No. 23-1761

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOE BRUNEAU, DAVID PHILLIPS, DANA RALKO, PATRICIA RALKO, MARY RANDALL, OSRO RANDALL, JAMES MRDUTT, and ALICIA MRDUTT,

Plaintiffs - Appellants,

v.

COUNTY OF MIDLAND and COUNTY OF GLADWIN,

Defendants - Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan – Northern Division
Honorable Thomas L. Ludington, District Judge

BRIEF OF APPELLANTS JOE BRUNEAU, ET AL.

ORAL ARGUMENT REQUESTED

Mark L. McAlpine (P35583)
Douglas W. Eyre (P63068)
Mark W. Oszust (P82854)
McAlpine PC
3201 University Drive, Suite 200
Auburn Hills, MI 48326
(248) 373-3700

Counsel for Plaintiffs-Appellants

GLOSSARY OF TERMS

"Appellants" means Joe Bruneau, David Phillips, Dana Ralko, Patricia Ralko, Mary Randall, Osro Randall, James Mrdutt, and Alicia Mrdutt.

"Appellees" means County of Midland and County of Gladwin.

"FLTF" means the Appellees' delegated authority, the Four Lakes Task Force.

"Dam" means the Edenville Dam.

"FERC" means the Federal Energy Regulatory Commission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested because this case raises constitutional questions that are of great importance related to unconstitutional takings in violation of the Federal and Michigan Constitution. Oral argument will assist the Court in addressing these important issues.

STATEMENT OF JURISDICTION

This Court has jurisdiction because Appellants raise a federal constitutional claim under 42 U.S.C. §1983. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, § 1343, and § 1367 because this case involves a federal question and pendant state claims.

On July 10, 2023, the Magistrate Judge issued her Report and Recommendation on Defendants' Motion for Summary Judgment, recommending that the Court dismiss Appellants' Amended Class Action Complaint. *See Report and Recommendation on Defendants' Motion for Summary Judgment*, R.81, PageID.7031. On July 24, 2023, Appellants objected to the Magistrate Judge's Report and Recommendation due to the fact that Appellants' property had indeed been taken for a public purpose. *See Plaintiffs' Objections to Magistrate Judge's Report and Recommendation regarding Defendants' Motion for Summary Disposition*, R.82, PageID.7037-7042. On July 26, 2023, the District Court overruled Appellants' Objections to the Magistrate Judge's Report and

Recommendation, adopted the Report and Recommendation, and dismissed Appellants' Amended Class Action Complaint with prejudice. *See Opinion and Order Overruling Plaintiffs' Objections, Adopting Magistrate Judge's Report and Recommendation, Granting Defendants' Motion for Summary Judgment, and Dismissing the Case*, R.83, PageID.7044. On that same day, the District Court entered its Judgment in this matter. *See Judgment*, R.84, PageID.7047.

On August 23, 2023, Appellants filed their Notice of Appeal. *See Notice of Appeal*, R.85, PageID.7048. Because the District Court's July 26, 2023, order was a final decision, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Appellees unlawfully took Appellants' property when they set dangerously high lake levels despite knowing that the Edenville Dam (the "Dam") was in need of significant repair and posed a threat to public health and safety. Appellees took action directly aimed at Appellants' property by obtaining a normal lake level order for the expressed public purpose "to protect the public's health, safety, and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around Wixom Lake, Sanford Lake, Smallwood Lake, and Secord Lake." *See Four Lakes Lake Level Study*, R.59-2, PageID.3114, 3117, 3120, 3124. The District Court dismissed Appellants' Amended Class Action Complaint by

adopting the Magistrate Judge's Report and Recommendation, which recommended that Appellants' taking claims under the Federal and Michigan Constitution should be dismissed because Appellees did not take Appellants' property for a public purpose or the benefit of any third party. *See Report and Recommendation on Defendants' Motion for Summary Judgment*, R.81, PageID.7027, 7029 – 30; *see Opinion and Order Overruling Plaintiffs' Objections, Adopting Magistrate Judge's Report and Recommendation, Granting Defendants' Motion for Summary Judgment, and Dismissing the Case* R.83, PageID.7046. The issues are:

1. Whether Appellees unlawfully took Appellants' property for a public purpose in violation of the Michigan Constitution.
2. Whether Appellees unlawfully took Appellants' property for a public purpose in violation of the Federal Constitution.

