Case No. 23-1761

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOE BRUNEAU; DAVID PHILLIPS; DANA RALKO; PATRICIA RALKO; MARY RANDALL; OSRO RANDALL; JAMES MRDUTT, ALICIA MRDUTT, individually and on behalf of all those similarly situated,

Plaintiffs-Appellants,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES AND ENERGY; MICHIGAN DEPARTMENT OF NATURAL RESOURCES; FOUR LAKES TASK FORCE,

Defendants,

MIDLAND COUNTY, MI; GLADWIN COUNTY, MI; JOHN DOES 1-100,

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BRIEF OF DEFENDANTS-APPELLEES MIDLAND COUNTY, MI AND GLADWIN COUNTY, MI ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-1761 Case Name: Bruneau et al v. MI Dept of Envt et al.

Name of counsel: Kevin J. Campbell

Pursuant to 6th Cir. R. 26.1, Gladwin County
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on 8/28/23 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Kevin J. Campbell
17436 College Parkway
Livonia, MI 48152

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure.** With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed.**

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) **Form and Time of Disclosure.** The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants-Appellees Midland County and Gladwin County request oral argument. The Plaintiffs-Appellants mischaracterize both the facts and the law.

It is anticipated that such mischaracterizations will arise again in the Plaintiffs-Appellants' reply brief. Oral argument will be the only opportunity for the Defendants-Appellees' counsel to rebut such statements.

STATEMENT REGARDING JURISDICTION

Defendants-Appellees Midland County and Gladwin County accept the Plaintiffs-Appellants' jurisdictional statement as substantively correct.

COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DOES THE EVIDENTIARY RECORD SUPPORT THE REQUISITE ELEMENTS OF THE PLAINTIFF-APPELLANTS' INVERSE CONDEMNATION "TAKING" CLAIM UNDER MICHIGAN LAW?

The Plaintiffs-Appellants answer: "Yes."

The Defendants-Appellees answer: "No."

II. DOES THE EVIDENTIARY RECORD SUPPORT THE REQUISITE ELEMENTS OF THE PLAINTIFFS-APPELLANTS' FIFTH AMENDMENT "TAKING" CLAIM UNDER FEDERAL LAW?

The Plaintiffs-Appellants answer: "Yes."

The Defendants-Appellees answer: "No."

COUNTER-STATEMENT OF THE CASE

Introduction.

The Plaintiffs-Appellants summarize their argument by stating that "*Appellees set into motion the destructive forces that caused the [Edenville] Dam collapse by establishing dangerously high lake levels despite knowing that the Dam lacked adequate spillway capacity and was in need of significant repair.*" **(Plaintiffs-Appellants' Brief, p. 8)**. They rely heavily on the recent Michigan Court of Appeals decision in ***Krieger v. Department of Environment, Great Lakes, and Energy***, No. 359859, 2023 WL 5808605 (Mich. Ct. App. Sept. 7, 2023. **(Plaintiffs-Appellants' Brief, pp. 8, 11-15, 17-18)**.

But ***Krieger*** addressed claims against the *state* agencies that actually exercised regulatory authority over the dam. Moreover, ***Krieger*** offered only a pre-discovery analysis by reference to the pleadings alone - - with the bare *allegations* of the plaintiffs regarding the defendants' conduct being accepted as "true," ***Krieger***, at *2, 13. The court recognized that the allegations about the defendants' supposed "operational control of the dam" might be shown by discovery to be false. ***Id.*** at *13.

The ***Krieger*** analysis is not declarative or dispositive against the Defendants-Appellee Counties in the present case. Analysis of the bare allegations of the plaintiffs in ***Krieger*** against the state agencies are meaningless. This present case

must be decided based upon analysis of the actual evidentiary record as it relates to Midland and Gladwin Counties.

As established by the post-discovery record in the present case, the Plaintiffs-Appellants have no evidentiary support for a claim against the counties at all. Appellees Midland County and Gladwin County never "set into motion" the "destructive forces" identified in the record. Nor, critically, did the Counties ever have ownership, regulatory control or actual control over the dam.

With such context, the counties did not cause any "taking" of the Plaintiffs-Appellants' property under the terms of either Michigan or federal law. Therefore, summary judgment in favor of Midland County and Gladwin County should be affirmed.

Substantive Facts.

The Edenville Dam was one of four dams "located in a series along the Tittabawassee River" in Michigan's Midland and Gladwin Counties. **(R. 59-8, Pg ID 3670, IFT Final Report, p. S-2)**. The four dams were built between 1923 and 1925. **(R 59-8, Pg ID 3695, IFT Final Report, p. 7)**.

The owner of the Edenville Dam was granted a power generation license by the Federal Energy Regulatory Commission (FERC) in 1998. **(R. 59-8, Pg ID 3773, IFT Final Report, p. 85)**. The Boyce Trust purchased the four dams in 2006, with Boyce Hydro, LLC, becoming the specific entity responsible for the operation and

management of the dams. **(R. 59-8, Pg ID 3696, 3763, 3773, IFT Final Report, pp. 8, 75, 85)**. As acknowledged by the Plaintiffs-Appellants' own Amended Complaint, the Boyce entities remained the owners of the Edenville Dam at the time of its failure. **(R. 32, Pg ID 547, Amended Complaint, ¶ 29; R. 59-8, Pg ID 3689, IFT Final Report, p. 1)**.

Throughout this litigation, including the present appeal, the Plaintiffs-Appellants have focused upon the spillway capacity of the Edenville Dam. There is no dispute that government regulators deemed the spillway capacity to be inadequate. Indeed, "it was known as early as 1991" - - i.e., even *before* the FERC issued the power generation license in 1998 - - "that the spillway capacity was not sufficient." **(R. 59-8, Pg ID 3799, IFT Final Report, p. 111)**.

