UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northwestern Corporation   Project No. 2188-259

JOINT MOTION TO INTERVENE
And PROTEST

COME NOW: Firehole Ranch LLC ("FHR"), with mailing address of 3014 Colter Avenue, Bozeman MT 59715, Lyndy Caine Owner/Manager; Kirkwood Marina, LLC ("KM"), with mailing addresses of, P. O. Box 1427, 11505 Hebgen Lake Road, West Yellowstone, MT 59758, Yvonne Douglas, Manager; and, Barta Enterprises, Inc., dba Yellowstone Holiday Resort, 16990 Hebgen Lake Rd., West Yellowstone, MT 59758, Vickie Barta, President, (the "Businesses") are Montana Corporations and file this, their JOINT MOTION TO INTERVENE And PROTEST. The Businesses move for entry of an ORDER permitting the Businesses to intervene and participate as parties in this Matter. The Businesses are independent entities with the same or similar business interests on Hebgen Lake.

INTERVENTION

The Northwestern Corporation (the "Company") failed to act prudently in the administration of the releases of water from Hebgen Lake to the detriment and with resulting damages to the Businesses. The Businesses have demonstrated in ATTACHMENT A (Attached hereto and adopted herein by reference) that they were directly damaged as a result of poor planning and the Company's imprudent decisions. The Businesses are real parties in interest having direct and consequential monetary damages and should be allowed to jointly intervene and fully participate in this administrative action. Were the Businesses to sustain another year like 2021, it is likely that all or some of those entities will fail and go out of business. Recreational users and other individuals have been adversely affected and may similarly seek to be considered adversely affected parties.

OVERVIEW

The Businesses were adversely affected by decisions of the Company as it regulated the discharges from Hebgen Lake commencing June 15, 2021[1]. The Company apparently made excessive spring discharges disregarding the existence of minimal snowpack. **No one is questioning the need to protect the fisheries in the lower Madison River. It is better protected by a properly operating reservoir.** We find ourselves with a deficit management of the resource where:

- The Company should have given notice to appropriate state and federal governments and parties that would be affected by extreme drawdowns of Hebgen Lake. It sought no input on its intended discharge strategy before the spring runoff began and should have provided a comment before it unilaterally favored one competing interest over all others. The practice of providing notice and an opportunity to participate is called due process, fairness or prudence.

- The Company should have explored options such as alternative water sources such as Ennis Lake and whether with some minor engineering intervention, Quake Lake. Use of those alternative resources may have resulted in an operational plan that minimized or lessened the adverse consequences to all adversely affected parties while still benefitting the Madison.

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[1] The Company did not provide information on its operational protocol to anyone before June 15. Based upon anecdotal information, the decision by the Company to discharge high quantities of runoff in early spring, 2021 likely contributed to the shortfalls that occurred after June 15.

- The Company should have sought a variance to the operational permit requirements for the Madison River flow gage at Kirby ranch near Cameron, Montana ("Kirby") based upon a percentage of available flows when confronted with weather changes associated with global warming.

- The Company should have developed a Recovery Plan establishing how it would manage outflows from Hebgen Lake in order to maintain the minimum pool elevation and discharges to support the established businesses operating on Hebgen Lake and healthy fisheries in the Madison River during drought conditions.

THE COMPANY'S APPARENT LACK OF PRUDENT DECISION-MAKING (PRE JUNE 15)

The Company supports its plea for a variance with the conditions it found itself in as of June 15 without reference to how those conditions developed. What is conspicuously absent from its application for a variance is how the Company managed the spring snowpack runoff during the early months of 2021 through the first two weeks of June. The levels in Hebgen Lake were more than two feet below the full pool maximum. No data is provided by the Company demonstrating the Company's "prudence" in administering and aggressively storing the maximum available amount of runoff before June 15. The Company wrote on July 21:

> "As you are all well aware, 2021 has been a very challenging water year with dismal precipitation and early, hot weather. It doesn't look like we are getting a break any time soon." (Infra Ftnt 2.)

Prudence would dictate filling the Hebgen Lake as soon as possible and should have been a priority.

Anecdotal reports from fishing guides and other local residents state that the spring discharges from Hebgen Lake were inordinately high, excessive, and more on the order of a normal snowpack year. The FERC should require that The Company disclose the Company's policy for discharging during a year of "dismal precipitation." It would be imprudent had the Company discharged water as if it were a "normal year." If the FERC finds it to be so, the Company, in part, created the water shortage crisis.