STATEMENT OF THE CASE

I. INTRODUCTION

This case stems from the collapse of the Dam, which caused catastrophic damage to residential and personal properties of Appellants and other putative class members. The evidence shows that prior to the Dam collapse on May 19, 2020, Appellees and their delegated authority, the Four Lakes Task Force ("FLTF"), were well aware that the Dam was in need of significant repair – most critically, increasing the Dam's spillway capacity – in order to protect the public health and safety of

surrounding individuals and businesses and their respective properties around the Dam. *See Lyman Expert Report*, R.59-1, PageID.3039-40; *Four Lakes Lake Level Study*, R.59-2**,** PageID.3113-3125; *2019 Annual Report*, R.59-3, PageID.3426-27. Specifically, Appellees and FLTF knew that the Dam was unable to safely pass testing required by the Federal Energy Regulatory Commission ("FERC"), as well as Michigan's less stringent Probable Maximum Flood ("PMF") capacity requirement, which Michigan dams must pass to safely handle rainfall and prevent flooding. *See FLTF Flood Study Summary*, R.59-4, PageID.3444.

Despite knowing that the Dam needed to significantly increase its spillway capacity, Appellees sought and obtained a lake level order ten (10) months prior to the Dam collapse from the Midland County Circuit Court, which established the same dangerously high lake levels for Wixom Lake that were in place prior to the State of Michigan taking over regulatory control of the Dam from the federal government. *See Appellees' 307 Petition*, R.59-5, PageID.3454-3482; *Lake Level Order,* R.59-6, PageID.3484-3495. FERC made clear when revoking the previous Dam owner's license that they were doing so specifically because it had failed to increase the Dam's inadequate spillway capacity. *See FERC Order Revoking License*, R.59-7, PageID.3636, 3647, 3654, 3661. While Appellees were aware that the Dam desperately needed increased spillway capacity, they deprioritized that in favor of other repairs. *See 2019 Annual Report*, R.59-3, PageID.3427.

Appellees were aware that the Dam needed additional spillway capacity because shortly after FERC revoked the previous Dam owner's license due to its failure to increase spillway capacity, Appellees passed resolutions proposing to make the FLTF their delegated authority and set lake levels in order to protect public safety and health. *See Four Lakes Lake Level Study*, R.59-2, PageID.3113-3125. On October 9, 2018, and October 16, 2018, Gladwin and Midland County respectively approved resolutions stating the following:

> WHEREAS, in order to maintain the normal lake levels for Wixom Lake, Sanford Lake, Smallwood Lake, and Secord Lake (the "Lakes") in Gladwin and Midland Counties, the County Board of Commissioners has determined that it is necessary to establish the normal level or levels of the Lakes in order to protect the public's health, safety, and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the lake.
>
> NOW THEREFORE BE IT RESOLVED, that the County Board of Commissioners finds that in order to protect the public's health, safety, and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the Lakes, that it is necessary to take all action to establish and maintain the normal lake level for the Lakes (the "Lake Level Project").

Id. at PageID.3117, 3124. Additionally, Appellees were aware that the Dam had inadequate spillway capacity because the FLTF informed the Appellees that the Dam could not pass ½ of the PMF. Instead of immediately increasing the Dam's spillway capacity or maintaining lower lake levels, however, Appellees inexplicably chose to petition for the same lake levels that had been in place for decades and opted not to begin increasing spillway capacity until 2023. *See 2019 Annual Report*, R.59-3, PageID.3426-27; *Appellees' 307 Petition*, R.59-5, PageID.3454-65.

Appellees' decision to obtain a lake level order that maintained dangerously high lake levels and postponed increasing the Dam's inadequate spillway capacity until 2023 directly led to the flooding that destroyed Appellants' property. While the Dam collapse was caused by a condition called static liquefaction, the trigger for that collapse was the high-water levels in Wixom Lake – levels the Appellees sought and received judicial permission to set – despite knowing that the Dam lacked adequate spillway capacity. According to the Final IFT Report:

> [i]f, sufficient funds would have been available to upgrade the spillway capacity to pass an extreme flood, therefore the rise of the lake in May 2020 would have been limited and the failure would almost certainly have been prevented.

See Final IFT Report, R.59-8, PageID.3669. Appellants' intentional and reckless actions, which were directed at Appellants' properties for a public purpose, amount to a constitutional taking, thereby entitling Appellants to compensation under the law.

II. PROCEDURAL HISTORY

On June 17, 2020, Appellants initiated this case by filing their Class Action Complaint alleging, amongst other things, violations of the Federal Constitution under 42 U.S.C § 1983 and Michigan Constitution Article 10 § 2 against Appellees, as well as the Michigan Department of Environment, Great Lakes & Energy ("EGLE"), the Michigan Department of Natural Resources ("MDNR"), and FLTF.

