



## Four Lakes of Gladwin and Midland Counties Chronicle of Transition to Public Ownership

### Background

Secord, Smallwood, Wixom and Sanford Lakes (the “Four Lakes”) are located in Midland and Gladwin counties in central Michigan and were created by the impoundment of the Tittabawassee and Tobacco Rivers by four privately owned hydroelectric dams. Prior to December 2020, the dams were operated by Boyce Hydro Power and its affiliated entities (Boyce)<sup>1</sup> and owned by the William D. Boyce Trusts.<sup>2</sup> Boyce acquired the dams in 2003 from Wolverine Power Corporation.<sup>3</sup> All four hydroelectric dams were regulated by the Federal Energy and Regulatory Commission (FERC) until the licenses were revoked and regulatory jurisdiction was assumed by the State of Michigan following the dam failures of the Edenville (Wixom Lake) and Sanford dams. Ultimately, all four dams and related property rights were acquired by the counties of Midland and Gladwin through condemnation initiated after the dam failures in May 2020. Today, all four dams, bottomlands flowage right previously owned by Boyce are now owned by the counties.

### 2018

After more than 15 years of violations and citing a “history of obfuscation and outright disregard” of license obligations, in February 2018, the Federal Energy Regulatory Commission (FERC) proposed revoking Boyce Hydro Power’s hydroelectric generating license for the Edenville Dam. Michigan common law does not require a private dam owner to maintain the existence of a dam or the artificial level of a lake.<sup>4</sup> Concerned with the potential loss of Wixom Lake, and looking for long-term stability of the Four Lakes, in 2018 representatives from lake associations on the Four Lakes looked to the possibility of transitioning the four hydroelectric dams from private ownership to public ownership. The Sanford Lake Preservation Association (SLPA) approached Boyce with a proposal to acquire the dams. In April 2018, SLPA signed a Letter of Intent to acquire the dams from Boyce.

In July 2018, the counties of Midland and Gladwin (“counties”) adopted resolutions recommending and inviting the lake associations or representatives for all Four Lakes to form a “citizen task force” called Four Lakes Task Force (FLTF) to develop a plan and present recommendations of establishing the normal (i.e., legal) levels of all Four Lakes. The citizen task force was also to address recommendations with respect to the potential special assessment boundaries and the entity to serve as the counties’ Delegated Authority (to oversee and manage the lake levels, prepare the special assessment district, and the options for the long-term ownership, finance, operations, maintenance and improvement of the lake level structures).

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<sup>1</sup> Each dam, referred to as “Projects” were owned separately by the respective limited liability companies: Sanford Hydro Property, LLC, Edenville Hydro Property, LLC, Smallwood Hydro Property, LLC and Secord Hydro Property, LLC. In addition, a separate entity, Boyce Hydro Power, LLC, contracted with each of the Projects for use and control. A separate entity, known as Boyce Michigan, LLC, owned non-dam real estate.

<sup>2</sup> W.D. Boyce Trusts #2350, #3649 and #3650.

<sup>3</sup> The four hydroelectric dams were acquired by Synex Michigan LLC in 2003. In 2007, Synex Michigan, LLC changed its name to Boyce Hydro Power, LLC.

<sup>4</sup> *Goodrich v. McMillan*, 217 Mich. 630, 187 NW 368 (1922)(Ownership of a dam does not impose a duty on the dam owner to maintain the water at an artificial level created by operation of a dam).



Throughout, 2018 the Lake Associations engaged in filings with FERC, discussions EGLE, and local, state and federal stakeholders. FLTF requested FERC to initiate a plan for transitioning regulatory control to EGLE but keep FERC oversight of the dams until the community could negotiate with and acquire the dams from Boyce. It became clear to FLTF that FERC did not have a comprehensive plan for regulatory transition, nor did it wait for FTLF and the counties to develop a transition plan from federal to state regulatory control. In September 2018, while all four lakes were lowered for required inspections, FERC ordered the revocation of the Edenville license, and Boyce chose not to restore the Wixom Lake level. In meetings with EGLE, it was uncertain how the lakes could come up without a state legal level established.

FLTF secured engineering, legal and consulting support and undertook significant due diligence and hydrological studies to develop a plan to acquire the four dams and hydroelectric power assets from Boyce.

In October 2018, the counties adopted resolutions finding that “to protect the public’s health, safety and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the lakes”<sup>5</sup> it was necessary to establish the normal levels for all Four Lakes. In addition, the resolutions provided that all costs in connection with the maintenance of the normal levels of the Four Lakes “shall be defrayed by special assessments for the benefits derived against privately owned parcels of land, political subdivisions of the state, and state owned lands.”<sup>6</sup> FLTF was appointed the counties’ Delegated Authority, and to act on behalf of the Board of Commissioners to oversee the lake level project, to prepare a special assessment district(s) and special assessment roll(s), and to “take all other actions as necessary and required by the delegated authority as provided in Part 307.”<sup>7</sup> The counties further directed their respective legal counsel to file petitions in the circuit courts of the counties for the determination of the legal lake levels and boundaries of the special assessment district.

