

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION – BAY CITY**

In re: ) Case No. 20-21214  
)  
BOYCE HYDRO, LLC, *et al.* ) (Joint Administration Requested)  
)  
Debtors.<sup>1</sup> ) Chapter 11  
)  
\_\_\_\_\_ Honorable Daniel S. Opperman

**DECLARATION OF LEE W. MUELLER  
IN SUPPORT OF FIRST-DAY MOTIONS AND APPLICATIONS**

I, Lee W. Mueller (“*Mueller*”), hereby declare under penalty of perjury that the following is true to the best of my knowledge, information, and belief:

1. I am one of two “Managing Members” of Boyce Hydro, LLC (“*BH*”), Boyce Hydro Power, LLC (“*BHP*”; and together with BH, the “*Debtors*”). I also hold the same title for the following non-debtor affiliates: Edenville Hydro Property LLC (“*Edenville HP*”), Sanford Hydro Property LLC (“*Sanford HP*”), Secord Hydro Property LLC (“*Secord HP*”), and Smallwood Hydro Property LLC (“*Smallwood HP*”; and collectively with Edenville HP, Sanford HP and Secord HP, the “*HoldCos*”). Notwithstanding my title, the sole members of the Debtors

<sup>1</sup> The debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal taxpayer-identification number, are: (i) Boyce Hydro, LLC (6694), Case No. 20-21214 and (ii) Boyce Hydro Power, LLC (3034), Case No. 20-21215.

and the HoldCos are three non-debtor trusts (the “*Boyce Trusts*”).<sup>2</sup> I am the co-trustee of each of the Boyce Trusts.

2. I have held the foregoing position with the Debtors and the HoldCos since 2007 and I am familiar with the day-to-day operations, business affairs, and books and records of both the Debtors and the HoldCos.

3. On July 31, 2020 (the “*Petition Date*”), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (as amended, the “*Bankruptcy Code*”), in the United States Bankruptcy Court for the Eastern District of Michigan (the “*Bankruptcy Court*”). In order to enable the Debtors to minimize any adverse effects of the chapter 11 filing, and ultimately preserve operations and maximize creditor recoveries, the Debtors are requesting various types of relief in “first day” motions and applications (collectively, the “*First Day Motions*”) that are being filed with the Court. As detailed below, I expect that the HoldCos will also be filing related bankruptcy cases in order to effectuate the Insurance Settlement (as defined below), including the Plan contemplated thereby.

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<sup>2</sup> A corporate structure chart is attached hereto as Exhibit A. The percentage ownership interest of each of the Boyce Trusts is reflected therein, and the address of each of the Boyce Trusts is: 10120 Flamingo Road, Ste. 4192, Las Vegas, Nevada 89147.

4. I am submitting this declaration (the “*Declaration*”) in support of the Debtors’ chapter 11 petitions and First Day Motions. Except as otherwise indicated herein, all facts set forth in this Declaration are based on my personal knowledge, my review of public and nonpublic documents, or my opinion, based on my experience and knowledge of the Debtors’ industry and the Debtors’ operations and financial condition. If called upon to testify, I could and would testify competently to the statements set forth herein.

5. Part I of this Declaration describes the Debtors’ businesses and the circumstances surrounding the commencement of these chapter 11 cases (the “*Chapter 11 Cases*”). In Part II of this Declaration, I substantiate the truth and accuracy of the relevant facts set forth in the First Day Motions filed concurrently herewith.

## I. BACKGROUND

6. The Debtors have historically operated four hydroelectric dams (the “*Edenville Dam*”; “*Sanford Dam*”; “*Secord Dam*”; and “*Smallwood Dam*”; and together, the “*Dams*”) that are owned by the HoldCos. The Dams are located along the Tittabawassee River in Midland and Gladwin counties in Michigan. One Dam – the Edenville Dam – also impacts the Tobacco River in that the Tobacco River artificially joins the Tittabawassee River north of the Edenville Dam by virtue of

flowing through a constructed channel beneath a former 50 foot long bridge span situated on state highway M-30 in Tobacco Township, Gladwin County, Michigan.

**A. Corporate and Operational Structure**

7. The corporate structure for the Debtors and the HoldCos is as follows: Each HoldCo own a corresponding Dam (the Dam real estate, associated power stations, turbines, switchgear, spillways, and other physical improvements, and flowage rights). The HoldCos do not have employees.

8. BHP holds the Federal Energy Regulatory Commission (“*FERC*”) licenses for the three currently licensed Dams (Sanford, Secord, and Smallwood), is the assignee of a power purchase agreement (“*PPA*”) with Consumers Energy, is at various times party to sales agreements (“*REC Agreements*”) pursuant to which it sells Renewable Energy Credits, leases the four Dams from the HoldCos, and is party to an Operations and Maintenance Agreement (“*O&M Agreement*”) with BH. BHP does not have employees, and its main expenses are comprised of its lease obligations, funding to BH under the O&M Agreement, and professional fees.

9. BH is the entity that operates the Dams pursuant to the O&M Agreement with BHP. BH owns vehicles, equipment, furniture, computers, tools and other personal property needed for same. As of the Petition Date, BH had four

full time employees.<sup>3</sup> BH receives funding from BHP under the O&M Agreement, and its expenses are largely comprised of payroll and operational expenses relating to the Dams.

10. In terms of cash flow and inter-company transactions, BHP receives revenue as the holder of the licenses pursuant to the PPA and REC Agreement. BHP then: (a) pays monthly rent to the HoldCos in the form of paying the property taxes and Byline debt payments on behalf of the HoldCos and (b) makes monthly payments to BH under the O&M Agreement. BH then pays ordinary course operating expenses, including paying rent (\$5,500 per month) to Boyce Michigan, LLC (“*BM*”; a related non-debtor) for the property where BH’s operations offices are situated and equipment is stored (BH will not be paying rent to BM post-petition). A list of all transactions between and among the Debtors and the HoldCos for the year preceding the Petition Date is attached as Exhibit A. The Debtors and the HoldCos do not have any inter-company balances on their books.

## **B. The Debtors’ Capital Structure**

11. *Secured Debt*: The Debtors and HoldCos have one U.S. Department of Agriculture (“*USDA*”) loan and seven U.S. Small Business Association (“*SBA*”)

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<sup>3</sup> Given the small number of employees, prior to the Petition Date, the Debtors pre-paid the employees, including paying out a relatively small amount of accrued vacation time, to ensure that no employee would be a pre-petition creditor as of the Petition Date (eliminating the need for and cost of an employee wage motion).

loans, all issued through Byline Bank (“Byline”) either directly or as assignee, and all cross-collateralized. The loans are as follows:

<b>Loan</b>	<b>Date Issued</b>	<b>Borrower(s)</b>	<b>Guarantor(s)</b>	<b>Original Principal Amount</b>	<b>Approximate Amount Owed as of July 30, 2020</b>
SBA Loan 49178450-07 (Bank #16499)	11/28/11	Sanford HP, BH, BHP	Edenville HP, Secord HP, Smallwood HP, Boyce Trusts	\$421,000	\$346,286.53
SBA Loan 49177950-05 (Bank #16498)	11/28/11	Sanford HP, BH, BHP	Edenville HP, Secord HP, Smallwood HP, Boyce Trusts	\$844,000	\$700,814.03
SBA Loan 49179550-05 (Bank #16501)	11/28/11	Edenville HP, BH, BHP	Sanford HP, Secord HP, Smallwood HP, Boyce Trusts	\$636,000	\$530,502.03
SBA Loan 49180650-00 (Bank #16500)	11/28/11	Edenville HP, BH, BHP	Sanford HP, Secord HP, Smallwood HP, Boyce Trusts	\$1,297,000	\$1,083,227.52
SBA Loan 49182850-07 (Bank #16504)	11/28/11	Secord HP, BH, BHP	Edenville HP, Sanford HP, Smallwood HP, Boyce Trusts	\$730,000	\$608,641.51
SBA Loan 49181950-04 (Bank #16503)	11/28/11	Secord HP, BH, BHP	Edenville HP, Sanford HP, Smallwood HP, Boyce Trusts	\$390,000	\$317,476.93
SBA Loan	11/28/11	Smallwood	Edenville HP,	\$339,000	\$273,255.50

49183150-03 (Bank #16502)		HP, BH, BHP	Sanford HP, Secord HP, Boyce Trusts		
USDA Loan 26-056-380858018 (Bank #21912)	10/16/14	Sanford HP, BH, BHP	Edenville HP, Secord HP, Smallwood HP, Boyce Trusts	\$2,500,000	\$2,246,799.75
<b>TOTAL:</b>				\$7,157,000	\$6,107,003.80

12. Byline asserts that it has senior liens on substantially all assets of the Debtors and the HoldCos to secure the foregoing loans.