When Boyce failed to satisfy repeated demands by the FERC for the spillway capacity to be upgraded, the FERC revoked the Edenville Dam's power generation license effective September 10, 2018. **(R. 59-7, Pg ID 3634-3663, FERC Order Revoking Boyce Hydro License; R. 59-8, Pg ID 3774-3775, IFT Final Report, pp. 86-87)**. Regulatory authority over the dam then fell to the Michigan Department of Environment, Great Lakes and Energy (EGLE). Mich. Comp. Laws §§324.31506 et seq. **(R. 59-8, Pg ID 3695, IFT Final Report, p. 7)**. The EGLE likewise considered the spillway capacity to be inadequate. **(R. 59-8, Pg ID 3789-3790, 3802, IFT Final Report, pp. 101-102, 114)**.

Highlighting the recognized inadequacies of the spillways, the Plaintiffs-Appellants' case hangs upon the argument that Midland and Gladwin Counties could and should have prevented the failure of the Edenville Dam by "*immediately increasing the Dam's spillway capacity or maintaining lower lake levels*." **(Plaintiffs-Appellants' Brief, p. 5)**. But the record demonstrates that the counties never had ownership or authority whereby to take such action. The Plaintiffs-Appellants' argument confuses future possibilities with then-present realities.

Upon revocation of the FERC license and the cessation of federal oversight, area residents became concerned that the dams and the resulting water system might be "abandoned" by the owner (Boyce). **(R. 56-2, Pg ID 2421, Kepler Dep., p. 8)**. A group of lake associations, led by the Sanford Lake Preservation Association, formed the Four Lakes Task Force (FLTF) and negotiated with Boyce to purchase the dams. **(R. 59-8, Pg ID 3764, IFT Final Report, p. 76)**.

By agreement of August 2019, the FLTF became "delegated authority" for Midland and Gladwin Counties for purposes of a "lake level project" under Part 307 of Michigan's Natural Resources and Environmental Protection Act, Mich. Comp. Laws §324.30701 et seq. **(R. 56-7, Pg ID 2497-2511, Agreement Between Counties and FLTF)**. This agreement provided that the FLTF would convey the dams to the counties within 180 days *after* the *intended* acquisition of the dams by the FLTF from Boyce. **(R. 56-7, Pg ID 2501, Agreement Between Counties and**

FLTF, p. 5, ¶ 3.f.). But it was "understood" that the FLTF was at the time *still* in the process of "*negotiating* . . . to acquire the necessary rights" that would "enable" the FLTF to actually fulfill its intended role under the agreement. **(R. 56-7, Pg ID 2500, Agreement Between Counties and FLTF, ¶ 3.b.)**. Action by the FLTF (or by the counties through the FLTF) to fulfill the tasks contemplated by the agreement *necessarily remained contingent* upon the terms that could be reached between the FLTF and Boyce. And Boyce itself was not a party to this agreement. **(R. 56-7, Pg ID 2497, 2511, Agreement, preamble and signature lines; R. 59-8, Pg ID 3764, IFT Final Report, p. 76)**.

In December of 2019, with subsequent amendments extending the dates, terms were reached whereby the FLTF would purchase the dams - - with purchase payments to commence by June 1, 2020, and a final "closing" scheduled for January 2022. **(R. 56-9, Pg ID 2513-2554, Original Purchase Agreement; R. 56-8, Pg ID 2556-2558, First Amendment to Purchase Agreement, particularly p. 2)**. But the purchase agreement between the FLTF and Boyce never went into effect. And the Plaintiffs-Appellants muddle the relevant details.

Even had the purchase agreement become operative upon the FLTF making its first installment payment to an escrow agent **(R. 56-8, Pg ID 2523-2524, Purchase Agreement, §2.01)**, Boyce was to retain "*possession and control,*" until the actual closing scheduled for 2022. **(R. 56-8, Pg ID 2524, Purchase Agreement,**

p. 12 §201). And Boyce was to continue "*operate and maintain the Edenville Dam*." **(R. 56-8, Pg ID 2524, 2523, Purchase Agreement, §2.06(1)(e))**. Although there was a separate "operating agreement" that would have become effective between the FLTF and Boyce *if* the sale transaction had proceeded, "[i]t never got initiated." **(R. 56-8, Pg ID 2533, Purchase Agreement, §2.06(1)(e); R. 56-2, Pg ID 2440, Kepler Dep., p. 28)**.

The original January 2020 date for the initiating payment by the FLTF was changed to June 1, 2020, by amendment. **(R. 56-9, Pg ID 2557, First Amendment to Purchase Agreement, p. 2; R. 56-2, Pg ID 2440, 2443, Kepler Dep., pp. 28, 31)**. The FLTF "couldn't proceed in January," because a "cloud of legal issues between the State and Boyce Hydro" had left the FLTF unable to obtain "the needed financing" in the form of "a bond-anticipation note." **(R. 56-2, Pg ID 2443, Kepler Dep., p. 31; R. 59-1, Pg ID 3069, FLTF Press Release, June 8, 2020 "Attachment 6" to Lyman Report, [p. 34])**.