Complaint, R.1, PageID.25, 28. EGLE, MDNR and FLTF were dismissed by stipulation on September 18, 2020, and November 25, 2020, respectively. *See Stipulated Order Dismissing EGLE and MDNR*, R. 24, PageID.515; *Stipulated Order Dismissing FLTF*, R.25, PageID.517. On July 9, 2021, the Court entered an Order requiring Appellants to file an amended complaint. *See Order Adjourning Case Management and Scheduling Order*, R.31, PageID.536. Pursuant to the Court's Order, on July 19, 2021, Appellants filed their Amended Class Action Complaint, alleging amongst other things, that Appellees unlawful took Appellants' properties in violation of the Federal Constitution under 42 U.S.C § 1983 and Michigan Constitution Article 10 § 2. *See Amended Class Action Complaint*, R.32, PageID.562, 565.

On October 25, 2022, Appellees filed their Motion for Summary Judgment pursuant to FRCP 56, seeking to summarily dismiss Appellants' Amended Class Action Complaint. *See Motion for Summary Judgment*, R.56, PageID.2377. On July 26, 2023, the District Court dismissed Appellants' Amended Complaint by adopting the Magistrate Judge's Report and Recommendation, which suggested that Appellants' taking claims under the Federal and Michigan Constitution should be dismissed because Appellees did not take Appellants' property for a public purpose or the benefit of any third party. *See Report and Recommendation on Defendants' Motion for Summary Judgment,* R.81, PageID.7027, 7029 – 30; *Opinion and Order*

Granting Defendants' Motion for Summary Judgment, R.83, PageID.7046. On that same day, the District Court entered its judgment in this matter. *See Judgment*, R.84, PageID.7047.

On August 23, 2023, Appellants timely filed their Notice of Appeal. *See Notice of Appeal*, R.85, PageID.7048.

SUMMARY OF THE ARGUMENT

Appellants and the putative class are all residents of Midland and Gladwin County who had their real and personal property destroyed by the Dam collapse. Appellees set into motion the destructive forces that caused the Dam collapse by establishing dangerously high lake levels despite knowing that the Dam lacked adequate spillway capacity and that it was in need of significant repair. Appellants' properties were taken for the expressed public purpose "to protect the public's health, safety, and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the lake." *See Four Lakes Lake Level Study*, R.59-2, PageID.3113-3125. Following the District Court's ruling that is being appealed, the Michigan Court of Appeals squarely addressed these issues in another case concerning the Dam and held plaintiffs had stated a viable takings claim. *See Krieger v. Dep't of Env't, Great Lakes, & Energy*, No. 359895, 2023 WL 5808605, Mich. Ct. App. Sept. 7, 2023). Appellees have failed to compensate Appellants for their properties in violation of the Michigan and Federal Constitution.

As such, the District Court erred in ruling that Appellants' Michigan inverse condemnation and federal constitution claim should be summarily dismissed.

STANDARD OF REVIEW

The standard of review for summary judgment is de novo. *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008). "In reviewing the district court's grant of summary judgment, [courts] draw reasonable inferences in favor of the nonmoving party." *SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc.*, 33 F.4th 872, 878 (6th Cir. 2022). The moving party is entitled to summary judgment if it "show[s] the absence of a genuine dispute of material fact as to at least one essential element" of each claim for which it seeks judgment, with a genuine dispute existing when the nonmoving party presents "sufficient evidence from which a jury can reasonably find" in its favor. *Id*. Appellate courts are careful not "to weigh the evidence and determine the truth of the matter," but only "determine whether there is a genuine issue for trial." *Jackson v. VHS Detroit Receiving Hosp., Inc.*, 814 F.3d 769, 775 (6th Cir. 2016). Review of summary judgment is "limited to ascertaining whether any factual issue pertinent to the controversy exists; it does not extend to resolution of any such issue." *Tygrett v. Washington*, 543 F.2d 840, 844 n.17 (D.C. Cir. 1974). "As a result, any findings of fact in relation to a motion for summary judgment are not truly findings of fact…and are entitled to no deference." *SunAmerica Hous. Fund 1050,* 33 F.4th 872, 878 (6th Cir. 2022) (internal quotes

omitted) (quoting *Garter-Bare Co. v. Munsingwear, Inc.*, 650 F.2d 975, 983 (9th Cir. 1980) (Wallace, J., concurring).

ARGUMENT

I. THE DISTRICT COURT ERRED BY SUMMARILY DISMISSING APPELLANTS' MICHIGAN INVERSE CONDEMNATION CLAIM

The Michigan Constitution prohibits the taking of private property for public use without just compensation. MI CONST Art. 10, § 2; *Wiggins v. City of Burton,* 291 Mich.App 532, 571; 805 NW2d 517 (2011). "Michigan recognizes the theory of inverse condemnation as a means of enforcing the constitutional ban on uncompensated takings of property." *Biff's Grills, Inc. v. State Hwy. Comm.*, 75 Mich.App. 154, 156-157, 254 N.W.2d 824 (1997). A claim of inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken ... even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Mays v. Governor of Michigan*, 506 Mich. 157, 173, 954 N.W.2d 139, 148 (2020). "Inverse condemnation can occur without a physical taking of the property; a diminution in the value of the property or a partial destruction can constitute a taking." *Merkur Steel Supply Inc. v. City of Detroit*, 261 Mich. App. 116, 125, 680 N.W.2d 485, 492 (2004) (internal quotes omitted). "What governmental action constitutes a taking is not narrowly construed, nor does it require an actual physical invasion of the property. No precise

formula exists." *Hinojosa v. Dep't of Nat. Res.*, 263 Mich. App. 537, 548–49, 688 N.W.2d 550, 556–57 (2004) (internal quotes omitted).