13. In addition, certain contractors that BH retained to provide critical emergency services to help the Debtors stabilize the dams in the wake of the Flooding (as defined below) unfortunately were not paid due to the challenging circumstances described herein. I understand that some contractors have filed mechanics liens against properties owned by the HoldCos, but I believe those debts are unsecured as to the Debtors (to the extent they are obligors).

14. *Unsecured Debt:* As of the Petition Date, the Debtors had just over \$1 million in liquidated unsecured debts that I am aware of, some of that disputed. In addition, individuals and business owners whose property was damaged in the Flooding have asserted millions of dollars in disputed and unliquidated litigation

claims against the Debtors, including via numerous class action and individual lawsuits that have been filed since the Flooding occurred.<sup>4</sup>

### **C. The History of the Debtors' Businesses**

15. The Dams were constructed in the early 1920s and commenced electrical generation in 1925. In addition to generating electricity, they have historically provided real estate development value for scores of subdivision developers, residential contractors, material suppliers and related businesses. The thousands of acres of reservoirs created by the privately funded, constructed, maintained, and operated four dams during the past 96 years have unquestionably created the most significant economic real estate asset in Gladwin County and in the Midland County townships of Jerome, Edenville and Hope. The recreational opportunities and amenities embodied in the impoundments substantially increases the local tax base by creating waterfront property where previously only forest and farmland existed. Between 1925 and 1987 the four dams and their daily operations were unencumbered by increasing regulatory control, constraints, and financial

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<sup>4</sup> As discussed below, the Debtors and HoldCos do not believe that they in any way caused the Flooding – quite the opposite. They tried to take steps that would have *prevented* the Flooding and were forced to reverse course by parties that have also been named in the lawsuits including, without limitation, the parties to the Lake Level Order (as defined below). Nonetheless, I feel terrible for all of the Flooding victims, and in preparing and filing these Chapter 11 Cases the Debtors have endeavored to structure a mechanism to help flooding victims achieve a recovery (irrespective of fault) and enable them to more efficiently pursue claims against the genuinely culpable parties that might enhance that recovery.



burdens embedded in the ever-expanding rules and policies spawned by the Congressional Federal Power Act of 1920. In 1984, FERC obtained jurisdiction over the Dams. Sanford was licensed in 1987, and Edenville, Smallwood, and Secord were licensed in 1998.

16. The Debtors acquired the Dams in 2006 and immediately began making improvements, including those required by FERC to improve their safety. Through April 2020, the Debtors had spent in excess of \$6 million on capital improvements to the Dams, much for improvements required by FERC. Due to the limited revenue generated by the Dams, much of the money needed to make these improvements was borrowed by the Debtors and was being re-paid through operating revenue over time.

17. One FERC-required improvement that the Debtors were unable to afford was the addition of spillway capacity at the Edenville Dam, which was estimated to cost in excess of \$8,000,000. Accordingly, in 2013 the Debtors offered to surrender their FERC license for the Edenville Dam and lower the level of the Wixom Reservoir, the associated impoundment, to the top of the spillway sills to a “Run of River Level” – approximately 7 feet below the prior “normal pond” level – in order to ensure that it would have a reserve or buffer capacity to temporarily store and attenuate the inflow of water into the river system thus

increasing dam safety in the event of an extreme rainstorm that would produce flooding in excess of any flood that had occurred since 1925.

18. The proposal to lower the water level at Wixom Reservoir met intense opposition from the local community and governmental agencies. In response, the Debtors sought to design acceptable alternatives for increasing spillway capacity on an incremental basis which could have possibly been financed by its lender if rate increases were obtained through the new PPA. Additionally, the Debtors sought to accommodate the concerns by finding a buyer that could afford to add the additional spillway capacity, also effectively contingent upon obtaining a new PPA with better rates. Unable to find such a buyer and having not yet secured the sought after new PPA with increased rates, in September 2018, FERC revoked Edenville Dam's license to generate electricity. Thereafter the Edenville Dam no longer had any revenue generation and thus no funds whatsoever to operate much less make the substantial dam safety improvements required by FERC. Annual revenue from the Edenville Dam operation had averaged approximately \$1.3 million during the three previous years. Upon the FERC license revocation, the Edenville Dam became subject to the regulatory control of the Dam Safety Unit of Michigan's department of the Environment, Great Lakes and Energy ("*EGLE*").

19. The other three Dams continued to operate and produce electricity pursuant to FERC licenses. In 2019, the Debtors generated gross revenue of

approximately \$1,528,291.47 million under the PPA and \$33,310.16 under the REC Agreements.

**D. Events Leading to the Chapter 11 Filings**

20. After FERC revoked the Edenville Dam license, BH gradually opened all six Edenville Dam spillway gates to draw down the water level of Wixom Reservoir to Run of River Level (again, about seven feet below “normal pond” level). As previously stated, this was done for the safety of BH operators and the upstream and downstream communities: lower impoundment levels provide substantial additional protection (impoundment storage buffering) from severe storms and flooding events, and as noted, FERC had determined in 2013 under a possible license surrender, that in the absence of the needed additional spillway capacity, establishing impoundment storage buffering would be an appropriate mitigation measure.

**The Debtors are forced to raise water levels in Wixom Reservoir**

21. The Debtors’ efforts to stabilize Wixom Reservoir at a safe level were again met with intense opposition. In 2019, governmental entities sought, and in May 2019 obtained, a court order setting water levels for the reservoirs behind each of the Dams (the “*Lake Level Order*”). The Lake Level Order set the water level for Wixom Reservoir at essentially the same “normal pond” level as was required when that Dam was subject to FERC’s jurisdiction and regulatory

authority. The Debtors were not consulted about the petition for the intended court order, and did not sign off on the Lake Level Order, which was approved and signed by representatives for Midland County, Gladwin County, the Four Lakes Task Force (the “*FLTF*”), the EGLE and the Michigan Department of Natural Resources (“*MDNR*”).

22. The FLTF, one of the parties to the Lake Level Order, is a non-profit association that was appointed as the “Delegated Authority” for Midland and Gladwin Counties pursuant to Part 307 of the Michigan Natural Resources and Environmental Protection Act, Michigan Public Act 451 of the Public Acts of 1994, as amended, MCL 324.30701 *et seq.* (“*Part 307*”). As the Delegated Authority, I understand that FLTF is tasked with maintaining the normal level of the reservoirs. It has assessment power over an assessment district (“*Assessment District*”) comprising approximately 8,000 tax parcels and homes around the four reservoirs, and purports to have the authority to purchase or otherwise acquire, including through condemnation, properties needed to maintain reservoir levels.

23. In April 2019 – with the Debtors aware that the Lake Level Order was likely to be entered but still unable to afford additional spillway capacity at the Edenville Dam – the Debtors reached an agreement in principal whereby the FLTF agreed to purchase the majority of the assets of the Debtors and the HoldCos and to assume responsibility for the ownership, operation, and maintenance of all four

Dams. As part of this agreement, the FLTF paid BH \$40,000 per month beginning in May 2019 to help cover costs, including costs associated with raising the level of Wixom Reservoir to “normal pond” level (as was by then required by the Lake Level Order) and maintain it there through the summer months for the recreational benefit of those living along its shores. These monthly payments were to be applied to the ultimate purchase price of Debtors’ assets.