## 2019

The SLPA amended its articles and changed its name to Four Lakes Task Force (FLTF). FLTF is a non-profit IRS 501(c)(3) organization that was established, among other things, to lessen the burden of government. FLTF established a mission to maintain lake levels into the future by acquiring the Boyce dams and lakes on behalf of the counties, to ensure that all four dams became and remained compliant with either state or federal safety standards and establish a local authority to responsibly manage the dams. Its board of directors consists of volunteer members from the Lake Associations and includes a County Commissioner from Midland and Gladwin counties.

On January 25, 2019, petitions were filed by the counties in Midland and Gladwin circuit courts to establish the normal (legal) levels for all Four Lakes, pursuant to Part 307 “Inland Lake Levels” of the Michigan Natural Resources and Environmental Protection Act (“Part 307”)<sup>8</sup>. By order of the State Court Administrator, Midland County Judge Stephen Carras was assigned to hear both cases, including the case filed in the Gladwin County Circuit Court. The hearing was scheduled for May 3, 2019, and in accordance with the notice requirements set forth in Part 307, all property owners within the proposed special

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<sup>5</sup> County of Gladwin Resolution 2018-034, adopted October 9, 2018; County Midland Resolution, adopted October 16, 2018.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Part 307 of 1994 PA 451, as amended, MCL 324.30701 et seq.



assessment district, and political subdivisions (i.e., counties, villages and townships) were provided a notice of the hearing.

In the meantime, in April 2019, SLPA (aka FLTF) signed a letter of agreement (“LOA”) regarding the acquisition of the dams and hydroelectric assets from Boyce. Initially, the LOA targeted the completion and execution of a definitive purchase agreement by the end of 2019. As the parties negotiated final terms and conditions, FLTF agreed to transitional payments of \$40,000 per month (to be applied to the purchase price of the dams) so that Boyce would promptly begin the process of bringing up the lake level for Wixom Lake.

On May 3, 2019, Judge Carras received information supporting the petitions, the Four Lakes Lake Level Report, and testimony. After providing an opportunity for all those present at the hearing to comment and taking into consideration the factors set forth in Part 307, on May 28, 2019, Judge Carras established the normal levels for each of the Four Lakes. The levels established for each of the Four Lakes was based on the historical water levels and conditions set forth in the FERC licenses. Judge Carras also approved the Four Lakes Special Assessment District. This was a final order, and anyone aggrieved by Judge Carras’ order had the right to appeal the decision within 21 days following the entry of the Lake Level Order. There were no appeals of this order.

August 2019, the counties entered into an inter-governmental agreement with FLTF. The purpose of the agreement was to establish terms and conditions between the counties and FLTF (as the counties’ Part 307 Delegated Authority) with respect to the acquisition of the dams, and the administration, operation, maintenance, repair, replacement, and improvements of the dams. In addition, this intergovernmental agreement acknowledged that FLTF would negotiate a definitive agreement with Boyce to acquire the necessary rights that would enable the counties (through their Delegated Authority) to maintain the normal lake levels in accordance with the Lake Level Order.

Following the LOA, FLTF had Boyce’s permission to begin its due diligence in connection with the acquisition of dams. This included many factors, including document review, property evaluations, and hydrological studies (which included full gate operation tests on Edenville and Sanford).

In September 2019, a meeting was held with representatives from EGLE, FLTF and Boyce. The meeting addressed several issues, including:

- **SPILLWAY CAPACITY:** Boyce had made an earlier claim that the Edenville Dam had capacity to meet the state requirements; FLTF believed it may not meet state standards, and was pursuing an updated study and engineering. It was also discussed with EGLE that just keeping the water down would not make much of an impact in a severe storm.
- **GATES:** Boyce did not want to operate the Edenville Dam at normal levels during the winter. FLTF’s observation of gate operations on Edenville (and the prior experience between Boyce and FERC in stopping electrical generation during the winter), was that without new gate hoists it was not safe to operate the dam. Out of concern for safety, and given that the agreement would have FLTF assume operational oversight in January, FLTF worked with Boyce to submit a permit to lower the dam below winter operations.
- This would include the rescue of mussels as the water was lowered.



Ultimately EGLE did not permit the lowering of the water at Wixom Lake below the winter normal level due to the timing and potential natural resource damage (and in particular, loss of mussels) as a result of the drawdown. Boyce went forward with its drawdown without first obtaining authorization from EGLE. Out of concern with this action, FLTF contracted for a mussel rescue on its own. In addition, in anticipation of its acquisition of the dams (and because Boyce had not made certain repairs at the Edenville Dam), FLTF initiated a plan for certain winter improvements at the Edenville dam which included the design and installation of new gate hoists to be installed in 2020.