THE COMPANY'S APPARENT LACK OF PRUDENT DECISION-MAKING
(POST JUNE 15)

The Company intentionally withheld critical information as to the severity of necessary withdrawals from Hebgen Lake to maintain the Madison River levels at Kirby. It cherry picks the 2021 facts so as to try to parallel the facts as they occurred in 2007 in an attempt to obtain from the FERC similar treatment, waiving the need for a variance.

Evidence of this questionable pattern of behavior is found in the Company's Response to the request from the FERC staff. The graph of "Hebgen Reservoir Elevation 2021" (the "Graph") found on unnumbered page 2 of the Company's Request for variance (the "Request") oddly only represents data starting on June 15. The Company however acknowledges:

> The deviation was caused by low snowpack, minimal inflows to the project, and hot and dry summer due to extreme drought conditions observed in southwest Montana. (Request at unnumbered page 1)

Low snowpack and "extreme" drought conditions were evident to the Company long before July 21, when the full pool minimum was reached.

By the start of July, 2021, it should have been intuitively obvious to the Company from an extrapolation of the data on the Graph that were the Company to continue withdrawals at its then-current rate, the full pool minimum permit condition would have been violated far earlier than "October 1." In fact, the permit condition was violated 70 days earlier than October 1 on July 22.

The Request has attached a series of the Company's e-mails sent concerning the draw-down. One of the earliest e-mails attached to the Request was dated July 21, 2021 and was sent to various state and federal agencies.[2] Those earliest e-mails seem to be an attempt to understate the immediacy and the severity of the situation to coopt the other governmental agencies not to interfere with the Company's plan of operation. The reference in that e-mail states "Re: Drafting of Hebgen Reservoir below 6530.26 *before Oct. 1*," [Emphasis supplied] while a true statement, it understates the imminent violation that the e-mail itself notes:

> At this rate we will drop below our FERC directed reservoir elevation of 6,530.26 feet by the end of this week.

Further, the e-mails of the 21st try to underplay the severity of the impending crisis by comparing the then current facts to those that existed in 2007, stating:

> This year is looking very similar to what we observed in 2007. If this trend continues we would expect to see Hebgen Reservoir elevation around 6527.5 - 6528 feet (6-7 feet below full pool) by October 1st.[3]

That statement is a deceptive understatement as to the severe conditions. First, the statement references 2007 actual maximum withdrawal level, 6-7 feet below full pool <u>maximum</u> by October 1st. A 6-7 foot level below full pool is approximately 1-2 feet below the full pool <u>minimum</u> by October 1. The Company's data on the Graph shows that one foot (1') below the full pool minimum was reached just after July 27, 2021 or approximately 64 days before October 1. The level of two feet (2') below full pool

[2] Watson, Trevor ; Brey, Jason -FS ; Storrar, Keenan ; Chris Boone (ctboone@blm.gov) ; Jodi_Bush@fws.gov; James Boyd (james_boyd@fws.gov) ; Shallcross, Alden T ; Jaeger, Matt <mattjaeger@mt.gov.

[3] To: Watson, Trevor ; Brey, Jason -FS ; Storrar, Keenan ; Chris Boone (ctboone@blm.gov) ; Jodi_Bush@fws.gov; James Boyd (james_boyd@fws.gov) ; Shallcross, Alden T ; Jaeger, Matt

minimum level was reached on August 8, 2021, or 53 days before October 1. Those milestones show an extremely more severe situation than 2007. In fact, the actual level reached five feet (5') below the full pool minimum on October 1, 2021 and ten feet (10') below full pool maximum and not "6-7 feet." Had the Company extrapolated existing data in early or mid-July, the Company would have projected reaching ten feet (10') below full pool maximum conservatively by early September and should have disclosed those projections.

It can be reasonably inferred from the Company's e-mails what was at play. The Company portrays a scenario to attempt to understate the severity so as to mimic what had occurred in 2007, when the FERC did not require a variance for violating the full pool minimum. It states:

> NorthWestern held a conference call with the FERC staff who issued this letter to better understand the request. We reviewed the process NorthWestern had gone through for this same situation in 2007 in which this request for temporary variance was not required.[4]

What is glaringly obvious is that the 2021 facts are more severe and not "the same situation (as) in 2007." The Company's mis-characterization is punctuated when it wrote on July 21:

> "As you are all well aware, 2021 has been a very challenging water year with dismal precipitation and early, hot weather. It doesn't look like we are getting a break any time soon."[5]

The Company's apparent surprise that the FERC would now question the Company's decision is itself a surprise. The Company wrote:

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[4] E-mail of September 21 to Hebgen and Madison Partners, from Andrew Welch, p. 3 of the unlabeled attachments.