24. As Wixom Reservoir was now subject to the Lake Level Order, in September 2019, BH, as the legally required applicant for any permit involving its property, cooperated with FLTF’s prepared permit to lower the level of Wixom Reservoir during the winter for the safety of BH operators and the safety of the people and property downstream of the Edenville Dam. Although the EGLE had not yet issued a ruling on the application to lower the reservoir, in early November 2019, in consultation with the FLTF, BH again began the process of reducing the level of Wixom Reservoir to Run of River Level (for the same safety reasons as the September 2018 drawdown). While the drawdown was in progress, the application was denied. BH, through the actions and undertakings of FLTF and its agents, appealed the denial and, while the appeal was pending, believing the safety issues to be paramount, BH continued with the drawdown.

25. In December 2019, the FLTF and a related entity, Four Lakes Operations Company, signed an asset purchase agreement (“*FLTF Purchase*

*Agreement*”) with the Debtors and HoldCos (consummating the agreement in principal that had been reached in April 2019) that valued the purchased assets at \$16,000,000 and that obligated the FLTF to make certain safety improvements to the Dams subject to a schedule of progress submitted to FERC.

26. Also, in December 2019, the EGLE’s Water Resources Division (“*EGLE-WRD*”) issued an Enforcement Notice against, without limitation, me, BH, and BHP alleging that the November 2019 drawdown of Wixom Reservoir resulted in surface water drainage of adjacent wetlands and other damage to natural resources, including freshwater mussels. EGLE-WRD demanded that the Boyce entities immediately cease the active drawdown of Wixom Reservoir. The Notice also warned that if the Boyce entities did not comply, EGLE-WRD might take escalated enforcement actions. Then, on January 21, 2020, counsel from the Office of the Michigan Attorney General (“*MIAG*”) sent an email advising that a civil action would be filed by the MIAG, MDNR and EGLE seeking natural resource damages for the “millions of freshwater mussels” allegedly “killed” as the result of the 2018 and 2019 drawdowns of Wixom Reservoir and an injunction against future drawdowns. These threatened legal actions had the effect of preventing the

closing on the FLTF Purchase Agreement as the FLTF was unable to obtain the financing it needed to close given the threatened litigation.<sup>5</sup>

27. In April 2020, under intense pressure from the EGLE-WRD and the MIAG, and at the request of the FLTF, BH applied for and received a permit to begin increasing the level of Wixom Reservoir back to “normal pond” level. This permit was granted despite the FLTF and EGLE knowing that the Edenville Dam did not have adequate spillway capacity to meet the state’s probable maximum flood (“PMF”) requirement, which was already 50% lower than FERC’s PMF requirements. After the permit was granted, BH began closing the spillway gates to slowly refill Wixom Reservoir to “normal pond” as demanded by EGLE-WRD and the MIAG. During the first week of May 2020, the water level of Wixom Reservoir reached “normal pond” levels.

**The Edenville Dam fails after the Debtors are forced to raise water levels**

28. On Friday, May 15 – approximately one week after being pushed into achieving “normal pond” levels at Wixom Reservoir – BH became aware that a major storm was approaching. Concerned about safety, BH began lowering the water levels at the impoundments behind all four of the Dams in an effort to reduce

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<sup>5</sup> On May 1, 2020, the MIAG, on behalf of the EGLE and MDNR did, in fact, file suit against the Debtors and me, personally, among others, seeking millions of dollars in damages for the death of mussels allegedly killed by the drawdowns of 2018 and 2019.

the water levels to the bottom limits of the allowable range or somewhat lower if possible. As with its previous drawdowns, BH took this action without requesting a permit which, in this instance, would have been pointless due to the time the bureaucratic process requires to apply for, and possibly obtain, a permit. BH believed the safety of downstream residents and property had to take priority over rigid compliance with recreational water levels that BH was under court order to maintain or the near certainty that it would be sued and/or fined, again, over a dam safety-related drawdown.

29. Over the next several days, BH operators worked around the clock to maintain or control the water level increases in the impoundments and monitor the structural integrity of the Dams as the storm continued to add water to the drainage basins of the Tobacco and Tittabawassee rivers, causing extensive flooding in the area (generally, the “*Flooding*”). Eventually, the amount of water entering Wixom Reservoir exceeded the amount of water the Edenville Dam was capable of discharging downriver through the spillway structures, even with all six of its spillway gates fully open. With all gates open there was no ability to accelerate the discharge of the flood level water. The level of Wixom Reservoir gradually rose to a maximum level of approximately five and one half feet above normal pond which was approximately one and one half feet below the top of the earthen embankment. Although the Edenville Dam was never overtopped, on Tuesday



evening, May 19, 2020, the east end of the Edenville Dam, about four feet below the earthen embankment crest, was breached by virtue of upstream wind driven wave action causing surface erosion and sloughing subsidence with a subsequent soil saturation and then a water piping failure through the downstream face of the embankment. Once water began flowing through the saturated soil and down the backside of the 48 foot high embankment, the upper portion of the downstream embankment slid down and collapsed creating an uncontrolled breach. The eastern end of earthen embankment catastrophically failed thus discharging the full volume and contents of Wixom Reservoir downriver into the Sanford Reservoir.

30. At the time of the Edenville Dam breach, the earthen embankment portion of the Sanford Dam, had already reached a significant and historic flood stage level of its Sanford Reservoir impoundment, , despite having had all of its six spillway gates fully open for many hours. The Sanford Dam earthen embankment was quickly overtopped and demolished by the catastrophic volume of water rushing into it from the Edenville Dam breach. The destruction of the Sanford Dam (together with breach of the Edenville Dam that caused it, the “*Dam Breaches*”), exacerbated the already historic downriver Flooding that extended from the Village of Sanford to the city of Midland. The additional downstream flood wave emanating from the Sanford Dam overtopping and inundation forced

thousands of residents to evacuate and further inundated many homes and businesses with elevated floodwaters.

31. This catastrophic event is exactly what I and the Debtors had long been trying to prevent, including by attempting to keep the Wixom Reservoir lowered approximately six or seven feet to a Run of River Level until such time as at least one of the several spillway alteration plans previously designed by Boyce Hydro could be funded and constructed. I am personally devastated and am in despair for all property owners who have been impacted – many of whom I know personally. I am frustrated by years of unwillingness by homeowners to contribute to improvements that could have improved the Dam for everyone, and with the regulatory decisions that directly caused this catastrophe. These are frustrations that existed long before the Dam Breaches because I could see unwise decisions beyond the control of the Debtors being made that were making such a result far more probable. Comprehension of the journey that led to the tragedy we are now experiencing together is hard to express in words.

### **The current status of the Dams**

32. In the days after the Edenville and Sanford Dams breached, the Debtors had crews working around the clock to stabilize the Tobacco River spillway portions of the Edenville Dam and the powerhouse structure at the Sanford Dam to ensure that there was no immediate risk of further deterioration.

They have also addressed non-critical erosion issues at the Secord and Smallwood Dams – the two dams that weathered the event well and did not fail – in order to return those to operational status as soon as possible. All four Dams are either intact and stable (Secord and Smallwood), or are stabilized to the extent currently possible without significant emergency grant funding (Edenville and Sanford).

33. On May 20, 2020, FERC sent me a letter directing BHP, as the licensee, to fully lower the Secord and Smallwood reservoirs to the tops of the concrete spillways which is approximately 8 feet below normal pond. This was done in order to allow the dams to be further inspected by BHP's consulting engineers. The dams therefore now function in a Run of River mode until further notice. Although the letter did not specifically state that BHP had to stop generating electricity at those dams, they are unable to do so at the lowered reservoir levels and, as such, they are temporarily unable to generate any revenue until FERC allows the reservoir levels to be raised. The current status at each dam, and the Debtors' plans for each, is as follows:

34. **Secord Dam:** The Secord dam is a 45-foot head earthen embankment with two concrete spillways and a concrete powerhouse. The Flooding did not impact the dam's stability or cause any significant damage. The Debtors believe that subject to completion of one relatively minor concrete construction project in the tailrace of the spillways, a project the Debtors had already contemplated, the

dam is ready to resume operations as soon as approval is obtained from FERC to raise the reservoir level (something that will also benefit Secord residents). To that end, the Debtors commissioned an inspection engineering report and submitted it to FERC and have included funds in their cash collateral budgets to ideally provide sufficient liquidity to address any repairs required by FERC. The Debtors are exploring possible transactions for the Secord and Smallwood Dams (as discussed below) and are open to all alternatives (including reorganizing) to maximize the value of the Secord and Smallwood Dams for the benefit of creditors.

