

Friends of the Boyne River
P. O. Box 186
Boyne City, MI 49712

Federal Energy Regulatory Commission
Secretary of the Commission
888 First St. NE
Washington DC 20426

July 15, 2025

RE: Boyne USA's Filing of 20250620-5100, FERC Project Number 3409-032

The Friends of the Boyne River (FoBR) objects to multiple statements made by Boyne USA in their response to LTBB. But first, there seemed to be an underlying misconception of the findings of the Independent Forensic Team's report on the failure of the Edenville and Sanford dams. That report was not dependent upon the size of the dams, but was about failures in the overall process. Stating that the IFT report on the Edenville and Sanford dam failures does not apply to a smaller dam is extremely misleading – at best. The worst dam failure in United States history had about 18% of the water volume of the Edenville dam, but over 2,200 people lost their lives. No lives were lost in the Edenville dam failure – which had over 5 times as much water behind it. That should be a pretty good indicator that the volume of the water behind a dam is not the critical factor in how hazardous a dam might be. If there is a lesson to be learned from the IFT report, then it applies to the Boyne River dam as much as any other dam.

After the stated misconception of the IFT report, Boyne USA decided to revisit the public access issue. We will try to assist Boyne USA in their level of understanding by revisiting the recent history of eminent domain in Michigan. In the early 2000's, a court case was making its way through the federal court system and eventually reached the U.S. Supreme Court. It was *Kelo v New London*. That case was about the use of Connecticut's laws of eminent domain to convert private property to another private entity. Kelo sought the protection of the U.S. Constitution to prevent Connecticut's definition of "public use" to condemn their property. At the same time, a similar court case was working its way through Michigan's legal system and had reached Michigan's Supreme Court. That case was *County of Wayne v Hathcock*. The Michigan Supreme Court was well aware of the *Kelo v New London* case, so they sought to address the definition of public use as it existed at the time of Michigan's last state constitution, which was 1963. The case of *County of Wayne v Hathcock* was decided in 2004. That Michigan Supreme Court case was (and is) the definitive decision on the exercise of eminent domain in Michigan as it existed in 1963.

The U.S. Supreme Court decision in *Kelo v New London* was rendered in 2005. In a nutshell, the court decided that Connecticut controlled its own definition of what constituted a public use. This caused a nationwide stir. Apparently, at least 47 of the 50 states eventually either amended their state constitutions, or changed their laws on condemnation (exercise of eminent domain). Michigan did both. The Michigan legislature put forth a referendum (in one chamber

it was a unanimous vote) to be voted upon in the next statewide election – in November of 2006 – to amend Article X, Section 2 of the Michigan state constitution. That amendment was passed by a vote of the people. It included the following sentence: “Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.” That sentence is referring to the *Hathcock* decision. In January of 2007, the Michigan legislature rewrote the actual law pertaining to exercise of eminent domain (MCL 213.23) by using sections of the *Hathcock* decision verbatim. In other words, Boyne USA must operate the hydroelectric dam under MCL 213.23. If their attorney believes they have a magic formula that proves MCL 213.23 is in error, then they need to cite the *Hathcock* decision in their argument.

Boyne USA includes the following statement in their discussion of why LTBB is not entitled to access the reservoir: “It is Boyne’s understanding, after record reviews, that this condition is not unusual with similar license conditions where an impoundment is completely surrounded by private property.” We did a record review of our own. The property used for the Boyne River hydroelectric dam was originally acquired by Charles Follmer and Ernest Stowe under the name of “Follmer & Stowe”; they then incorporated the Boyne River Power Company in 1906, and sold the property to the corporation, in which they were both officers, for the purpose of building a hydroelectric dam – which was for a public use. According to the *Hathcock* decision, the controlling legal precedent for a public use was from 1891. In other words, the Boyne River Power Company would have complied with the current law – MCL 213.23 – from the very beginning of the project. The reservoir was, by Boyne USA’s contention, surrounded by private property. Yet, the Boyne River Power Company allowed full public access, as required by the 1891 legal precedent. In 1927, the property was signed over to Michigan Public Service Company. Yet, Michigan Public Service Company allowed full public access, as required by the 1891 legal precedent. In 1950, the property was signed over to Consumers Power Company. Yet, Consumers Power Company allowed full public access, as required by the 1891 legal precedent. At no point can we find any record of ownership around the reservoir as being for anything other than “private property”, by Boyne USA’s definition. Yet at every point, the dam was being operated for a public use, and there was full public access as required by Michigan law. In fact, we looked at Consumers Power’s web page, and they very publicly proclaim that they have 259,000 acres of “private land” that is available for public access. By Boyne USA’s argument, Consumers Power should be joining Boyne USA in denying public access to their “private lands”. We suspect that Consumers Power would decline involvement. They would not want to be involved in a frivolous legal argument.