And before the new June 1, 2020, date for the initiating payment, the dam failed, so the payment was never made. **(R. 56-2, Pg ID 2442, Kepler Dep., p. 30)**. Again, the Plaintiffs-Appellants' Amended Complaint admits that the *Boyce entities* were still the "*owners*" of the dams "*[d]uring the relevant time*," i.e., through the time of the Edenville Dam failure. **(R. 32, Pg ID 547, Amended Complaint, ¶ 29;**

See also R. 59-8, Pg ID 3689, IFT Final Report, p. 1).[1]

Ultimately, no sale ever took place at all. After the failure of the Edenville Dam, the counties instead initiated condemnation proceedings through the FLTF to obtain title to the dams. With delays resulting from Boyce filing for bankruptcy, the counties, through the FLTF, did not obtain title to the Edenville Dam until December 2020. **(R. 59-8, Pg ID 3689, IFT Final Report, p. 1; R. 56-2, Pg ID 2460-2461, Kepler Dep., pp. 48-49; R. 56-18, Pg ID 2994-3006, Consent Judgments).** Neither the counties themselves, nor the FLTF, had ownership of the dams until entry of the condemnation Consent Judgments - - seven months *after* the Edenville Dam had already failed.

And, as referenced above, regulatory authority was held by Michigan's EGLE. Mich. Comp. Laws §§324.31506, et seq. **(R. 59-8, Pg ID 3695, IFT Final Report, p. 7).** No entity - - neither Boyce, nor the FLTF, nor the Counties - - could take any action with regard to the Edenville Dam or the level of the water impounded behind it unless permitted to do so by the EGLE, as described more fully below.

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[1] Moreover, as held in a recent decision by the federal district court for the Western District of Michigan, "*Boyce, LLC, Boyce Hydropower, LLC, Boyce Hydro, LLC, WD Boyce Trust 2350, WD Boyce Trust 3649 and WD Boyce Trust 3650*" are the entities that "*owned and controlled the Edenville Dam beginning in 2006 and up to and including the date its east embankment failed on May 19, 2020.*" ***Michigan Department of Environment v. Mueller***, No. 1:20-cv-528, 2023 WL 7162918, at *1, 4 (W.D. Mich. Oct. 6, 2023), *underline added*. This finding resulted in judgment against those Boyce entities. ***Id.***, at *4.

The Plaintiff-Appellants highlight that, with the loss of enforcement by the FERC, Midland and Gladwin Counties petitioned for a circuit court order under Part 307 of Michigan's Natural Resources and Environmental Protection Act to establish a normal lake level. **(R. 59-8, PG ID 3743, IFT Final Report, p. 55; R. 56-6, Pg ID 2491-2495, Lake Level Order, 5/28/19, ¶ 2)**. But the lake level was never under the control of the counties.

The FERC license requirements had already established the "normal operating lake level" for Wixom Lake (the impoundment behind the Edenville Dam) at a measured surface elevation of 675.8 feet, with a winter draw down to 672.8 feet. **(R. 59-8, Pg ID 3696, 3743, IFT Final Report, pp. 8, 55)**.[2] The counties' petitioned for a continuation of the same level of Wixom Lake that the FERC had required. **(R. 56-5, Pg ID 2484, 2487, Petition, ¶ 34 and Requested Relief, ¶ E; R. 59-8, Pg ID 3743, IFT Final Report, p. 55)**.

But under the applicable law, the circuit court is obligated to *determine* an appropriate normal lake level by reference to multiple factors, including both the history of past lake levels and evidence offered by "all interested persons." Mich. Comp. Laws §324.30707(4). And the counties specifically phrased their petition as a request for "an independent" determination by the court. **(R. 56-5, Pg ID 2485,**

[2] This is measured by the National Geodetic Vertical Datum of 1929 (NGVD 29) established by the federal government. **(See R. 59-8, Pg ID 3696, IFT Final Report, p. 8, n. 5)**.

Petition, ¶ 37).

The circuit court determined to maintain the lake levels that had been previously established by the FERC. **(R. 56-6, Pg ID 2491, Lake Level Order, 5/28/19, ¶ 2)**. The Plaintiffs-Appellants accuse the state circuit court of simply adopting the requested levels, without conducting the appropriate statutory analysis. **(Plaintiffs-Appellants' Brief, pp. 16-17)**. But there is no basis for this accusation. Nor is there any basis to condemn the counties for proposing the FERC endorsed level as appropriate.

As matters then stood, there was no reason for the counties or the circuit court to doubt the propriety of the existing lake level. The spillway inadequacy had been documented beginning in 1991 - - but the FERC nevertheless maintained the 675.8 foot lake elevation as the "normal" level for the entire two decades of its regulatory control from 1998 to 2018.

Moreover, the counties and the FLTF did not simply accept the FERC lake level at face value. They obtained a lake level study that specifically recommended that the normal lake level be set "to match the FERC regulated lake levels," resulting in "no change from the historically operated lake levels." **(R. 59-2, Pg ID 3110, Spicer Group Lake Level Study, p. 19)**.

Extrapolating from the technical inadequacy of the Edenville Dam spillway capacity, the Plaintiffs-Appellants assert that failure of the Edenville Dam was the

foreseeable consequence of maintaining the historic water level in Wixom Lake. But the record negates this proposition.

The only evidence in the record regarding the physical causation of the Edenville Dam failure is the IFT report. And the Plaintiffs-Appellants' own expert relies upon the IFT report "*100 percent*," having done no independent study or analyses of his own. **(R. 56-12, Pg ID 2838-2841, Lyman Dep., pp. 98-101)**.

It was the conclusion of the IFT that "[t]he physical mechanism of the May 19, 2020 failure of Edenville Dam was static liquefaction (sudden loss of soil strength) in a section of the embankment abutting the dam, which resulted in instability failure of the downstream slope and then breach of the reservoir through the dam." **(R. 59-8, Pg ID 3669, IFT Final Report, p. S-1)**. But prior to that actual event, there was no basis to suspect that the lake level or lack of spillway capacity would trigger this mechanism by which the dam failed.