[5] To: Watson, Trevor ; Brey, Jason -FS ; Storrar, Keenan ; Chris Boone (ctboone@blm.gov) ; Jodi_Bush@fws.gov; James Boyd (james_boyd@fws.gov); Shallcross, Alden T ; Jaeger, Matt.

> This is a change of procedure at FERC and to fulfill the filing request we need to evaluate what impacts this sustained drawdown will have on any of our license requirements. [6]

The Company should have considered "what impacts this sustained drawdown will have on any of our license requirements" when it first realized that the information it had showed much more severe impacts were to be. The Company should have alerted all the parties that the extrapolation of the data clearly showed the projected severity of the violations on the full pool minimum. The Company had sufficient lead time to request input and then seek variances to its permit conditions to minimize the environmental impacts and the impacts to ALL adversely affected parties.

PROTEST

The FERC should not grant the Company a "Get out of Jail Free Card" in the form of a variance. The Company is not without fault in the turn of events that resulted in environmental damage was well as damages to the Businesses and others adversely affected parties. The failure of the Company was not to maximize the storage before the spring runoff began and to plan a release strategy that minimized damages. That lack of planning, in part, brought about the tragedy it sought to avoid by excessively drawing the Hebgen Lake levels down.

Another fundamental error in judgment was the Company's failure to notice agencies and substantially affected persons of the projected impacts to the system when having realized the severity of the drought conditions in early 2021. The Company cannot hide behind what the FERC did in 2007 since the facts and consequences are significantly more adverse in 2021.

The Company should have notified the FERC when it first became

[6] ***Id.*** at footnote 4, *supra.*

apparent that discharges were not going to be "business as usual." **No one is questioning the need to protect the fisheries in the lower Madison River. It is better protected by a properly operating reservoir.**

CONCLUSION

Regulated companies have two paths when addressing extraordinary situations; they can seek a variance and risk a denial or they can march forward without a variance and then beg forgiveness. Northwestern chose the latter and is now facing the consequences.

WHEREFORE, the FERC should deny the Company's Request for a variance and impose such penalties and conditions on the Company's operating license as it deems appropriate. In light of what happened in 2021 and the changing climate, the Businesses are asking for a complete reevaluation of the requirements for managing Hebgen Lake and the Madison River with added emphasis on gathering relevant data year round, planning for storage and use of a limited resource.

At a minimum, those conditions should include:

- The Company should be required to provide notice before they occur and as soon as is practical to appropriate state and federal governments and adversely affected parties when it is apparent from the existing conditions that extreme drawdowns of Hebgen Lake would likely fall below full pool minimums.

- The Company should be required to explore additional source options including but not limited to Ennis Lake and, with some minor engineering intervention, Quake Lake and report back to the FERC as to the feasibility of each.

- The Company should evaluate seeking a variance to the operational permit requirements for Kirby based upon a percentage of available flows and not a specific rate as a result of weather changes associated with global warming.

- The Company should be required to prepare a Recovery Plan establishing how it will manage inflows and outflows to Hebgen Lake in order to maintain the minimum pool elevation and discharges to support the established businesses operating on Hebgen Lake and healthy fisheries in the Madison River during draught conditions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the JOINT MOTION TO INTERVENE And PROTEST has been filed or furnished via the Commission's E-Filing System at: http://www.ferc.gov/docs-filing/efiling.asp or email this 4th day of January, 2022 and to:

Jeremy Jessup, (202) 502-6779
Jeremy.Jessup@ferc.gov

Mary Gail Sullivan, Director, Environmental and Lands
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Lyndy Caine
/s/ Lyndy Caine

ATTACHMENT A

FIREHOLE RANCH, LLC.

Lodge operations:

Direct losses: A total of 39 reservations were cancelled at a total of $356,477.00 due to the early closing of Firehole Ranch. The lake levels became so low we could no longer have boats in the water and had to cancel the last 1/3 of our sold-out season

Transportation Operational Issues:

The Ranch transports its guests back and forth across the lake morning and evening. On September 5th we pulled two boats out of the water, leaving us with one operable boat for guest and supplies. On September 12th we pulled the last boats out of the Marina. Our Marina operations were disturbed from September 5th, until closing on October 10th. A total of 36 days.