In Michigan, "[i]t is well settled that a governmental actor may cause a taking of private property by flooding the property or diverting excess surface water onto the property." *Wiggins v City of Burton*, 291 Mich App 532, 572, 805 N.W.2d 517 (2011)*; see also Krieger v. Dep't of Env't, Great Lakes, & Energy*, No. 359895, 2023 WL 5808605, at *9 (Mich. Ct. App. Sept. 7, 2023). The Michigan Supreme Court has recognized that a taking may occur "where real estate is actually invaded by superinduced water, earth, sand or other material." *Peterman v. Dep't. of Natural Resources,* 446 Mich. 177, 189 n16; 521 NW2d 499 (1994) (internal quotation marks and citation omitted). "Generally, a plaintiff alleging a de facto taking or inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 277, 792 N.W.2d 798 (2010); *see also Charles Murphy, M.D., P.C. v Detroit*, 201 Mich App 54, 56, 506 N.W.2d 5 (1993) ("While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property.").

A. Appellees took affirmative actions directed at Appellants' property.

A governmental entity can take affirmative actions directed at a person's property when authorizing and maintaining lake levels. *Krieger v. Dep't of Env't, Great Lakes, & Energy*, No. 359895, 2023 WL 5808605, at *10 (Mich. Ct. App. Sept. 7, 2023) is a similar suit against various Michigan state agencies, including Michigan's Department of Environment, Great Lakes, and Energy and Department of Natural Resources (the "State Agencies"), related to the Dam collapse. The Michigan Court of Appeals held that a viable inverse condemnation claim was plead against the State Agencies because the State Agencies took affirmative actions directed at plaintiffs' properties by "authorizing higher lake levels" and pressuring the Dam owner to keep water levels high. *Id*. at 10 – 11. According to the Michigan Court of Appeals, authorizing, setting, and maintaining lake levels was an affirmative action directed at the plaintiffs' properties. *Id*.; *Peterman v Dep't of Natural Resources*, 446 Mich. 177, 191, 521 N.W.2d 499 (1994).

Analogous to the State Agencies in *Krieger*, Appellees took action directly aimed at Appellants' properties when they opted to control the Dam by setting and maintaining dangerously high lake levels despite knowing that the Dam lacked adequate spillway capacity and was in need of significant repair. Specifically, Appellees took affirmative action directly aimed at Appellants' properties when they successfully petitioned the Midland County Circuit Court to set dangerously high

lake levels for Wixom Lake. After FERC revoked the Edenville Dam's license to generate power, both Appellees passed resolutions to establish normal lake levels for Wixom Lake in order to, amongst other things, "preserve and protect the value of property around the lake." *See Four Lakes Lake Level Study*, R.59-2, PageID.3113-3125. Despite knowing that the Edenville Dam's FERC license had been revoked due to the Dam's lack of spillway capacity, the Appellees petitioned the Midland County Circuit Court to maintain normal lake levels that had been in place for nearly 80 years. *See Appellees' 307 Petition*, R.59-5, PageID.3454-65. On July 18, 2019, the Midland County Circuit Court granted the Appellees' Petition by setting the same lake levels that had been in effect during FERC regulation. *See Lake Level Order,* R.59-6, PageID.3484-3495.

Setting and maintaining dangerously high lake levels was the affirmative actions directed at Appellants' properties, which ultimately "set into motion the destructive forces that caused" the damage to Appellants' properties. *Krieger* at *10; *see Peterman*, 446 Mich. 177, 191, 521 N.W.2d 499, 507 (1994). Similar to the State Agencies in *Krieger*, Appellees took affirmative actions directly aimed at Appellants' property.

B. Appellees controlled the Dam for a public purpose.

The District Court erred when it held that Appellants' properties were not taken for a public purpose. Appellees passed resolutions and successfully petitioned

to set and maintain lake levels in order to "protect the public's health, safety, and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the lake." *See Four Lakes Lake Level Study*, R.59-2, PageID.3113-3125. It is undeniable that all the above are public purposes.