The dam safety inspection reports from 1995 through 2018 had judged the embankments to be in satisfactory to excellent condition. **(R. 59-8, Pg ID 3776-3777, IFT Final Report, pp. 88-89)**. Indeed, the 2015 report described the embankments as "good to excellent." **(R. 59-8, Pg ID 3781, IFT Final Report, p. 93)**. And even despite such favorable assessments, the owners of the dam had done work to strengthen the embankments. As summarized by the IFT:

> [T]he dam had already gone through PFMA, several geotechnical investigations, and six FERC Part 12 D

> inspections and evaluations, the most recent in 2015. The conclusions by the engineering consultants and FERC were that there were no significant embankment stability concerns which had not already been addressed by embankment overlays and drain modifications.
>
> **(R. 59-8, Pg ID 3817, IFT Final Report, p. 129).**

When asked directly whether Boyce, the FLTF or *anyone else* had any notice or indication that the embankment would fail because of a rain event, the Plaintiffs-Appellants' expert stated: "*No, I would say not, because of the stability evaluations that we discussed.*" **(R. 56-12, Pg ID 2869-2870, Lyman Dep., pp. 129-130).**

Post-failure analysis offered the "hypothetical scenario" that greater spillway capacity could have prevented the dam failure. **(R. 59-8, Pg ID 3755, IFT Final Report, p. 67).** But the report also conceded that "*it is not definitely known how much lower the peak lake level would have needed to be to prevent triggering*" of the static liquefaction. **(R. 59-8, Pg ID 3754-3755, IFT Final Report, pp. 66-67).** In fact, even by pre-lowering the lake to "run-the-river" levels (i.e., no impoundment above natural river level at all), the estimated reduction to the Wixom Lake level would have been only "0.2 feet relative to the lake level at the time of failure," which was still "unlikely to have prevented the failures." **(R. 59-8, Pg ID 3754-3755, IFT Final Report, pp. 66-67).**

Moreover, the pre-failure concern of the FERC and EGLE about the spillways had nothing to do with the latent embankment defect that actually caused the dam to

fail. The concern with spillway capacity was to ensure that the impounded water would not "overtop" the dam. **(R. 59-7, Pg ID 3636, FERC Order Revoking License, p. 2, section A.3.; R. 59-8, Pg ID 3669, 3674-3675, IFT Final Report, pp. S-1, S-6, S-7).** The Plaintiffs-Appellants acknowledge in their Complaint that it is "*over-topping*" that the "*[s]pillways are built to prevent.*" **(R. 32, Pg ID 544, Amended Complaint, ¶¶ 16-17).**

The spillways proved adequate to this purpose. The water did not overtop the embankment **(R. 59-8, Pg ID 3672, IFT Final Report, p. S-4).** In fact, "[t]he IFT concluded that overtopping was not a plausible mechanism for the failure of the Edenville dam." **(R. 59-8, Pg ID 3731, IFT Final Report, p. 43, §4.1.1.1).** And, as just described above, the "static liquefaction" mechanism by which failure actually occurred was something that multiple consulting engineers and the FERC had determined was not a risk - - as the Plaintiffs-Appellants' expert has expressly accepted. **(R. 56-12, Pg ID 2869-2810, Lyman Dep., pp. 129-130).**

Rather, the IFT found that the actual construction of the dam "deviated substantially from the design plans and construction specifications, and these deviations "substantially compromised the safety margins of the embankment stability," thus putting the dam at risk of embankment failure due to "static liquefaction." **(R. 59-8, Pg ID 3807, IFT Final Report, p. 119).** The static liquefaction was determined by the IFT to result from a latent defect dating back to

the construction of the dam in the 1920s - - that none of the multiple engineering studies had discovered. As acknowledged by the IFT Report, this defect was "never recognized." **(R. 58-9, Pg ID 3669, IFT Final Report, S-1)**.

The Plaintiffs-Appellants' expert confirmed that static liquefaction is "an unusual failure mechanism" that "is not really a condition that is of concern in a water resources or hydro project like this." **(R. 56-12, Pg ID 2856, 2869, Lyman Dep., pp. 116, 128-129)**. As the Plaintiffs-Appellants' expert concedes, there was no reason for Midland County or Gladwin County to anticipate such risk. **(R. 56-12, Pg ID 2870, Lyman Dep., p. 130)**.

In these circumstances, neither Midland County nor Gladwin County (nor the state circuit court) had any reason to question the lake level that had been approved and maintained by the FERC. This is particularly so, given that the inadequacy of the spillways had already been determined by 1991 **(R. 59-8, Pg ID 3799, IFT Final Report, p. 111)**, and the FERC had nevertheless *maintained* that same lake level during the entire period of its oversight of the dam from 1998 to September 2018.

Significantly, the FLTF was planning to upgrade the spillway capacity, once it had the ownership and authority to take such action. As acknowledged by the Plaintiffs-Appellants **(Plaintiffs-Appellants' Brief, p. 16)**, the FLTF had already taken steps to obtain funding and preliminary engineering studies for the upgrades in anticipation of its future purchase of the dam. **(R. 59-3, Pg ID 3426, 3428, FLTF**

2019 Annual Report, pp. 2, 4). The FLTF had retained engineers to design the dam upgrades and a construction firm to execute the work. **(R. 56-2, Pg ID 2448, Kepler Dep., p. 36)**.

But as of the April 16, 2020 (the date of the FLTF 2019 Annual Report) the studies for the spillway upgrades had not yet been completed. Final design was anticipated in 2021, with spillway upgrades projected to begin in 2023. **(R. 59-3, Pg ID 3427, FLTF 2019 Annual Report, p. 3)**.