35. **Smallwood Dam:** The Smallwood Dam is reinforced with sheet piling on the upstream impoundment face of the earthen embankment, and the Flooding did not impact the dam's stability. Water did, however, rise above a 30-inch square air vent located below the powerhouse generator room floor at a service platform (the vent is an intentional opening in the powerhouse turbine chamber sidewall), and the pressure of water spraying from the vent caused non-structural erosion below the dam. The Debtors brought in rip-rap and other material and have completely repaired the erosion. There was also some erosion in the flow path of an overflow bypass area that is designed to allow water to go around the sheet pile wall. Again, the Debtors engaged a specialty contractor to repair the erosion and re-grade the impacted area. Finally, a section of concrete spillway side retaining wall was destroyed. This will have to be reconstructed to

re-start operations, as recommended in the Debtors' inspection report to FERC. I anticipate that the necessary construction work would take about four weeks assuming FERC approves the repair plans as issued (allowing the Debtors to raise water levels and re-start operations). The Debtors are exploring alternatives for the Smallwood Dam in the same manner as with the Secord Dam (discussed above).

36. **Edenville Dam:** The Edenville dam is the earthen dam that first breached in the Flooding. The dam has two sections, each with its own set of spillways, one on the west (Tobacco River) side (the "*Tobacco Side*") and the other on the east (Tittabawassee River) side (the "*Tittabawassee Side*"). A channel connects the two sides of Wixom Reservoir (allowing water and boats to pass from one side to the other), and a bridge carrying state highway M-30 usually spans the channel.

37. In the flood, the M-30 causeway bridge collapsed into the cross channel, limiting water flow between the two sides of Wixom Reservoir. On the Tobacco Side (west end of the dam) the upstream side of the dam was not seriously eroded. There was, however, erosion to the downstream side of the earthen embankment on the left and right side of the concrete spillway structure caused by high tail water currents that developed after the dam breach. However, this damage has been temporarily addressed, and the M-30 causeway bridge channel is now being cleared by the Michigan Department of Transportation. The left and right

side tailrace concrete retaining walls at the Tobacco spillway had been in need of reconstruction prior to the flood event. Sections of retaining walls on both sides were washed away. Therefore, these areas of retaining wall structure require replacement as part of the prudent construction measures needed in order to restore the pond level in the Tobacco River to normal conditions. Normal operations of the repaired Tobacco spillway will allow the river water to flow through the spillways as regulated by the operation of the spillway gates.

38. On the Tittabawassee Side of the Dam – the side of the Dam that breached – the river has now formed a new channel around the end of the remaining section of the dam (so the river itself has stabilized in its channel). There is remaining stabilization work required where water is flowing through the channel (from the Tobacco Side to the Tittabawassee Side). Although this is not an imminent threat, water flow parallel to the remaining section of the Dam threatens to erode the upstream face of the remaining portion of the earthen dam over time. BH and its consulting engineer have proposed alternatives to address this, and the MDEQ Dam Safety Unit are conducting their own assessment. Ultimately the Debtors do not have the funds that would be needed to accomplish the long-term restoration of the Tobacco River impoundment upstream of the Edenville Dam or re-build the Edenville Dam generally. These funds would, of necessity, come from

public funding sources including federal grants and eventually from Special Assessment Districts.

39. As discussed below, the FLTF backed out of the FLTF Purchase Agreement shortly after the Dam Breaches and, since then, has expressed an intent to imminently move to condemn the Edenville Dam and take over stabilization efforts. Edenville HP – the owner of the Edenville Dam – has not filed for bankruptcy protection, so nothing is impeding such a filing.

40. In fact, the Debtors do not own the approximately 8,600 acres of land which comprise (a) the former “bottomlands” of Wixom Reservoir (the “*Bottomlands*”) and (b) an area between the Smallwood and Edenville Dams. That acreage is necessary for (a) the FLTF to obtain the entirety of the Edenville Dam and Wixom Reservoir property and (b) the estate to make the best case for value in a condemnation proceeding. Accordingly, the Boyce Trusts have authorized BM, the non-debtor owner of the Bottomlands, to deed the Bottomlands to Edenville HP or its designee, with BM waiving any rights to the proceeds generated by such properties (such that additional proceeds would benefit the estates), so long as the releases contemplated by the Insurance Settlement (as defined below) are approved.

41. To be clear, the Debtors reserve their right to contest, without limitation, the valuation portion of the condemnation proceeding for the Edenville

Dam properties (“*Valuation Proceeding*”). Just the scrap value of the equipment in the Edenville Dam alone has substantial value, and as discussed below, the Dams are special purpose assets that have tremendous value to the community and any governmental unit acquiring them.

42. **Sanford Dam:** The Sanford Dam is also an earthen dam, and as discussed above, its earthen section of civil structure was destroyed after the Edenville Dam breached. At this point, most of the earthen structure of the Dam has been washed away, but the powerhouse and concrete spillway remain largely intact. As with Edenville the river has carved out a new flow path channel, and in that sense the situation is generally stable. However, there is a debris that needs to be cleaned up in the former bottomlands,<sup>6</sup> and some of the former reservoir embankments are steep, and in danger of eroding, likely requiring interim stabilization, which the Debtors do not have the funds to accomplish.

43. As with Edenville, the FLTF has expressed a desire to condemn the Sanford Dam and take over stabilization efforts. Sanford HP – the owner of the Dam – has not filed for bankruptcy protection, so nothing is impeding such a filing, though as with Edenville, the Debtors reserve all rights as to value, and the propriety of the FLTF’s “good faith” offer, for such assets.

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<sup>6</sup> The bottomlands of the Sanford Dam reservoir are owned by the Sanford Lake Preservation Authority, an entity that is not related to any of the Debtors or the Boyce Trusts.



**The FLTF's efforts to take economic advantage of the Dam Breaches**

44. On May 22, 2020, three days after the Dam Breaches, the FLTF sent a letter purporting to terminate the FLTF Purchase Agreement. The Debtors understood the rationale for doing this, but also assumed that the FLTF – like a true governmental entity seeking to strike a fair balance between acquiring land while fairly treating the impacted landowner and its creditors – would have worked in good faith to structure a deal that would work for the community, the Debtors and the HoldCos and their creditors, and the FLTF.

45. Instead, on June 19, 2020, FLTF presented a “good faith offer” to Debtors, the Boyce Trusts, and other parties in which it proposed to purchase the Dams and various other properties owned by non-debtor entities for (a) \$100,000 in cash and (b) a “release” with respect to \$797,500 the FLTF had allegedly previously paid to the Debtors to maintain water levels or for other reasons (*i.e.*, illusory consideration, since the FLTF does not even have a claim for these amounts). In sum, effectively the FLTF reduced its offer from \$16 million to \$100,000, and the FLTF threatened to initiate condemnation proceedings if the offer was not accepted by June 25, 2020.

