

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Boyne USA	)	Docket No. 3409-032
Boyne Falls, MI	)	Boyne River Hydroelectric Project

RESPONSE TO THE FRIENDS OF BOYNE RIVER’S COMMENT BY ADAM KENNEDY

Boyne, USA (“**Boyne**”) by and through its counsel, Kuhn Rogers, PLC., submits this response to the comments filed by Adam Kennedy on behalf of the Friends of Boyne River (“**FOBR**”). *Exhibit A – FOBR May 30, 2025, Letter*. FOBR presents several false assertions in an attempt to sensationalize these proceedings. These baseless assertions must be addressed and corrected. Boyne requests that the Federal Energy Regulatory Commission (“**FERC**”) review and consider this response.

HISTORY OF THE BOYNE RIVER DAM

FOBR asserts several unsubstantiated assumptions and beliefs about the dam, the restrictive covenants originally imposed on the dam and surrounding property in 1963, and the safety of the dam. FOBR assumes in its submittal to FERC, without evidence, that in 1963 Consumers Energy surrendered its license because “Consumers Power did not want to get stuck with the cost of decommissioning the dam.” Further, FOBR claims that Boyne has “chosen to ignore the existence of the land use restriction.” Finally, FOBR claims that operating the penstocks was and is unsafe and that Boyne has not discussed “anywhere in the application process ... that they resolved the safety issues that led to the [1963] restrictive covenants.” None of these claims are supported, some are outright false, and FOBR uses the unsupported claims to fear-monger by comparing the Boyne Dam Project to the Sanford and Edenville Dams.

FOBR baselessly asserts that Consumers Energy sold its interest and forfeited its license in 1963 to avoid then-present, and therefore ongoing, liability. Alternatively, a reasonable and informed individual would understand that Consumers Energy surrendered its FERC license to reduce its operational costs related to the dam. A reasonable person would not associate a surrender of the license with an attempt to thwart responsibility and justice. Instead, a rational individual would infer that the restrictive covenants and license surrender were a mode to prevent unwanted competition in power generation and sales and to avoid future procedural complexities, by fully transferring its interest in this asset to a new owner. FOBR appears to ignore any other evidence that conflicts with its narrative regarding the nature of the transaction history that resulted in the change of ownership from Consumers Energy to Boyne.

Most importantly, and contrary to the recent false assertions, Boyne is not bound by any of the 1963 Restrictive Covenants. The land use restrictions and restrictive covenants imposed on Boyne during the Consumers Energy deal were completely discharged decades ago. *Exhibit B – Consumers Restrictive Covenant Discharge*. The reasoning presented by FOBR regarding the justifications related to the long-discharged restrictions are pure conjecture and speculation, specifically as it relates to Consumers Energy’s intentions, reasoning, and decision-making related to transferring its interest in the dam to Boyne. Boyne is not in violation of the 1963 Restrictive Covenant and is entitled to proceed with dam operations under FERC regulation.

Finally, in an attempt to further sensationalize its position, FOBR states that Boyne has failed to be transparent with FERC and the public as it relates to dam safety and compares the Boyne Dam Project to the Sanford and Edenville Dams. This shameful tactic preys on the aftermath, tragedy, and destruction that occurred after the Sanford and Edenville Dam failures, when those dams are not in any way comparable to the Boyne Dam in construction, size, or scale of impoundment. The public record is replete with dam safety and engineering documents provided by Boyne to FERC, which clearly demonstrate the safety of the Boyne Dam. Boyne has and will continue to disclose all required documents, data, and reports as required by law to FERC, which publishes all non-confidential information in its public e-Library.

CONCLUSION

Boyne respectfully requests that the Federal Energy Regulatory Commission continues to review the Friends of Boyne River's comments with a careful eye and with speculation as to the validity of the claims they have asserted and will continue to assert as these proceedings continue. Boyne requests that FERC recognize the restrictive covenant discharge, signed and recorded in June 1980. Finally, Boyne requests that FERC leave the intervening parties to their own proofs relating to their own Motions for Intervention.

Respectfully Submitted,
JOSEPH E. QUANDT



Date: June 11, 2025

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Exhibit A:
FOBR May 30, 2025 Letter

Adam Kennedy, BOYNE CITY, MI.

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

May 30, 2025

RE: Boyne USA's Objection to Motions to Intervene Filed by City of Boyne City and Charlevoix County Office of Emergency Management, Boyne River Hydroelectric Project, FERC Project Number 3409-032

The Friends of the Boyne River (FoBR) is in receipt of Boyne USA's objection to the Motions to Intervene by Boyne City and Charlevoix County. Boyne USA cites as its main objection that each motion needed "to be made in a timely manner and requires good cause for the intervening party's motion to be granted by discretion." They further state that the deadline would have been January 23, 2021. (We believe that calculated date to be incorrect: Boyne USA's amended application was dated June 15, 2020.) However, there appear to be two circumstances that impact that date. The first is the release of the Independent Forensic Team's (IFT) report on the Edenville and Sanford dam failures. From page 470 of that report: "The parties most at risk from the project, while deriving little or no benefit from the project, were the downstream property owners who did in fact experience devastating property losses of about \$200+ million during the May 2020 flood event; a significant portion of this property damage was likely attributable to the dam failures. Fortunately, there was no loss of life or serious injury. The downstream property owners had limited information about the dams and limited ability to influence decisions being made in relation to the dams. They were therefore in a position where they simply had to rely on other parties to take actions to keep the risks posed by the dams at an acceptably low level. In effect, the downstream property owners were "innocent bystanders" who ultimately became "innocent victims" when the dams failed." From page 458 of that report: "the IFT believes that

the industry standards were themselves inadequate and need to be expanded to better address cold regions hydrology, comprehensiveness of geotechnical evaluations including embankment stability evaluation, and consideration of the potential for static liquefaction.” It should be pointed out that Charlevoix County is about 100 miles north of Edenville. The “cold regions hydrogeology” (solifluction or gelifluction) is more pronounced in Charlevoix County than in Midland or Gladwin.