The FLTF did not, as the Plaintiffs-Appellants contend "deprioritize" the spillways. **(Plaintiffs-Appellants' Brief, p. 4)**. The spillway *was* prioritized. **(R. 56-2, Pg ID 2447, Kepler Dep., p. 35)**.

Specifically, the gates controlling water flow into the spillways "weren't in good service." **(R. 56-2, Pg ID 2428, Kepler Dep., p. 16)**. As documented by the IFT Report, the spillway gates at the Edenville Dam could not be fully opened so as to allow full discharge into the spillway - - and this situation specifically hindered water release at the time of the May 19, 2020 incident at issue. **(R. 59-8, Pg ID 3675, 3705-3706, IFT Final Report, pp. 5-7, 17-18)**. "[T]he available spillway capacity of Edenville during the May 2020 event was limited because the gates were judged not to be able to be safely fully opened, which reduced the available outflow and thus contributed to the high lake level." **(R. 59-8, Pg ID 3753, IFT Final Report, p. 65)**.

The gates allowing water into the spillways were seen as the necessary repair that could be accomplished most quickly. **(R. 56-2, Pg ID 2451-2452, Kepler Dep., pp. 39-40)**. So repair of the gates was the part *of the spillways* that was to receive the first attention. **(R. 56-2, Pg ID 2441-2452, Kepler Dep., pp. 39-40)**.

But despite negotiation of the purchase agreement and operating agreement (which never went into effect absent the initiating payment), there had been no final written agreement reached between the FLTF and Boyce regarding repairs. **(R. 56-2, Pg ID 2448-2449, Kepler Dep., pp. 36-37)**. The FLTF obtained voluntary consent from Boyce to undertake $300,000.00 worth of "winter repairs" in March of 2020, encompassing "concrete repairs to pier noses and wingwalls" and installation of "new lifting lugs" on the spillway gates in anticipation of installing new gate hoists. **(R. 59-3, Pg ID 3429, FLTF 2019 Annual Report, April 16, 2020, p. 5; R. 56-2, Pg ID 2448-2449, Kepler Dep., pp. 36-37)**. Again, this confirms that the spillways (i.e., the gates) had been prioritized by the FLTF. But contrary to the Plaintiffs-Appellants' contention, further spillway upgrades could not yet be done -- as described below.

In apparent reference to this March 2020 repair work, together with the FLTF's efforts to procure funding and the necessary engineering for spillway upgrades, the Plaintiffs-Appellants contend that the counties "had considerable control over the operation of the Edenville Dam at the time of collapse." **(Plaintiffs-**

Appellants' Brief, p. 16). But there is absolutely no evidence that the FLTF or (more relevantly) the counties ever had operational control over the Edenville Dam at all. Even had the purchase agreement gone into effect, operational control would have remained with Boyce. **(R. 56-8, Pg ID 2523, 2524, Purchase Agreement, §§2.01 and 2.06(1)(e))**.

None of the actions by the FLTF equate to "control" over anything. The FLTF could act only after obtaining expressed permission from Boyce. The purchase agreement and associated operating agreement between the FLTF and Boyce had not gone into effect, because the initiating payment by the FLTF had not yet been made. And the counties had no ownership, control or authority at all, because the FLTF had none.

This is highlighted by the experience when the counties' expert sought access to the site after the May 2020 failure event. Boyce exercised its right as property owner to exclude such access until October. **(R. 56-11, Pg ID 2733, Anderson Dep., p. 26)**. Aside from Boyce, only Michigan's EGLE had any regulatory authority over the dam. Neither the counties, nor the FLTF, had control of anything, until after the post-failure condemnation proceedings gave the counties ownership.

And neither the FLTF nor the counties could have "immediately" undertaken any spillway upgrades, even if the purchase agreement had gone into effect. The FLTF and the Counties could not undertake any enlargement, reconstruction or

alteration of the dam, except by permit of Michigan's EGLE. Mich. Comp. Laws §§324.31507, 324.31509. Such a permit could not be issued, until "all plans and specifications" were prepared by a licensed professional engineer - - and approved by the EGLE. Mich. Comp. Laws §§324.31508(1), 324.31515(1).

Despite having begun the process, the FLTF in 2020 was still awaiting completion of the studies and plans from its engineers. **(R. 59-3, Pg ID 3427, FLTF 2019 Annual Report, p. 3)**. The "design flood hydrologic analyses" report was not completed until July 2021. **(R. 56-17, Pg ID 2926-2992, Ayres Design Flood Hydrologic Analyses)**. Engineering design work to accommodate the findings could not begin until that time, with the EGLE permitting process to follow. And only after an EGLE permit was granted could any actual work begin.

As the Plaintiffs-Appellants' own expert acknowledges, the necessary studies, inspections, reviews and permitting would take "*anywhere from a few months to a few years depending on the complexity of the addition.*" **(R. 56-12, Pg ID 2805-2808, Lyman Dep., pp. 65-68)**. Having looked at the FLTF documents, the Plaintiffs-Appellants' expert agreed that "*they had about a five-year time frame for completing the project, which seems reasonable*." **(R. 56-12, Pg ID 2808, Lyman Dep., p. 68)**.

Thus, the record affords no support for the Plaintiffs-Appellants' contention that the counties could have made spillway upgrades before the dam failure.

It is also clear that the "destructive forces" were *not* the lake levels behind the dam, nor attributable in anyway to Midland or Gladwin Counties. Again, the IFT concluded that design defects dating to the original construction of the dam in the 1920s "created the fundamental physical condition required for static liquification" of the dam embankments. **(R. 59-8, Pg ID 3669, IFT Report, p. S-1)**. Although the water level reached at the time of the dam failure "contributed to triggering static liquefaction," the IFT concluded it to be "*unlikely*" that lowering of the lake level would have "prevented" the dam failure. **(R. 59-8, Pg ID 3754-3755, IFT Report, pp. 66-67)**. And even though the IFT indicated that the lake level "contributed to triggering static liquefication," the IFT admitted that "*it is not definitely known how much lower the peak lake level would have needed to be to prevent triggering*." **(R. 59-8, Pg ID 3754-3755, IFT Final Report, pp. 66-67)**.