46. The FLTF's offer was, in my opinion, a demonstrably and inexplicably “bad faith” offer. Accepting such an offer would have been (and still would be) devastating for the Debtors' creditors. At a most basic level, the Debtors

believe that *just the liquidation value* of the machinery and equipment in *just the* Edenville and Sanford dam houses alone would likely realize multiples of the \$100,000 offer. Moreover, the value to FLTF (or another governmental entity) of special purpose assets such as the Dams, which generate a tremendous amount of tax revenue and economic activity, remains high notwithstanding their condition (*i.e.*, FLTF cannot re-build the Dams or realistically assess owners without ownership, and without re-building the Dams, rent rolls will be reduced for years). Additionally, FLTF has a preliminary permit issued by FERC which gives FLTF the exclusive right to study the feasibility of filing and obtaining a new FERC license for the dam which would then be able to generate and sell electricity under the terms of a new 20-year Power Purchase Agreement (PPA) that I spent five years seeking to obtain from Consumers Energy Company through the efforts of a group of Independent Power Producers. The FLTF is a signatory to this PPA which would take effect upon issuance of a FERC license to FLTF or its subsidiary. Similarly, properties near the Edenville Dam owned by BM (the “*BM Properties*”) were included in the offer notwithstanding that they are worth at least \$1 million (as discussed in greater detail in the Cash Collateral Motion (defined below)) and are not necessary for the repair or reconstruction of the dam. The offer also ignored the fact that the Secord and Smallwood Dams were not materially damaged and have value and prospects independent of the value of the breached Dams. Finally,

when the Debtors asked the FLTF to provide the valuations it relied upon in making its offer – a necessity in a condemnation – the FLTF produced a single “valuation” dated June 23, 2020 – *i.e.*, apparently produced four days *after* it submitted the “good faith” offer. The “valuation” improperly lumps all of the various separately owned and independent properties together, assigning a nominal value to valuable properties based on FLTF’s claim that the Edenville and Sanford Dams (which again are separate properties and separately owned) have negative values. That is not a logical, or to my understanding an appropriate or “good faith” method of valuing properties that a governmental entity seeks to condemn.

47. Notwithstanding the nature of the FLTF offer (and the impact that such a transaction would have on creditors), the Debtors continued to engage in discussions with the FLTF.

48. On June 26, 2020, after extensive discussions, a deal was reached. The parties agreed in writing to a term sheet (“*Term Sheet*”), subject to final documentation. Without going into the specifics of the deal reflected in the Term Sheet (because it was a settlement communication), it would have resulted in materially more consideration for the estates, an opportunity to reorganize around the Secord and Smallwood Dams, and additional benefits to FLTF. The Debtors were also at all times open to the FLTF acquiring all four Dams so long as the transaction was fair to creditors.

49. The Debtors drafted and circulated an agreement to memorialize the term sheet on June 29, 2020. The Debtors also alerted the FLTF to their plans for obtaining financing to allow the Debtors to cover any FERC-related costs required to re-start operations at the Secord and Smallwood Dams (to get those Dams operational for the benefit of creditors).

50. On July 3, 2020, the FLTF's counsel raised concerns about (a) a "new" provision in the draft agreement (that the Debtors believed it was understood as part of the discussion and Term Sheet, but also did not view as material) and (b) efforts by residents around Secord Lake to engage in a competing transaction with the Debtors for the Secord Dam assets outside of the FLTF.

51. Rather than circulating a revised draft that the FLTF viewed as agreeable and consistent with the Term Sheet, on July 7, 2020, the FLTF suddenly sent correspondence to FERC attempting to undermine third party engineering reports the Debtors had provided to FERC in order to get the Secord and Smallwood Dams operational. In other words, rather than pressing forward to document the Term Sheet in good faith, the FLTF attempted to undermine the Debtors' efforts to re-start operations at the Secord and Smallwood Dams and raise reservoir levels there for the benefit of residents and creditors.

52. I strongly believe that the FLTF backed out of the Term Sheet not because of any "new" provision (the Debtors made clear that they would consider

any revisions the FLTF had), but because the FLTF was very worried that (a) the Debtors had a means of funding re-start costs for the Secord and Smallwood Dams (opening up the possibility of a reorganization, or at least substantially increasing their value) and (b) the Debtors might have a competing buyer or partner (including in the form of a community organization for one or more of the Secord and Smallwood Dams).

53. In sum, the position that the FLTF is taking by threatening to condemn the Dams under any scenario and claiming the sole right to determine for residents how their Dams should be re-built – is not just chilling, but may end up eliminating, competitive bidding. Rather than recognizing that, however, and offering fair value for the assets (what I understand the condemnation process contemplates), the FLTF submitted a consolidated offer that in good conscience I could not possibly accept, consistent with my duties to creditors.

54. I believe the fact that the FLTF is at base a private entity – whose origin as the Sanford Lake Preservation Association (SLPS) effectively emanates from an association of self-interested homeowners that has now been imbued with governmental powers – has made this process more difficult. The FLTF seems focused on trying to use its position and powers to obtain the properties for virtually nothing, as opposed to considering what would truly constitute a fair offer in light of the remaining intrinsic value in the assets. I do not believe a normal

governmental entity would take the same approach with property owners that have for years paid taxes and provided immense value to the community, and that are now merely trying to make the best of a challenging situation for both the community and creditors.

**Monetizing or reorganizing around the Secord and Smallwood Dams**

55. With respect to the Secord and Smallwood Dams in particular, the FLTF has publicly chosen to advocate for completing extensive upgrades to both Dams up front, at a cost – according to the FLTF – of over \$35 million. Dave Kepler, the President of the FLTF has publicly asserted that residents will be lucky if reservoir levels are permanently raised by 2023 or 2024.

56. As referenced above, subject to FERC approval of plans, I believe that the Secord and Smallwood Dams can be quickly and safely re-started, raising water levels for residents and allowing for renewed power generation (almost certainly by spring of 2021 if not before). Upgrades to the Dams can then take place over time, on a schedule to previously worked out with FERC, and could be funded in partnership with the community. I also believe that the needed upgrades can be completed at materially less cost than the FLTF is suggesting.

57. Approximately 8,000 homeowners live around the four reservoirs, and roughly half of the homes are around the Secord and Smallwood Dams. In recent months, there has been a substantial groundswell of interest in alternatives

that might materially reduce their future assessments, including homeowners around the Secord Dam forming their own non-profit entity and trying to raise funds to help the Debtors with repairs. There are private buyers who may be interested as well (though my preference would be a partnership with or sale to a community-based group assuming it aligns with the best interests of creditors).

58. I understand that a transaction not involving the FLTF will be difficult because of the FLTF's political position. But the FLTF also needs the homeowners around the Secord and Smallwood reservoirs as part of its assessment district to make its plans work (including for economies of scale), and it is perfectly capable of avoiding the whole issue by making a fair offers for each of the four Dams and any other properties it seeks to take ownership of. Until that happens, I have a duty to explore alternatives as best I can in light of the overhang of the FLTF's condemnation threats, and at the moment I believe there is still material value to creditors in exploring such options.

**E. The necessity and objectives of the chapter 11 filings**

59. The Chapter 11 Cases were filed to maximize outcomes for creditors by, among other things: (a) maximizing sale, liquidation, and / or condemnation proceeds from the two dams impacted by the Dam Breaches; (b) maximizing the value of the two dams that remain operational (as noted, the Debtors are working with FERC to safely re-activate these Dams and exploring reorganization and sale

opportunities); (c) effectuating an Insurance Settlement (as defined below) reached pre-petition with the Debtors' liability insurers which should result in more than the policy proceeds coming into the estates; and (d) confirming a plan that will effectuate the Insurance Settlement and set up a liquidating trust to pursue the estates' significant litigation claims and distribute funds to creditors. The foregoing of course may change and evolve as the Chapter 11 Cases play out.

60. *Maximizing Recoveries from the Edenville and Sanford Dams.* As discussed above, the most likely outcome for the Edenville and Sanford Dams is condemnation. If the FLTF chooses not to condemn in the near term, the Debtors would likely look at other means of extracting value, including liquidating the valuable equipment in the dam houses (but the Debtors understand that the FLTF would prefer to control that process, and assume that value could be accounted for in a valuation hearing, so are not immediately pursuing such a path).

61. *Stabilizing Operations / Maximizing Value of the Secord and Smallwood Dams.* Again, the Debtors are working to obtain FERC permission to raise the reservoir level and re-start generation at the Secord and Smallwood Dams. As I discuss above, I believe there are multiple ways to monetize these Dams, including reorganizing around them either with or without community involvement, or potentially selling them, though I am cognizant that the overhang



of the FLTF condemnation threat may ultimately prevent such a transaction. A consensual transaction with the FLTF is possible if it agrees to pay fair value.

62. ***Insurance Settlement / Plan and Liquidating Trust.*** Prior to the bankruptcy filings the Debtors reached agreement with their liability insurers with respect to a settlement (the “*Insurance Settlement*”) that, among other things, would bring more than the policy limits (\$3 million in the aggregate) into the estates immediately, with the insurers and certain of the insured parties that are substantially contributing to the deal and/or the Chapter 11 Cases receiving releases.