The IFT report was issued in May of 2022, so neither Boyne City nor Charlevoix County would have been aware of the “inadequate standards” that played a role in the failure of the Edenville and Sanford dams, or that downstream residents of those dams were not adequately represented elsewhere in the process. That report was released well after January 23, 2021. However, the second circumstance is most important. The FoBR had received credible information that the previous operator of the hydroelectric dam had surrendered their license in 1962 due to an unrepairable issue with their hydroelectricity generation. The previous owner sold off all the generating equipment and then sold the dam and property for \$1 to the current owner in 1963. In the fall of 2023, we had been invited to see the dam while the water had been drawn down. At that time, we had witnessed a crack extending all the way around the concrete at the same elevation. The engineer had stated that Boyne USA was going to “fix” the crack as the last stage of the dam repair. That was a bit puzzling to us, since the crack appeared to be evidence of dam movement. When Boyne USA refilled the reservoir in July of 2024, the FoBR could see no evidence that the source of the crack had been fixed. We do not know what the previous owner had reported to the Federal Power Commission when they surrendered their license in 1962, but it occurred to us that the previous owner must have placed a restrictive land use covenant on the property at the time of sale in order to protect themselves. We went to the Register of Deeds in August of 2024 and discovered that a land use restriction had been included, and that Boyne Mountain Lodge had agreed that it and its successors would abide by the agreement.

We have found no discussion anywhere in the application process where Boyne USA explained that they resolved the safety issues that had led to the restrictive covenant. That means that neither Boyne City nor Charlevoix County could have anticipated by January 23, 2021 that there was a safety issue from June of 1963 that remained unaddressed in the amended application of June 15, 2020. Because Boyne USA had never brought it up or discussed it in the application process, the earliest that Boyne City or Charlevoix County could have known about the restrictive safety covenant would have been August of 2024. Both Boyne City and Charlevoix County – and most especially the office of emergency management – have a statutory role to play in ensuring the safety of their constituencies. Boyne City also owns property on the river and maintains three parks that abut the river. The individuals – whether citizens of Boyne City or

elsewhere - who utilize those parks would need to be evacuated in the event of an emergency. The city has infrastructure that would need to be protected in the event of an emergency.

We are not sure why Boyne USA has chosen to ignore the existence of the land use restriction. The Marketable Record Title Act makes it very clear that the restrictive land use covenant cannot be extinguished by the passage of time; MCL 565.104(e): "This act must not be applied to do any of the following: ... (e) Bar or extinguish any land or resource use restriction..." The land use restriction was created because there was a penstock leak that could not be permanently fixed. Consumers Power did not want to operate a dam where they could not use the penstocks, because they would not be able to generate electricity. That is why they were willing to sell all the lands and the dam for \$1 and a promise from the buyer not to operate the penstocks – Consumers Power did not want to get stuck with the cost of decommissioning the dam. Operating the penstocks was unsafe in 1962, and the soil conditions that caused it to be unsafe in 1962 still exist in 2025.

We believe that it is entirely appropriate and even necessary for Boyne City and Charlevoix County to be granted Intervenor status.

Thank you.

Sincerely,

Adam Kennedy

Friends of the Boyne River

Exhibit B:
Consumers Restrictive Covenant Discharge

Liber 259 Page 474

CHARLEVOIX COUNTY #3

This 27th day of June, 1980, CONSUMERS POWER COMPANY, a Michigan corporation (successor by merger to Consumers Power Company, a Maine corporation), 212 West Michigan Avenue, Jackson, Michigan, hereby declares its intent to abandon and release and does hereby abandon all rights and interests it may have now or in the future pursuant to the following provisions of a certain deed to BOYNE MOUNTAIN LODGE, INC., a Michigan corporation, recorded in Liber 193, page 93 in the Charlevoix County Register of Deeds office, conveying land in the Township of Boyne Valley, County of Charlevoix and State of Michigan:

Second party, by the acceptance of this instrument, hereby covenants and agrees that the premises herein conveyed shall not be used in any manner for the purpose of generating electric energy or for the propulsion of machinery by the use of any water power developed by the dam herein conveyed, or any other dam now or hereafter constructed, in whole or in part, on said premises, or any other dam located upstream or downstream from said premises, which will necessitate the use of the premises herein conveyed or the use of any water or water rights connected with the said premises. It is expressly understood and agreed that the aforesaid covenant shall be deemed to be a covenant running with the land and shall be binding upon the second party, its successors and assigns, Forever.

IN WITNESS WHEREOF, Consumers Power Company has caused this instrument to be executed by its duly authorized representative.

WITNESSES:

CONSUMERS POWER COMPANY

Carol J. Kieler
Carol J. Kieler

Diane M. Tyrrell
Diane M. Tyrrell

By

W. L. Reid
W. L. Reid

STATE OF MICHIGAN)
)SS
COUNTY OF JACKSON)

The foregoing instrument was acknowledged before me this 27th day of June, 1980, by W. L. Reid, Mgr. Land and Right of Way of Consumers Power Company, a Michigan corporation, on behalf of the corporation.

Beverly Wilson
Beverly Wilson
Notary Public, Jackson County, Michigan
My commission expires: 9/20/82

Prepared by:

Albert D. McCallum
Attorney at Law
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

REGISTER'S OFFICE
CHARLEVOIX CO., MICH.
RECORDED July 2th 1980
AT 10:11 AM
[Signature]

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