As a consequence, any conclusion that lowering the lake level would have prevented the static liquefaction is nothing more than conjecture. The rains in May 2020 caused "a record inflow into Wixom Lake." **(R. 59-8, Pg ID 3752, IFT Final Report, p. 64)**. Regardless of the initial level, this record inflow would have raised the lake level and pressured the defect in the embankment. The IFT admits that it cannot identify any level that would have prevented the "triggering" of the static liquefaction. **(R. 59-8, Pg ID 3754-3755, IFT Final Report, pp. 66-67)**. There is no evidentiary basis to claim that the pre-event lake level made any difference at all.

Moreover, a pre-event effort was made to lower the lake level - - but the EGLE refused to permit it. As the Plaintiffs-Appellants themselves insist should have been done, Boyce did seek to lower the lake level during the winter of 2019/2020 - - and the FLTF supported Boyce's permit request. **(R. 56-2, Pg ID 2427-2428, 2430, Kepler Dep., pp. 15-16, 18)**. But the requested permit for an 8 foot drawdown was denied by the EGLE. **(R. 56-2, Pg ID 2427-2428, Kepler Dep., pp. 15-16; R. 56-13, Pg ID 2885-2887, EGLE Permit Denial)**.

In fact, Boyce was so concerned to lower the lake level that it commenced a drawdown without the permit. **(R. 56-2, Pg ID 2459, Kepler Dep., p. 47)**. The State of Michigan then sued Boyce, because such action caused harm to mussels that lived in the lake. ***Id***.

For its part, the FLTF had tried to help Boyce by undertaking a "mussels recovery" project. ***Id***. But "the State went after Boyce for the damage to the mussels" anyway. ***Id***.

And it must be remembered that the 681.3 foot lake level estimated by the IFT at the time of the dam failure was 5.5 feet *above* the judicially ordered normal lake level that the counties had requested - - greatly exceeding the permissible 0.3 foot upward variance. **(R. 56-10, Pg ID 2640, IFT Final Report, p. 57, Table 5-1; R. 59-6, Pg ID 3491-3492, Lake Level Order, 5/28/19, ¶¶ 2 and 5a)**. The counties never asked for this improperly increased lake level. To any extent that "record high

upstream pool elevations" became the "triggering event" for static liquefaction **(Plaintiffs-Appellants' Brief, p. 21)**, neither Midland County nor Gladwin County than ever proposed or allowed such a lake level to occur. It was actions or inactions by the Boyce entities (as owners and operators of the dam), *exacerbated by the EGLE's refusal of Boyce's request for a drawdown,* that caused the actual lake level at the time of the embankment failure.

Procedural Facts.

Following discovery, Midland and Gladwin Counties sought summary judgment under Fed. R. Civ. P. 56. **(R. 56, Pg ID 2377-2409, Defendants' Motion Seeking Summary Judgment)**. The magistrate produced a Report and Recommendation that the Defendants' motion be granted. **(R. 81, Pg ID 7015-7032, Magistrate's Report and Recommendation)**. The district judge overruled the Plaintiffs-Appellants' objections, adopted the magistrate's R&R and granted judgment in favor of the Defendants-Appellees. **(R. 83, Pg ID 7044-7046, Opinion and Order; R. 84, Pg ID 7047, Judgment)**.

When the established factual record is considered in full, including those aspects confirmed by the Plaintiffs-Appellants' own expert, there is no basis to hold Midland County or Gratiot County liable to the Defendants-Appellees under either federal or Michigan law. Therefore, the district court's grant of summary judgment should be affirmed.

SUMMARY OF ARGUMENT

To maintain an inverse condemnation claim under Michigan law, the Plaintiffs-Appellants must demonstrate "*action*" by Midland and Gladwin Counties that constituted (1) an "*abuse*" of governmental power that was (2) "*directly aimed*" at the Plaintiffs-Appellants' properties. ***Blue Harvest, Inc. v. Department of Transportation***, 288 Mich. App. 267, 277, 792 N.W.2d 798, 805 (2010). But the record offers no evidence of any such "action."

The only action by the counties was to petition for independent review by the state circuit court to maintain the same lake level behind the Edenville Dam that the FERC had deemed proper during the entire two decades of its regulatory control over the dam, while the FERC had full knowledge of the condition of the dam and its spillways. Particularly with the support of an engineering study confirming the propriety of that lake level, together with the independent review by the state circuit court, there was no "abuse" of governmental power by the counties in pursuing the petition.

Nor was the petition "directly aimed" at the properties of the Plaintiffs-Appellants. The petition was aimed at the level of the lake behind the dam, not the downstream properties of the Plaintiffs-Appellants.

A Fifth Amendment "taking" occurs where physical intrusion or regulation by government encroaches upon private use of property. ***McCarthy v. City of***

Cleveland, 626 F.3d 280, 284 (6th Cir. 2010). Although temporary flooding by government action can give rise to a taking claim, the character and duration of the intrusion must be weighed. ***Arkansas Game and Fish Commission v. United States***, 568 U.S. 23, 36, 38 (2012). Isolated flooding events "do not make a taking." ***Ridgeline, Inc. v. United States***, 346 F.3d 1346, 1357 (Fed. Cir. 2003), ***Baird v. United States***, 5 Ct. Cl. 324, 329 (1984), ***Hartwig v. United States***, 202 Ct. Cl. 801, 809 (1973).