According to *Krieger,* the plaintiffs' inverse condemnation claim was viable because the State Agencies exercised control over the Edenville Dam for a public purpose. *Krieger*, No. 359895, 2023 WL 5808605, at *10 (Mich. Ct. App. Sept. 7, 2023), *Krieger* explained:

> …plaintiffs alleged that defendants exercised control over the Edenville Dam so much so that their use of the dam constituted a public use. Although privately-owned by Boyce, the dam was "subject to public oversight" by defendants. See *Id.* at 476, 684 N.W.2d 765. The "act of condemnation" by defendants was the alleged affirmative actions taken by defendants to keep lake water levels high and conceal risks, contributing to the dam failure and the damage to plaintiffs' properties. Analogizing to *Hathcock*, **the relevant question is whether defendants took plaintiffs' property by controlling the operation of the dam for a public use, not whether plaintiffs' property—once taken—would be put to a public use**. See *Id.* at 475-476, 684 N.W.2d 765. **Plaintiffs alleged that defendants pressured Boyce to keep water levels high to protect aquatic life**, prioritizing that interest at the expense of the safety of people and property. **Accepting these allegations as true, they suggest that defendants, through their operational control of the dam, put the dam to a public use in their pursuit of environmental protection**.

Id. at *13. *Krieger* held that the plaintiffs' inverse condemnation claim was viable because the State Agencies were controlling the operation of the Dam by requiring the Dam owner to maintain lake levels in order to protect aquatic life (a public purpose).

Similar to the State Agencies in *Krieger*, Appellees exercised control over the Dam for a public purpose. Specifically, Appellees exercised control over the Dam by obtaining a lake level order which required the owner of the Dam to maintain dangerously high lake levels. Analogous to the State Agencies' actions in *Krieger*, the Appellees' actions required and "**pressured**" the Dam owner to maintain dangerously high lake levels. *Id.* According to the Appellees' own resolutions, they set and maintained lake levels in order to "protect the public's health, safety, and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the lake." *See Four Lakes Lake Level Study*, R.59-2, PageID.3113-3125. As such, Appellees unlawfully took Appellants' properties by requiring and pressuring the Dam Owner to maintain normal lake levels that had been in effect under FERC regulation in order to, amongst other things, "protect the value of property around the lake."

In addition to setting and pressuring the Dam owner to maintain high lake levels, Appellees and their delegated authority, FLTF, exercised control over the Dam in other ways as well. Appellees appointed the FLTF as its Part 307 delegated

authority to act on their behalf to enforce and maintain the successfully petitioned for lake levels order. *See Agreement Between Appellees and FLTF,* R.56-7, PageID.2498-99. MCL 324.30708(1) states that "[a]fter the court determines the normal level of an inland lake in a proceeding initiated by the county, the delegated authority of any county or counties in which the inland lake is located shall provide for and maintain that normal level." Pursuant to MCL 324.30708(1) and the Appellees' and FLTF's Agreement, FLTF acted on Appellees' behalf by operating and maintaining the Dam, "supervis[ing], manag[ing], direct[ing] and control[ling] all aspects of the day-to-day operation maintenance of the [Edenville Dam]." *See Agreement between Appellees and FLTF,* R.56-7, PageID.2501. Appellees and FLTF also obtained $5,500,000.00 in financing for "repair and improvements" and engineering design services for the Dam. *See MDEC Grant Application*, R.59-10, PageID.3901; *2019 Annual Report*, R.59-3, PageID.3426. Prior to the Dam collapse, the Appellees and its delegated authority made actual repairs and upgrades to the Dam to ensure safe winter operations. Based on the foregoing, it is evident that Appellees had considerable control over the operation of the Edenville Dam at the time of collapse.

To escape liability, Appellees blame the Midland County Circuit Court for setting lake levels for Wixom Lake. *See Appellees' Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56*, R.56, PageID.2404. However, the Midland County

Circuit Court did not choose the lake levels on its own volition for Wixom Lake. A state circuit court simply does not have the expertise to create and establish normal lake levels on its own. Rather, Appellees petitioned the state circuit court to set lake levels as requested by Appellees. They provided the state circuit court with a lake level study report, which recommended and advocated for the lake levels requested by Appellees. *See Lake Level Report*, R.59-2, PageID.3093. Appellees' Petition and supporting documentation is ultimately what established the lake levels. The state circuit court did not do its own independent analysis to determine optimal levels; it relied on the representations of the Appellees. Ultimate responsibility for the too-high lake levels rests with Appellees.