63. The settlement agreement contemplates the HoldCos filing related bankruptcy cases and the Debtors and HoldCos quickly consummating a liquidating plan (“*Plan*”) that effectuates the releases through a channeling injunction, and that sets up a trust with specific funds for holders of covered claims (largely Flooding victims) who would benefit from the funds generated by the settlement. Claimants not covered by insurance would have their own funds within the Trust, and the Trust will be able to pursue litigation claims and monetize assets (including the Dam assets, either by agreement or valuation litigation) if not accomplished pre-confirmation.

64. In a separate but related matter, the Debtors need to fund the preparation of an independent forensic report that is (a) being required by FERC,

and could put the Debtors' licenses at risk if not completed and (b) I believe will be extremely beneficial to the trustee of the liquidating trust for pursuing the estate's litigation claims (ideally materially increasing the "pot" for creditors). The Debtors anticipate seeking to use a small portion of the proceeds of the insurance settlement to fund the report, with the remainder of funds being held in trust for the benefit of holders of Covered Claims (as defined in the Insurance Settlement).

## **II. FIRST DAY MOTIONS AND APPLICATION**

65. Concurrently with the filing of their Chapter 11 petitions, the Debtors are filing certain applications, motions, and proposed orders. The Debtors request that the relief described below be granted, as each request constitutes a critical element in achieving the successful restructuring of the Debtors for the benefit of all parties in interest.

66. I have reviewed and discussed with Debtors' counsel each of the First Day Motions filed contemporaneously herewith (including the exhibits thereto and supporting memoranda) and incorporate by reference any factual statements set forth in the First Day Motions. It is my belief that the relief sought in each of the First Day Motions is tailored to meet the goals described above and, ultimately, will be critical to the Debtors' ability to achieve the goals of these chapter 11 cases.

### **A. Debtor's First Day Motion for Joint Administration of Related Chapter 11 Cases Pursuant to Bankruptcy Rule 1015(b),**

**Bankruptcy Code Sections 105 and 302, and Local Rule 1015-1  
(the “*Joint Administration Motion*”)**

67. By the Joint Administration Motion, the Debtors request that the Bankruptcy Court authorize and direct the joint administration of the Chapter 11 Cases and the consolidation thereof only for procedural purposes pursuant to sections 105 and 302 of title 11 of the United States Code (the “*Bankruptcy Code*”), Rule 1015 of the Federal Rules of Bankruptcy Procedure (the “*Bankruptcy Rules*”) and Rule 1015-1 of the Local Rules of the United States Bankruptcy Court for the Eastern District of Michigan (the “*Local Rules*”). The Debtors request certain related relief, including the approval of a joint caption for the Chapter 11 Cases, and a notification to be placed on the docket in the cases other than the proposed lead case.

68. The Debtors are related entities and are filing petitions in the same Bankruptcy Court. I believe that joint administration will be less costly and burdensome than separate procedural administration of the estates due to the combined docket and combined notice to creditors and parties in interest. Parties in interest will likely file many applications, motions, orders, hearings, and notices in these cases that will affect all Debtors and their estates. Joint administration will keep all parties informed of matters related to these cases without the inconvenience and confusion of reviewing separate dockets. In addition, since the

Debtors are seeking only administrative consolidation by this motion, rather than substantive consolidation, I do not believe creditors' interests will be impacted.

69. I believe that if each Debtor's case was administered independently, there would be a number of duplicative pleadings and overlapping service. This unnecessary duplication of identical documents would be wasteful of the Debtors' resources, as well as other parties' and this Bankruptcy Court's resources.

70. Therefore, I believe that the Chapter 11 Cases should be jointly administered for procedural purposes only, and the Joint Administration Motion should be approved.

**B. Debtors' First Day Motion for Entry of an Order (I) Authorizing Debtors to (A) Maintain Insurance Policies and Programs; (B) Honor All Insurance Obligations; and (C) Continue Premium Financing Agreement; and (II) Granting Related Relief (the "*Insurance Motion*")**

71. By the Insurance Motion, the Debtors request, pursuant to sections 105(a), 363(b), and 503(b) of the Bankruptcy Code, and Rules 4001, 6003, and 6004 of the Bankruptcy Rules (i) authority, but not direction, to (a) maintain their pre-petition Insurance Policies and Programs (as defined herein) and (b) honor their Insurance Obligations (as defined herein) in the ordinary course of business during the administration of these Chapter 11 Cases, including paying any prepetition Insurance Obligations (as defined herein), and (c) continue to honor

and make payments under the Premium Financing Agreement (as defined below), and (ii) granting related relief.

72. In connection with the operation of the Debtors' businesses and the management of their properties, the Debtors maintain various insurance policies and workers' compensation programs (collectively, the "*Insurance Policies and Programs*") and all premiums and other obligations related thereto, including any broker or advisor fees, assessments, financing costs or other fees, collectively, the "*Insurance Obligations*") through several different insurance carriers (the "*Insurers*") including, but not limited to, those Insurance Policies and Programs and Insurers listed on Exhibit A annexed to the Insurance Motion (the "*Insurance Schedule*").

73. The Debtors maintain various liability, property and other insurance policies, which provide the Debtors with insurance related to, among other things, general liability, automotive liability, excess liability, and business property coverage (collectively, the "*Insurance Policies*"). The Debtors maintain the Insurance Policies to help manage and limit the various risks associated with operating their businesses, which is essential to the preservation of the value of the Debtors' businesses and assets.

74. Pursuant to the Insurance Policies, the Debtors pay premiums based upon a fixed rate established and billed by each Insurer (collectively, the

“*Insurance Premiums*”). The Debtors pay approximately \$128,715.50 in Insurance Premiums and related financing charges each year.

75. The Debtors pay their Insurance Premiums in full annually, or, to manage liquidity, through an insurance premium finance agreement (the “*Premium Financing Agreement*”) with IPFS Corporation (the “*PFA Lender*”) for certain commercial property and associated Insurance Policies (the “*PFA Policies*”). Pursuant to the Premium Financing Agreement, the PFA Lender has agreed to pay the insurance premiums due under the PFA Policies in exchange for payments from the Debtors, as set forth more fully below. The Debtors’ obligations under the Premium Financing Agreement are secured by all sums due under the Premium Financing Agreement and any unearned premiums or other sums that may become payable under the PFA Policies. I believe the PFA Policies are essential to the preservation of the Debtors’ business.

76. For the PFA Policies, which cover the period through January 1, 2021, the Debtors made an initial down payment of \$22,197.22 and agreed to make ten (10) monthly payments in the amount of \$5,155.60 (the Debtors are current on payments).

77. I believe the terms of the Premium Financing Agreement represents the best available terms. I also believe, the Debtors’ estates will benefit by maintaining this low-cost financing from the PFA Lender. Moreover, any

interruption of payments might adversely affect the Debtors' ability to obtain financing for future policies on favorable terms. Thus, I believe the authority to continue honoring their obligations (including any pre-petition obligations) pursuant to the Premium Financing Agreement, including the granting of security interests to the PFA Lender, and to renew or replace the Premium Financing Agreement in the ordinary course of business is in the best interest of the Debtors, their estates, and their creditors.

78. The Debtors maintain workers' compensation and employer liability insurance as required by state statute (collectively, the "*Workers' Compensation Programs*"). The Debtors' Workers' Compensation Programs are not self-insured.

79. In connection with the Workers' Compensation Programs, the Debtors pay premiums based upon a fixed rate established and billed by the insurance carrier (the "*Workers' Compensation Premiums*"). The Debtors pay approximately \$6,773.00 in Workers' Compensation Premiums each year.

80. I believe, if the Debtors are unable to renew and continue making payments under the Premium Financing Agreement, the PFA Lender could seek relief from the automatic stay to cancel the respective PFA Policies in accordance with the terms of the Premium Financing Agreement or to seek adequate protection of its respective investment. The Debtors then would be required to obtain replacement insurance on an expedited basis and at significant cost to the estates. If

the Debtors are required to obtain replacement insurance and to pay a lump-sum premium for such insurance in advance, this payment may be the same or greater than what the Debtors currently pay to the PFA Lender under the current Premium Financing Agreements. Even if the PFA Lender is not permitted to terminate the PFA Policies, any interruption of payments would severely and adversely affect the Debtors' ability to finance premiums for future policies. Accordingly, I believe that the practical solution is to continue making the premium financing payments.