Moreover, the flooding must result from government "action" rather than inaction, ***St. Bernard Parish Government v. United States***, 887 F.3d 1354, 1357, 1360 (Fed. Cir. 2018), and the action must be such that a "taking" is the intent or reasonably anticipated result of the action. ***Golf Village North, LLC v. City of Powell, Ohio***, 14 F.4th 611, 620-1 (6th Cir. 2021), ***John Horstmann Co. v. United States***, 257 U.S. 138, 145-6 (1921). Interference resulting from natural phenomena or mere negligence of governmental actors is not a taking. ***Thune v. United States***, 41 Fed. Cl. 49, 52 (1998).

There is no evidence that Midland and Gladwin Counties undertook any action that by intent, or by reasonably anticipated result, caused any intrusion upon the properties of the Plaintiffs-Appellants. Again, the only action by the counties was to petition for maintenance of the lake level deemed appropriate by the FERC, from which no failure of the Edenville Dam would have been anticipated - - as

confirmed by the independent report analyzing the dam failure after it occurred.

Moreover, neither Midland nor Gladwin County had either ownership or regulatory control over the Edenville Dam, whereby to take such action as the Plaintiffs-Appellants insist they should have done. Control and authority was in the hands of the Boyce entities and Michigan's EGLE. Indeed, that latter agency prohibited the very actions that the Plaintiffs-Appellants insist the counties should have taken. There is no basis to accuse the counties of any "taking," under either Michigan or federal law.

ARGUMENT

I. THE STANDARD OF APPELLATE REVIEW IS *DE NOVO*.

Defendants-Appellees County of Midland and County of Gladwin sought summary in the district court under Fed. R. Civ. P. 56. **(R. 56, Pg ID 2377, 2396, Defendants' Motion for Summary Judgment, pp. 1, 12)**. The district court granted summary judgment to the counties under the Rule 56 standard. **(R. 81, Pg ID 7020, 7021, Magistrate's Report and Recommendation, pp. 6-7; R. 83, Pg ID 7044-7046, Opinion and Order Granting Summary Judgment; R. 84, Pg ID 7047, Judgment)**.

A district court's grant of summary judgment is reviewed *de novo* on appeal. ***Puskas v. Delaware County, Ohio***, 56 F.4th 1088, 1093 (6th Cir. 2023). In doing so, this Court uses "the same Rule 56(c) standard as the district court. ***Moldowan v. City of Warren***, 578 F.3d 351, 373 (2009).

Summary judgment is properly granted where "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), ***Puskas***, 56 F.4th at 1093. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-8 (1986), *emphasis in original*.

This Court may affirm summary judgment "for any reason supported by the record, including on grounds different from those on which the district court relied." ***Phillips v. UAW International***, 854 F.3d 323, 326 (6th Cir. 2017).[3]

II. THE EVIDENTIARY RECORD CANNOT SUSTAIN A MICHIGAN "INVERSE CONDEMNATION" CLAIM AGAINST EITHER MIDLAND OR GLADWIN COUNTY.

It is ironic that the Plaintiffs-Appellants choose to quote ***Wiggins v. City of Burton***, 291 Mich. App. 532, 572, 805 N.W.2d 517, 541 (2011) for the proposition that a governmental actor "may cause a taking of private property by flooding the property or diverting excess service water onto the property." **(Plaintiffs-Appellants' Brief, p. 11)**. The text immediately following the quoted sentence then declares that the governmental defendant in ***Wiggins*** could not be liable under an "inverse condemnation" theory for flooding that occurred when the governmental defendant did not have "*ownership* of the drain and drainage system." ***Id.***, 291 Mich.

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[3] In their Amended Complaint, the Plaintiffs label their Fifth Amendment claim as "inverse condemnation," and their Michigan constitutional claim as for a "taking." **(R. 32, Pg ID 562, 565, Amended Complaint, Count I [Title] and ¶¶ 112-113)**. Their brief to this Court argues the Michigan constitutional claim as "inverse condemnation," and their Fifth Amendment claim as a "taking." **(Appellants' Brief, pp. 10, 21)**. Midland and Gladwin Counties' present brief follows the labeling now used by the Plaintiffs-Appellants. Significantly, the Plaintiffs-Appellants have abandoned their additional gross negligence claim by failing to identify it as an issue on appeal and failing to argue it in their brief. ***Dimond Rigging Co., LLC v. BDP International, Inc.***, 914 F.3d 435, 449 (6th Cir. 2019), ***J.B-K. By E.B. v. Secretary of Kentucky Cabinet for Health and Family Services***, 48 F.4th 721, 730 (6th Cir. 2020).

App. at 572-3, 805 N.W.2d at 541-2, *emphasis added*.

As described above, neither Midland County nor Gladwin County (nor the FLTF as their "delegated authority") ever had "ownership" of the Edenville Dam until after the dam failure and flooding of which the Plaintiffs-Appellants' complain. It was the Boyce entities alone that had ownership - - up to and including the date of the May 19, 2020 dam failure and flood - - as demonstrated by both the record in the present case and the liability judgment in ***Michigan Department of Environment v. Mueller***, No. 1:20-cv-528, 2023 WL 7162918, at *1, 4 (W.D. Mich. Oct. 6, 2023).

A. The Plaintiffs-Appellants wrongly interpret *Krieger* as satisfying their burden of proof.

The Plaintiffs acknowledge that "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 values and (2) that the government abused its powers in affirmative actions directly aimed at the property." ***Blue Harvest, Inc. v. Department of Transportation***, 288 Mich. App. 267, 277, 792 N.W.2d 798, 805 (2010). **(Plaintiffs-Appellants' Brief, p. 11)**. The ***Blue Harvest*** case further declares that "a plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages." ***Id.***, 288 Mich. App. at 277, 792 N.W.2d at 805.