Appellees are also unable to defeat Appellants' inverse condemnation claim by arguing that a private entity was in control of the Dam and not Appellees. *Krieger* rejected this same argument by the State Agencies. Specifically, *Krieger* explained:

> [State Agencies] broadly argue that an inverse condemnation claim cannot survive when it rests on allegations that a private entity's operation of its private property resulted in damages. [State Agencies] cite several cases for the proposition that "public use" can only arise from government actions on government projects. We decline to accept [State Agencies'] implicit suggestion to hold, in this context, and as a matter of law, that an inverse condemnation case can never be sustained when the alleged damages arise from a privately owned dam. "Flooding cases, like other takings cases, should be assessed with reference to the particular circumstances of each case, and not by resorting to blanket exclusionary rules." *Arkansas Game & Fish Comm v United States*, 568

> U.S. 23, 37, 133 S Ct 511, 184 L Ed 2d 417 (2012) (cleaned up). The fact that most previous inverse condemnation cases in Michigan have involved government projects is unsurprising. Because an inverse condemnation claim must be brought against the government, see *Wiggins*, 291 Mich App at 573, 805 N.W.2d 517, proving sufficient state action will often be easier when the government unilaterally owned and operated a dam. But that does not mean that, when allegations are made that the government—acting along with a privately owned dam operator—took affirmative steps that caused the dam to fail and damaged downstream property owners, Michigan's takings clause provides no remedy. See *Fritz v Washoe Co*, 132 Nev. 580, 584, 376 P.3d 794 (2016) ("When a private party and a government entity act in concert, government responsibility for any resulting damage to other private property may be established by demonstrating that the government entity was substantially involved in the development of private lands for public use which unreasonably injured the property of others.") (cleaned up).

Krieger at *13. As such, Appellants' inverse claim is not barred by the fact that a private entity held title to the Dam.

Lastly, the Magistrate Judge's Report and Recommendation, which was adopted by the District Court without any additional substantive analysis, recommended that Appellants' taking claims should be dismissed because the resolutions and subsequent successful efforts to maintain high lake levels were to "protect [Appellants'] property value"; not to destroy or diminish it. *See Report and Recommendation on Defendants' Motion for Summary Judgment*, R.81, PageID.7027. The District Court's decision to dismiss Appellants' inverse

condemnation claim suggests a governmental entity cannot take a person's property if the government's actions, which ultimately caused the taking, were for an altruistic purpose and not part of the government's intended "goal". *Id*. Sidestepping the takings clause in this manner is inappropriate. *Hall v. Meisner,* 51 F.4th 185, 190 (6th Cir. 2022), *reh'g denied*, No. 21-1700, 2023 WL 370649 (6th Cir. Jan. 4, 2023), and *cert. denied sub nom. Meisner v. Tawanda Hall*, 143 S. Ct. 2639 (2023). If it were, a governmental entity could always defeat a taking claim by simply alleging that the taking was not part of the government's intended goal.

C. Appellees' actions were the substantial cause of Appellants' damages.

Appellees' decision to set dangerously high lake levels, despite knowing that the Dam lacked adequate spillway capacity, was the direct and substantial cause of Appellants' damages. FERC made clear when revoking the previous Dam owner's license that they were doing so specifically because the previous Dam owner had failed to increase the Dam's inadequate spillway capacity. *See FERC Order Revoking License*, R.59-7, PageID.3636, 3647, 3654, 3661. Prior to petitioning the Midland County Circuit Court, Appellees knew that the Dam had inadequate spillway capacity and that it needed to be increased in order to satisfy PMF requirements. However, Appellees intentionally disregarded the Dam's need for additional spillway capacity and opted to petition the Midland County Circuit Court to maintain the dangerously high lake levels that had been in place under FERC

regulation. *FLTF Flood Study Summary*, R.59-4, PageID.3444. However, Appellees intentionally disregarded the Dam's need for additional spillway capacity and opted to petition the Midland County Circuit Court to maintain the dangerously high lake levels that had been in place under FERC regulation.

The Final IFT Report concluded that additional spillway capacity would likely have prevented the Dam collapse. The Dam failure was the result of a phenomenon called static liquefaction, which is the sudden loss of soil strength. Static liquefaction "occurred when Wixom Lake reached a level that was about 3 feet higher than the previous high level which occurred in 1929." *Final IFT Report*, R.59-8, PageID.3669. The Final IFT Report, noted, however, that:

> [i]f, sufficient funds would have been available to upgrade the spillway capacity to pass an extreme flood, therefore the rise of the lake in May 2020 would have been limited and the failure would almost certainly have been prevented.

Id. The Final IFT Report concluded that if the Dam had additional spillway capacity, static liquefaction would not have occurred; meaning the Dam would not have collapsed.