The low water this season left exposed rocks and old dock anchors that had to be cautiously navigated around. Many props were damaged or destroyed by the end of the season. The boats were sucking up a lot of mud from the bottom of the lake which caused numerous issues with lower units and required additional maintenance hours during and after the season.

Many staff hours were spent by our crew to keep our docks floating and safe for guest. Daily dock inspections and repairs were made. As the levels continued to drop, we extended our docks out further and further.

Measurable Damages – re: water transportation

5 dock sections had to be left in the lake mud due to the low water. We were unable to tow them out and will not know that extent of the damages until the water returns.

Dock damages and Boat maintenance and replacement parts, including props and lower units:

Cracked/Broken Dock Floats:	$3,840.00
Cracked/Broken Lumber and Hardware:	$1,000.00
Propellers and lower unit repairs:	$3,000.00
Materials for new anchors:	$1,000.00
Estimated Total Physical Damage:	$8,840.00

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KIRKWOOD MARINA, INC.

Kirkwood Marina[7] suffered direct monetary losses of income or incurred additional expenses due to low water conditions incurred by the Company's lowering of Hebgen Lake of:

Loss of Boat Rentals:
From August 7 through September 2021, over $136,000

Loss of marina slip rentals:
For August and September- over $22,000

Reconfiguration of docks (3 times) and gasoline service area and public launchings:
At least $4,500 and $2,250 respectively

Kirkwood incurred additional expenses including: having to make its cut lower than the launch ramp; deepen the gas dock and extend the gas hoses to reach farther; and, to clean out the weeds and bottom to make the docks more usable.

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YELLOWSTONE HOLIDAY RESORT

Yellowstone Holiday Resort (herein after "YHR") experienced a loss of revenue in 2021 of approximately $92,000, due entirely to the extreme low level of Hebgen Lake. This number is a very conservative estimate because it is based on what YHR made in 2020, and not the expected increase in revenues over 2021 in this post-Covid recreational environment.

YHR removed all its rental docks on July 11, 2021. The docks had been placed in Hebgen Lake on June 13th, which gave YHR about one month of rental slip operations. The fuel dock, which is attached by ramp, had to be removed on August 30th, due to low water.

Along with a rocky shoreline, YHR has an island rising out in front of the marina. As the lake's water level continued to drop, that island became a "hazard" for boaters. Many people got stuck on the island coming and going. By mid-August, only small boats were able to launch, and by September, it was nearly impossible to launch a boat at YHR.

[7] A work crew from the Company came to the Marina with a boat to remove the navigational buoys at the Hebgen dam. They were unable to launch their boat due to low water conditions. They returned with a small fishing outboard and had to pole it out of the cut to do their work at the dam. Many boats incurred damaged props hitting dock anchors and rocks – those rocks had to be moved at the Marina's expense.

Removing docks meant canceling and refunding all slip reservations. Some RV reservations also canceled due to the lack of water for recreating. YHR has 52 boat slips, 28 of which were rented seasonally. The remaining 24 slips were rented daily at $20/day. Along with renting canoes, kayaks, paddle boards, fishing boats and two pontoon boats, YHR has a small convenience store, offering drinks, snacks, ice cream, etc. -A lack of boaters and general recreational opportunities on the lake, led to a drastic decline in retail store sales. Essentially, after July 11th, YHR retail sales fell dramatically. In addition, though YHR was still able to sell fuel from the fuel dock until August 30th, the low water level prohibited most boats from reaching the fuel dock.

By all accounts, 2021 was a record-breaking year for most area businesses. YHR's RV site and cabin occupancy rates and retail revenue were at an all-time high in June and early July, with June's retail sales at an increase of 138% over 2020. By the end of July, that increase dropped to only 12%. The month of August saw a decrease of 48% in retail sales, with September down 32% compared to 2020.

YHR incurred no damage to property due to the level of the lake because they were VERY proactive in removing docks before damage could occur. YHR also signed the boat launch area with warnings about the low water level of both the marina and the lake. When the island started to appear in front of the marina, YHR personnel took extra precautions to warn boaters to steer clear of the island and hug the west shoreline. Even with these warnings, many boaters bottomed out in the marina, with some having to walk their boat to the shoreline or boat ramp. YHR was not made aware of any damages to individual's boats.

Document Content(s)