81. I believe paying the Insurance Obligations are necessary costs of preserving the Debtors' estates. The Debtors' failure to maintain the Workers' Compensation Programs could jeopardize their coverage and expose the Debtors to fines and other adverse actions by state workers' compensation boards. In addition, the risk that eligible workers' compensation claimants would not receive timely payments for prepetition employment-related injuries could negatively impact the financial well-being and morale of not just those claimants, but also the Debtors' active employees. In addition, I believe the Insurance Programs are essential to the Debtors' operations, as the Debtors would be exposed to significant liability if the Insurance Programs were allowed to lapse or terminate. Such exposure could have a materially adverse impact on the Debtors' chapter 11 strategy and their ability to maximize value for their stakeholders.



82. Accordingly, I believe authority to maintain the Insurance Policies and to pay all Insurance Obligations, including any unpaid Insurance Obligations arising prior to the commencement of these Chapter 11 Cases, is critical to the Debtors' ability to preserve the going-concern value of their businesses, which will inure to the benefit of all parties in interest.

83. Moreover, I believe the relief requested by the Insurance Motion represents a sound exercise of the Debtors' business judgment, is necessary to avoid immediate and irreparable harm to the Debtors' estates, and is justified under sections 363(b) and 105(a) of the Bankruptcy Code, and Rule 6003 of the Bankruptcy Code.

84. I believe the Debtors have sufficient funds to pay the Insurance Obligations in the ordinary course of business by virtue of expected cash flows from ongoing business operations. In addition, under the Debtors' existing cash management system, I believe the Debtors can readily identify checks or wire transfer requests as relating to an authorized payment in respect of the obligations addressed in the Insurance Motion. Accordingly, I believe that checks or wire transfer requests, other than those relating to the Insurance Obligations, inadvertently may not be honored and that the Court should authorize the Banks, when requested by the Debtors, to receive, process, honor and pay any and all checks or wire transfer requests in respect of the relief requested herein, solely to

the extent that the Debtors have sufficient funds standing to their credit with such Banks, and such Banks may rely on the representations of the Debtors without any duty of further inquiry and without liability for following the Debtors' instructions.

**D. Debtors' First Day Motion Pursuant to Sections 361 and 363 of the Bankruptcy Code and Bankruptcy Rule 4001 for Interim and Final Orders: (1) Authorizing Use of Cash Collateral; (2) Scheduling a Final Hearing; and (3) for Related Relief (the "*Cash Collateral Motion*")**

85. By the Cash Collateral Motion, the Debtors request entry of orders pursuant to sections 361 and 363 of the Bankruptcy Code and Rule 4001 of the Bankruptcy Rules: (1) authorizing the Debtors to use cash collateral pursuant to the respective budgets attached as Exhibit A to the Proposed Interim Order attached to the Cash Collateral Motion (collectively, the "*Budgets*"); (2) scheduling a final hearing on the Motion; and (3) for other related relief as necessary.

86. The Debtors have substantially pared back their operations to minimize cost as they pursue the Restructuring (including in light of the almost certain transfer of the breached dams) but do need to maintain operations and pay bankruptcy-related costs in order to accomplish the Restructuring. The anticipated costs and revenues for each Debtor through the end of November 2020 (the "*Budget Period*") are reflected in the Budgets.

87. In the aggregate, over the entire four-month Budget Period, I believe the Debtors project to incur an aggregate total of \$992,978 in expenses. *However,*

at least \$500,000 of those expenses are expected to be paid from unencumbered funds received during the Budget Period (as reflected in the Budgets), and notably the Budgets do not assume the Debtors realizing any value from their Dams and associated licenses (and one of the primary goals of the cases is to monetize those assets). Moreover, of the \$492,978 in projected aggregate Cash Collateral use, \$130,069 is proposed to go to Byline in the form of adequate protection payments. Factoring that in, my understanding is that the real use of Cash Collateral over the entire Budget Period is projected to be approximately \$362,909.

88. Of that \$362,909, at least \$96,000 is proposed to be spent on repairs to the Secord and Smallwood Dams (Byline collateral), and \$40,000 on associated engineering reports, all costs that I believe should enhance Byline's collateral by at least an equal amount (and ideally materially more if the Dams can be re-started or put in position to be re-started). Moreover, all costs in the BH Budget (\$257,204 in operating costs, inclusive of the \$96,000 in repairs noted above) are costs being incurred to maintain, repair, and protect Byline's Dam collateral.

89. Finally, while I strongly believe that there is more value to be obtained from the Secord and Smallwood Dams outside of a condemnation proceeding, even if all four Dams end up in condemnation, I believe that Byline will be better off as a result of the Restructuring and the Cash Collateral use requested. For one thing, the BHP Budget contemplates funding condemnation

counsel to challenge valuation (fair value must be paid by the condemning authority) and the liquidating trust established via the Plan will provide an efficient mechanism for litigating the issue and distributing proceeds (in addition to pursuing claims that may materially benefit Byline and other creditors). Moreover, the Insurance Settlement results in the Trusts authorizing BM to contribute thousands of acres of bottomlands associated with the Edenville Dam (avoiding any dispute over value allocation and hopefully enhancing the outcome at a valuation hearing). And if condemnation becomes the path in the coming months, the use of cash collateral would be lessened as the BH budget would be revised accordingly.

90. The Debtors' goal in using the Cash Collateral *is to achieve a materially better recovery for Byline* that I believe would occur in a liquidation or shut-down scenario where the collateral is not maintained or repaired, and efforts are not made to thoughtfully maximize value.

91. The only entity that I am aware of that asserts a security interest in cash or cash proceeds of other assets of the Debtors is Byline. The Debtors have one USDA loan and seven SBA loans, all issued through Byline (either directly or as assignee). I provide detail on these in Section I *supra*.

92. I believe the Debtors have an immediate need to use cash collateral (as that term is defined in section 363 of the Bankruptcy Code, the "*Cash*

*Collateral*”) of Byline in order to assure the orderly administration of their bankruptcy estates. Without use of the Cash Collateral in accordance with the Budget, the Debtors will not be able to pay their employees and other direct operating expenses. Inability to use the Cash Collateral on an expedited basis will likely result in an immediate cessation of the ongoing operations of the Debtors’ businesses and will cause irreparable harm to the Debtors’ estates. To give just one example, if the Debtors do not meet FERC requirements – such as getting a forensic report that FERC is requiring started and expeditiously completed, and completing repairs FERC requires – I believe that BHP would be at risk of losing its FERC licenses for the Secord and Smallwood Dams, licenses and Dams that I believe still have material value. And the Debtors need to fund payroll, Restructuring, and operational costs in the coming days and weeks. Put simply, the Debtors cannot continue operations and their Restructuring efforts absent use of the Cash Collateral.

93. I also believe that having the Debtors continue to operate and maintain the Dams, particularly the Secord and Smallwood Dams which are still holding back impoundments, is important from a safety / stewardship perspective.

94. I believe the ability of the Debtors to finance, through the use of Cash Collateral, their ongoing operations as they pursue the Restructuring for the benefit of all creditor constituencies is in the best interests of the Debtors, all their

creditors, and their estates. The relief requested is necessary in order to avoid immediate and irreparable harm and prejudice to the estates and to all parties-in-interest in these Bankruptcy Cases.


95. As Co-Trustee of the Boyce Trusts – which own both the Debtors and non-debtor BM – I can confirm that the Trusts and BM have agreed to grant Byline, to secure payment of an amount equal to any diminution in value of Byline’s collateral resulting from the Debtors’ use of Cash Collateral in these Chapter 11 Cases, first priority liens on the four currently unencumbered development properties described in Exhibit B to the Proposed Interim Order attached to the Cash Collateral Motion.