December 31, 2019, FLTF and Boyce signed a definitive purchase agreement in connection with the acquisition of the four dams. The agreement contemplated a series of payments, beginning with an Option and First Installment Payment to occur in January 2020 and Installment payments (made throughout 2020 and 2021), with the final closing and transfer of the dam and hydroelectric assets in January 2022.

## **2020**

In January 2020, the anticipated Option and First Installment Payment to Boyce did not occur. At that time, it became clear that the State of Michigan was going to bring an enforcement action against Boyce in connection with Boyce's drawdown of Wixom Lake in 2019. The litigation risked FLTF's ability to issue tax-exempt municipal financing for the acquisition. It was determined by FLTF and its legal and financial advisors, that FLTF should not seek financing until there was more certainty and notified Boyce that the Option and First Installment Payment would not occur in January. In April 2020, FLTF and the State of Michigan entered in an agreement that removed FLTF's risk associated with its financing of the dam acquisition. Also in April, Boyce and FLTF amended the Purchase Agreement pushing back the date for the Option and First Installment payment to June 2020. Final transfer of all the assets would not occur until January 2022.

On May 19, 2020, two years into FLTF efforts to acquire and improve the dams and sustain our lakes, and a month before making the Option and First Installment payment, the Edenville Dam failed, the Sanford Dam was overcome and failed, and Secord and Smallwood dams were ordered down by FERC for inspection and repair. Thousands of people, properties and a large environmental area were impacted.

The counties resolved to take the dams to protect the public, environment, and economy. On June 9, 2020, the counties amended the intergovernmental agreement with FLTF and assigned FLTF as their agent to coordinate recovery and restoration efforts, including the funding, administration, design, improvement, repairs and replacement of the dams. In addition, both counties adopted resolutions authorizing condemnation pursuant to Part 307 of the dam properties and directing its Delegated Authority (i.e., FLTF) to take all actions pursuant to Part 307 and the Michigan Uniform Condemnation Procedures Act to acquire the lake level properties.

Condemnation litigation was initiated in July 2020. At this time, Boyce declared bankruptcy, and as a result, the Bankruptcy Court stayed the condemnation suits. For the remainder of the year, FLTF negotiated with Boyce and the Bankruptcy Trustee, and the creditors, to reach a settlement that would permit the transfer of the Boyce dam-related properties.

FERC eventually declared that the FERC license on all four dams were implied surrendered, and FLTF supported that position, as there was no economic or legal path forward to obtain the licenses. FERC has a civil action against Boyce of \$15 million dollars.



### **Five Class Action Lawsuits Filed**

Within days of the dam failure, multiple class action lawsuits were filed against the State, counties, and FLTF. FLTF's insurance company refused to provide a defense and sued FLTF in Federal Court asserting that according to its policy the alleged claims were not covered. Eventually, FLTF was dismissed without prejudice in all class action lawsuits. FLTF has consistently maintained that the claims were without merit as we were working on behalf of the counties toward a sustainable solution for the community before the dam failures and flood occurred.

In December 2020, the U.S. Bankruptcy Court removed the stay, which enabled FLTF to acquire title to the Boyce properties through condemnation. In accordance with the settlement agreement, the counties on behalf of the Four Lakes Special Assessment District, obtained ownership of the Boyce properties.

### **Legal Position Related to Ownership of the Dams**

An important premise of the FLTF legal position relates to ownership of the dams at the time of failure.

Part 307 of the Natural Resources and Environmental Protection Act provides the legal framework for transferring privately-owned dams to public ownership and a path forward for long-term sustainability of the lakes.

In May 2022, the Independent Forensic Team (IFT) report related to the dam failure was released. The purpose of the IFT report was to *“evaluate physical and human factors that contributed to the failures and to identify lessons to be learned by the industry, emergency management, agencies, and the public to prevent future similar failures.”*

FLTF took exception with the term and concept introduced in the IFT Report Section 7.1.1 of *“functional ownership”* and defining the situation of having two organizations *functionally* (not legally) in a dam owner's role. FLTF, working on behalf of the counties, did not have ownership of the dams at the time of failure. This was affirmed by EGLE in a letter to FLTF dated June 30, 2021.

FLTF has stabilized all four dams and has obtained the funds and financing to restore or repair all four dams and lakes. The acquisition, recovery and restoration will cost over \$300 million.

*Without the decisive action of FLTF and Midland and Gladwin counties, the four dams would not be on a path to restoration today and the Four Lakes' communities would not be well on their way to economic, recreational and environmental restoration.*

Links:

[Motion to Dismiss from Lawsuit](#) – Sept. 15, 2020

[Condemnation Litigation Settled with Boyce](#) – Nov. 13, 2022

[Task Force Dropped from Flooding Lawsuits](#) – Dec. 5, 2020

[Bankruptcy Court Ruling](#) – Dec. 7, 2020

[EGLE Recognition of Dam Ownership](#) – June 30, 2021

[FLTF Shares Analysis of IFT Findings](#) – May 25, 2022