We are extremely puzzled by Boyne USA’s continued insistence that they do not need to follow Michigan law. Let’s suppose, for argument’s sake, that they manage to convince FERC that they do not have to allow public access as required by Michigan law. What happens if anyone, LTBB member or not, decides to go up and fish on the reservoir? What does Boyne USA think they can do about it? Are they going to call upon the Michigan DNR or the local sheriff’s department to issue a ticket for trespassing? Any law enforcement agency is going to be aware of MCL

600.2907. They are not going to be anxious to become involved in a dispute over public access given the language in MCL 213.23. Not only that, but Boyne USA has clearly not been a “good neighbor” to either of those parties during the license renewal process. What does Boyne USA hope to gain? If they really want to have the property be private, surrender the license to generate hydroelectricity. That problem could be solved in the twinkling of an eye.

There are times when a party to a legal dispute inadvertently makes an argument that actually supports the other party’s point. Boyne USA appears to have done that in their filing of 20250620-5100. We would draw your attention to their EXHIBIT (*sic*) C in that filing, and specifically their Attachment B, entitled “Bank Stability / Instability Photolog”. However, we would also draw attention to a joint publication of the United States Geological Survey (USGS) and the Geological Survey of Canada that addresses slope instability and its causes. That publication can easily be found online as USGS Circular 1325. The USGS has a division that consists of geologists and geological engineers whose function is to study and report on slope instability of any magnitude, as well as steps for mitigation. We will quote from the abstract of that publication: “We recommend this handbook to managers and decisionmakers in communities in the hope that the information will be disseminated by such officials to other members of those communities.”

On page 38, in the first photo of the “photolog”, one can see very noticeable curvature of very large tree trunks on the north bank. Those trees seem to be “bowing” toward the dam. The curvature of the trees is even more noticeable if one were to stand on the south bank and hold a carpenter’s level at arm’s length and look at the topmost branches. Many people have already done so. Undoubtedly, some LTBB members have done so. Probably other citizens have done so and expressed their concern to the city or to the county. We know that some FoBR members have done so. It is also easy for anyone to read Circular 1325 and find the following quote on page 25 under predictability: “Indicated by curved tree trunks...” It is also telling for them to read that a common “triggering mechanism” is “leaking pipes”. The diameter of the trees that have been impacted indicate that the triggering mechanism must have been going on for quite some time.

Although we do not want to go through all the signs of the instability at this time, we need to make it clear that the instability is NOT caused by fishermen. In order to dismiss that possibility, we will quote from Boyne USA’s amended Exhibit E to their license renewal application, dated June 15, 2020. The following quote appears on page 92: “No visible signs of the original structure have been observed. or are likely to exist, since the adjacent spillway structure was also rebuilt at that time. Based on comparison of the 1923 photograph with current photographs and field observations, the Licensee concluded that no evidence of the original powerhouse remains.” This quote was in reference to the old powerhouse. The problem with the statement is that it is demonstrably false. The foundation of the old powerhouse still exists, and extends for approximately 10 feet to the north, beyond the current powerhouse. When the leaking penstocks were operating, the leak was infiltrating the soil above the old powerhouse

foundation and was washing the soil away from below. Over time, the soil above was collapsing into the voids that were being created by the leaks. That has led to a very noticeable depression in the soil immediately north of the current powerhouse. That weakness in the soil now appears to be extending into the dam face immediately above the depression. Sometime after June of 2022, someone had a load of gravel dumped into the depression, but that has no impact on mitigating the damage caused by the leak. In fact, it just serves to make the depression more noticeable.

Boyne USA has put in a chain link fence that immediately abuts the old powerhouse foundation. In fact, that is the easiest way to locate the old powerhouse foundation. That fence is a barrier to any angler who would set out to climb the slope. Therefore, that internal erosion, and that soil instability, is NOT caused by anglers. It was caused by the leaking penstocks.

Boyne USA has acknowledged that the penstocks leak. Boyne USA has acknowledged that a land use restriction had been placed upon the property that would have prevented the penstock leaks if the restrictive covenant had been honored. We are not sure why this cannot be resolved very simply. Boyne USA needs to honor the restrictive covenant, but now they also have to address the damage that has been done and only maintain the reservoir at a safe level. They have successfully blocked the City of Boyne City and Charlevoix County from participating in this exercise, so we will point out that the only party that could be relied upon to determine a safe operating level for the reservoir would be a qualified hydrogeologist.

Thank you for your time and consideration.

Sincerely,

Friends of the Boyne River
PO Box 186
Boyne City MI 49712

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