96. The BM Properties are comprised of four parcels south of the Edenville Dam. To provide a sense of the value of the BM Properties, on December 31, 2019, BM entered into an Asset Purchase Agreement with the FLTF pursuant to which FLTF agreed to pay \$1,000,000 for these four parcels. Because this sale was part of a larger transaction, BM agreed to accept this price notwithstanding that on August 21, 2019, it had received an appraisal that valued just the three parcels East of state highway M-30 (*i.e., less than all of the BM Properties*) at \$1,275,000. I believe (and I know BM believes) that the BM Properties have substantial recreational development potential, potential which BM has already taken steps to pursue.

97. I believe the Debtors have an urgent and immediate need to use Cash Collateral to continue to their business operations while they pursue the Restructuring. All of the Debtors' businesses will be immediately and irreparably harmed without authorization from the Court to use Cash Collateral, as requested, on an interim basis pending the final hearing.

I declare under penalty of perjury that the foregoing is true and correct.

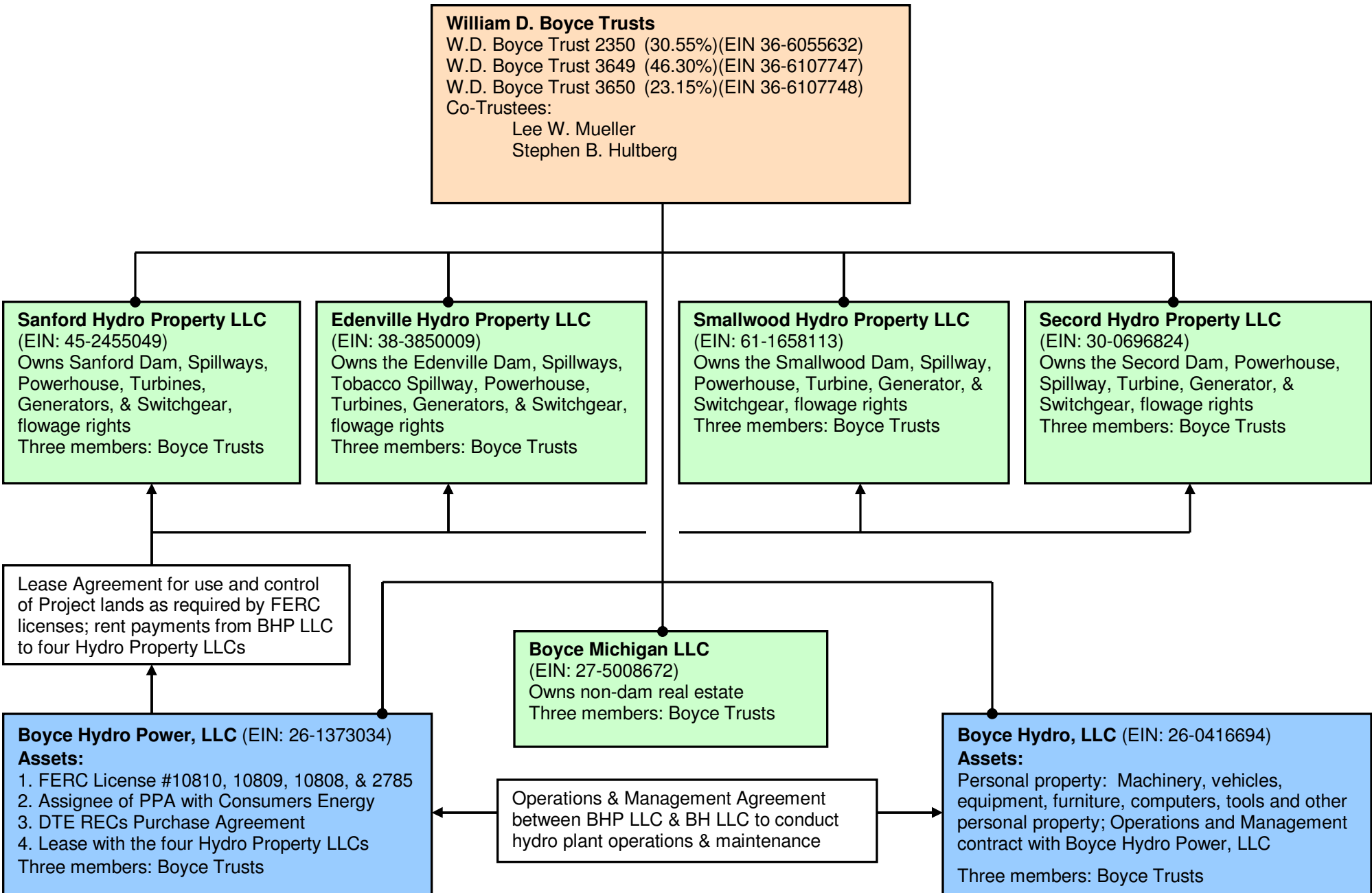
Date: August 3, 2020

By:   
Lee W. Mueller  
Authorized Representative and Co-Manager  
of each of the Debtors

# **EXHIBIT A**



**Boyce Trusts' Entities and Ownership Reorganization Chart for Michigan Business Entities**  
**1 January, 2012**



**EXHIBIT B**

Intercompany Transactions

## Exhibit

### Note to Schedule of Intercompany Transfers

The payments reflected on the following page represent funding from BHP (the entity that receives revenue as the holder of the FERC licenses and the party to the PPA) to BH (the entity that operates the Dams pursuant to the O&M Agreement). The Debtors will continue to investigate, including in connection with preparing their Schedules and Statements of Financial Affairs, but are not aware of other material inter-company transfers between and among the Debtors, or between and among the Debtors and the HoldCos.

To be clear, BHP also leases the Dams owned by the HoldCos, and pays monthly rent in the form of paying property taxes and Byline debt payments on behalf of the HoldCos. Similarly, BHP pays for certain professional services that may benefit one or more of the other entities. But those payments do not go from one entity to another and are not intercompany transfers in that sense.

**Boyce Hydro Power, LLC**  
**Intercompany transactions**  
**July 31, 2019 through July 31, 2020**

Type	Date	Name	Original Amount	Paid Amount	Balance
<b>Operations</b>					
Check	08/26/2019	Boyce Hydro LLC	50,000.00	50,000.00	50,000.00
Check	09/20/2019	Boyce Hydro LLC	80,000.00	80,000.00	130,000.00
Check	10/07/2019	Boyce Hydro LLC	60,000.00	60,000.00	190,000.00
Check	11/01/2019	Boyce Hydro LLC	50,000.00	50,000.00	240,000.00
Check	11/13/2019	Boyce Hydro LLC	50,000.00	50,000.00	290,000.00
Check	12/02/2019	Boyce Hydro LLC	50,000.00	50,000.00	340,000.00
Check	12/17/2019	Boyce Hydro LLC	50,000.00	50,000.00	390,000.00
Check	01/02/2020	Boyce Hydro LLC	50,000.00	50,000.00	440,000.00
Check	01/13/2020	Boyce Hydro LLC	75,000.00	75,000.00	515,000.00
Check	01/25/2020	Boyce Hydro LLC	25,000.00	25,000.00	540,000.00
Check	02/05/2020	Boyce Hydro LLC	25,000.00	25,000.00	565,000.00
Check	02/10/2020	Boyce Hydro LLC	100,000.00	100,000.00	665,000.00
Check	02/24/2020	Boyce Hydro LLC	25,000.00	25,000.00	690,000.00
Check	03/06/2020	Boyce Hydro LLC	50,000.00	50,000.00	740,000.00
Check	03/23/2020	Boyce Hydro LLC	50,000.00	50,000.00	790,000.00
Check	04/09/2020	Boyce Hydro LLC	50,000.00	50,000.00	840,000.00
Check	04/17/2020	Boyce Hydro LLC	75,000.00	75,000.00	915,000.00
Check	05/14/2020	Boyce Hydro LLC	50,000.00	50,000.00	965,000.00
Check	06/15/2020	Boyce Hydro LLC	100,000.00	100,000.00	1,065,000.00
Total Operations				1,065,000.00	1,065,000.00
<b>TOTAL</b>				<b>1,065,000.00</b>	<b>1,065,000.00</b>