Appellants' Expert, Mr. Tracy Lyman, endorses the findings and conclusions set forth in the IFT Report. Mr. Lyman issued an Expert Report concluding that high reservoir levels that developed upstream of the Dam caused the dam to collapse. *Lyman Report*, R.59-1, PageID.3038, 3045. Mr. Lyman also concluded that

maintaining lower lake levels until the Appellees could increase the spillway capacity at the Dam would have prevented Wixom Lake from reaching historically high upstream pool elevations at the time of the collapse, and therefore prevented the failure itself. *Id*. at PageID.3038, 3044-46. Lastly, Mr. Lyman concluded that if the Dam had enough spillway capacity to pass 50% of the Probable Maximum Flood, then the Dam would have safely passed the flood waters of May 17 – 19, 2020, and the Dam would not have collapsed. *Id*.

Mr. Lyman's conclusions, in conjunction with the Final IFT Report, provide support that Appellees substantially caused the Dam collapse. Specifically, the Final IFT Report concluded that additional spillway capacity would have prevented static liquefaction. Mr. Lyman's Report concluded that additional spillway capacity, coupled with lower lake levels, would have prevented Wixom Lake from reaching record high upstream pool elevations and therefore, the triggering event (static liquefaction) that caused the Dam to collapse. As such, the Appellees' affirmative actions directly and substantially caused the Dam to collapse.

II. THE DISTRICT COURT ERRED BY DISMISSING APPELLANTS' FIFTH AMENDMENT TAKING CLAIM

The Federal Takings Clause provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V, cl. 4. "[A] property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Knick v. Twp. of Scott*, ——

U.S. ——, 139 S. Ct. 2162, 2170, 204 L.Ed.2d 558 (2019). "If a local government takes private property without paying for it, [then] that government has violated the Fifth Amendment .... [a]nd the property owner may sue the government at that time in federal court for the 'deprivation' of a right 'secured by the Constitution." *Knick*, 139 S. Ct. at 2170 (quoting 42 U.S.C. § 1983); *see also Miner v. Ogemaw Cnty. Rd. Comm'n*, No. 1:21-CV-11192, 2022 WL 4017281, at *9 (E.D. Mich. Sept. 2, 2022).

There are two types of federal takings: physical and regulatory. *Waste Mgmt., Inc. of Tennessee v. Metro. Gov't of Nashville & Davidson Cnty*., 130 F.3d 731, 737 (6th Cir. 1997). Since 1871, the Supreme Court has held that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 172, 20 L. Ed. 557 (1871). A taking can occur when a person's property is damaged by a temporary flooding. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 38, 133 S. Ct. 511, 522, 184 L. Ed. 2d 417 (2012).

A. Appellants' property was indeed taken for a public purpose.

The District Court erred by holding that Appellants' properties were not taken for a public purpose. *See Report and Recommendation on Defendants' Motion for Summary Judgment*, R.81, PageID.7027; *Opinion and Order Overruling Plaintiffs'*

Objections, Adopting Magistrate Judge's Report and Recommendation, Granting Defendants' Motion for Summary Judgment, and Dismissing Case, R.83, PageID.7046. The Fifth Amendment's public purpose standard is an easy standard to achieve given that it has been applied "broadly." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241, 104 S. Ct. 2321, 2329–30, 81 L. Ed. 2d 186 (1984). In fact, the Sixth Circuit has even held that "[v]ery few takings will fail to satisfy" the public purpose standard. *Montgomery v. Carter Cnty., Tennessee*, 226 F.3d 758, 765–66 (6th Cir. 2000). According to *Montgomery*, "all that is required to for the taking to be considered for public use is a rational relationship to some conceivable public purpose." *Id*. at 765.

As explained above, Appellees set and pressured the Dam owner to maintain dangerously high lake levels in order to "protect the public's health, safety, and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the lake." *See Four Lakes Lake Level Study*, R.59-2, PageID.3113-3125. Again, all the reasons stated in the Appellees' resolutions, as well as the Appellees' and its delegated authority's operation of the Dam, were for a public purpose. *See Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 102, 99 L. Ed. 27 (1954) (suggesting that "[p]ublic safety, public health, morality, peace and quiet, law and order" are public purposes). As such, the District Court erred when it

dismissed Appellants' Fifth Amendment taking claim for failing to establish that Appellants' property was taken for a public purpose.

The District Court also erred by primarily relying on *Golf Vill. N., LLC v. City of Powell, Ohio*, 14 F.4th 611, 618 (6th Cir. 2021) to summarily dismiss Appellants' federal taking claim. *See Report and Recommendation on Defendants' Motion for Summary Judgment*, R.81, PageID.7026-27. *Golf Vill N.* partially involved a federal taking claim related to a group of plaintiffs' right to exclude the public from private property. *Id*. The Sixth Circuit held that plaintiffs' taking claim was properly dismissed because plaintiffs "failed to plead factual content that the City appropriated a right of access for the public to" privately owned streets that were possessed by plaintiffs. *Id*. at 618. *Golf Vill N.* also held by citing to *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003) that to "constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owners right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value." *Id*. at 621. The Magistrate Judge's Report and Recommendation, which was adopted by the District Court, relied on *Golf Vill N*. to summarily dismiss Appellants' federal taking by stating that Appellants' properties were not taken because Appellees "did not flood [Appellants'] properties to appropriate a benefit for any third party." *Report*

and Recommendation on Defendants' Motion for Summary Judgment, R.81, PageID.7027.

