Project. Central notes that this is also consistent with FERC’s December 31, 2003 (105 FERC ¶ 62,234) approval of the current Project boundary at Johnson Lake, subsequent to the November 6, 2000, letter from FERC, which nonetheless included more than 600 residential leased lots within the Project boundary. The Jeffrey Lake residential leased area occupies land that Central acquired and owns for the purposes of constructing and operating the Project, subject to a lease agreement which acknowledges that this is the primary purpose of these lands, immediately adjacent to and with direct access to the Project shoreline, and at an elevation mostly below the top of the dam and within a potential flood surcharge zone; it should be of little surprise that these lands would be included with the Project boundary.