Importantly, *Golf Vill N*. does not describe in detail what is a public benefit or a public purpose regarding a taking. As such, the lower court's reliance on *Golf Vill N*. to reason that a taking in this matter was not for a public purpose or for benefit is misplaced.

Golf Vill N. is also distinguishable because this matter does not involve a taking related to a person's property right to exclude. Instead, this matter involves a taking related to a governmental entity setting and maintaining dangerously high lakes levels, which ultimately created a flood that caused significant damage to Appellants' property. This is significant because *Golf Vill N*. relied on *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003), which incorrectly suggested that a temporary flooding cannot constitute a taking. In fact, the Magistrate Judge went out of her way to note that *Golf Vill N.* was based on shaking grounds when she stated:

> *Golf Village* recites language from *Ridge Line*, 346 F.3d at 1355, explaining that only permanent, rather than temporary, deprivations can constitute takings. 14 F.4th at 620–21. However, the Supreme Court rejected this rule in *Arkansas Game and Fish Comm'n*, 568 U.S. at 38–39, and the Sixth Circuit did not rely on it to reach its holding in *Golf Village*. See 14 F.4th at 620–21.

See Report and Recommendation on Defendants' Motion for Summary Judgment, R.81, PageID.7026, n. 5. Specifically, *Arkansas Game* held that a temporary flooding can amount to a taking. *Arkansas Game & Fish Comm'n*, 568 U.S. 23, 38, 133 S. Ct. 511, 522, 184 L. Ed. 2d 417 (2012). Given that *Golf Vill. N*. does not involve a taking related to a flood and is based on faulty grounds, the Court should not hold that *Golf Vill N*. is dispositive.

Lastly, unlike the plaintiffs in *Golf Vill. N*., Appellants have clearly asserted and established that the taking was for numerous expressed public purposes. *Four Lakes Lake Level Study*, R.59-2, PageID.3113-3125

CONCLUSION

The Court should reverse the District Court and hold that Appellants have established viable Michigan inverse condemnation and Fifth Amendment Taking claims.

Dated: November 8, 2023

MCALPINE P.C.

By: */s/ Mark L. McAlpine*
Mark L. McAlpine
Douglas W. Eyre
Mark W. Oszust
MCALPINE PC
3201 University Drive, Ste. 200
Auburn Hills, MI 48326
(248) 373-3700

CERTIFICATE OF COMPLIANCE

3. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(b)(i) and 6th Cir. R. 32 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

[X] this document contains 5,975 words.

4. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this document has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14 point.

Dated: November 8, 2023

MCALPINE P.C.

By: */s/ Mark L. McAlpine*
Mark L. McAlpine
Douglas W. Eyre
Mark W. Oszust
MCALPINE PC
3201 University Drive, Ste. 200
Auburn Hills, MI 48326
(248) 373-3700

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2023, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

Dated: November 8, 2023

MCALPINE P.C.

By: */s/ Mark L. McAlpine*
Mark L. McAlpine
Douglas W. Eyre
Mark W. Oszust
MCALPINE PC
3201 University Drive, Ste. 200
Auburn Hills, MI 48326
(248) 373-3700

ADDENDUM

Page

DESIGNATION OF RELEVANT DISTRCT COURT DOCUMENTS

Record Entry	Description	PageID #
1	Class Action Complaint	1 – 32
32	Amended Class Action Complaint	538 – 569
56	Defendants' Mtn. for SJ	2377 – 2409
56-7	Agreement Btw. Defendants and FLTF	2496 - 2511
59	Pls' Response to Mtn. for SJ	3010 – 3034
59-1	Lyman Expert Report	3035 – 3088
59-2	Four Lakes Lake Level Study	3089 – 3421
59-3	2019 Annual Report	3423 – 3442
59-4	FLTF Flood Study Summary	3433 – 3452
59-5	Defendants' 307 Petition	3453 – 3482
59-6	Lake Level Order	3483 – 3633
59-7	FERC Order Revoking License	3634 – 3663
59-8	Final IFT Report	3664 – 3843
59-9	Lyman Transcript	3844 – 3899
59-10	MDEC Grant Application	3901
81	Report and Recommendation on Mtn. for SJ	7015 – 7032
82	Pls' Objections to Report and Recommendation	7033 – 7043
83	Opinion and Order	7044 – 7046
84	Judgment	7047
85	Notice of Appeal	7048