The Plaintiffs-Appellants also quote ***Charles Murphy, M.D., P.C. v. Detroit***,

201 Mich. App. 54, 56, 506 N.W.2d 5, 7 (1993), for the proposition that "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." **(Plaintiffs-Appellants' Brief, p. 11)**. Key considerations are "the form, intensity, and deliberateness of the governmental actions." ***Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club***, 283 Mich. App. 264, 295, 769 N.W.2d 234, 252 (2009).

It must be observed that each of these elements of inverse condemnation are predicated upon "*action*" by the government, as opposed to inaction. ***Charles Murphy, M.D., P.C.***, 201 Mich. App. at 56, 506 N.W.2d at 7. Furthermore, that "action" must be (1) an "abuse" of the government's power that is (2) "directly aimed" at the property that was thereby taken. ***Blue Harvest, Inc.***, 288 Mich. App. at 277, 792 N.W.2d at 805.

The Plaintiffs-Appellants argue as though the Michigan Court of Appeals decision in ***Krieger v. Department of Environment, Great Lakes and Energy***, No. 359895, 2023 WL 5808605 (Mich. Ct. App. Sept. 7, 2023), has already established the dispositive facts for purposes of the present case. They contend that ***Krieger*** found that the EGLE and Department of Natural Resources "took affirmative actions directed at the plaintiffs' properties by authorizing higher lake levels and pressuring the Dam owner to keep the water levels high." The Plaintiffs-Appellants then argue

that, by analogy, this dispositively demonstrates that Midland and Gladwin Counties also "took action directly aimed at the 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." **(Plaintiffs-Appellants' Brief, p. 12)**. The Plaintiffs-Appellants also argue by analogy to ***Krieger*** that Midland and Gladwin Counties "exercised control over the dam by obtaining a lake level order" and "pressured the Dam owner to maintain dangerously high lake levels." **(Plaintiffs-Appellants' Brief, p. 15)**.

But the ***Krieger*** case made no such determinations, even as to the "state agencies" before it - - and certainly not toward Midland and Gladwin Counties (or the FLTF). The Michigan Court of Appeals addressed ***Krieger*** under the rubric of Michigan Court Rule 2.116(C)(8), in which the court "accept[s] the allegations in plaintiffs' complaints as true and construe those allegations in plaintiffs' favor." ***Id.***, at *1. This is the equivalent of a pre-discovery dismissal motion under Fed. R. Civ. P. 12(b)(6). ***Upton v. City of Royal Oak***, 492 Fed. Appx. 492, 506 (6th Cir. 2012).

Indeed, the court in ***Krieger*** made clear that "*[w]hile discovery may reveal facts contradicting these allegations, our role now is to accept these allegations as true and determine whether they state a viable claim of inverse condemnation.*" ***Id.***, at *13. The court concluded the *bare allegations* of the ***Krieger*** plaintiffs to be adequate to *state a claim*. But the court did not make any factual findings. Nor did

the court draw any legal conclusions based on any factual findings.

In the present case, however, discovery has been completed. The question here is whether the evidentiary record as actually developed by the parties could sustain the Plaintiffs-Appellants' pleaded claims. The Plaintiffs-Appellants cannot rely upon their allegations but, rather, must produce evidence from which a jury could find in their favor on the legal elements of their claim. ***Cox v. Kentucky Dept. of Transportation***, 53 F.3d 146, 149 (6th Cir. 1995).

"Essentially, a motion for summary judgment is a means by which to challenge the opposing party to 'put up or shut up' on a critical issue." ***Id.*** It is the Plaintiffs-Appellants' obligation to present "*evidence* upon which a reasonable jury could return a verdict" in their favor. ***Shreve v. Franklin County, Ohio***, 743 F.3d 126, 132 (6th Cir. 2014), *emphasis in original*. As demonstrated above and argued below, the Plaintiffs-Appellants have failed to do so. The *allegations* in the ***Krieger*** case cannot remedy this failure.

B. The Plaintiffs-Appellants have failed to produce evidence to support their Michigan inverse condemnation claim.

The Plaintiffs-Appellants predicate their inverse condemnation claim upon two supposedly wrongful actions by Midland and Gladwin Counties. First, the Plaintiffs-Appellants reference the counties having "sought and obtained a lake level order" that the Plaintiffs-Appellants allege was "dangerously high." **(R. 32, Pg ID**

550-551, Amended Complaint, ¶¶ 47-52; Plaintiffs-Appellants' Brief, p. 4). Second, the Plaintiffs-Appellants assert that Midland County and Gladwin County "deprioritized" spillway capacity upgrades, instead of "immediately increasing" that capacity or "maintaining lower lake levels." **(R. 32, Pg ID 555-566, Amended Complaint, ¶¶ 68-70; Plaintiffs-Appellants' Brief, pp. 4-5)**. But there is no support in the record for an inverse condemnation claim under either theory.

Although the counties' petition to set a lake level was an affirmative action, it was neither an "abuse" of governmental power, nor "directly aimed" at the Plaintiffs-Appellants' properties. This action was "aimed" only at Wixom Lake and the property of the Boyce entities (as the mechanism governing greater or lesser outflow from the lake). Nothing was "aimed" at the downstream properties of the Plaintiffs-Appellants.

Nor was the petition an "abuse" of government power. It was not an "abuse" to seek to maintain Wixom Lake, the Tittabawassee River watershed, the surrounding ecosystem and the surrounding man-made development in the condition that had become normal over the course of the century since the Edenville Dam was built. More specifically, there was no "abuse" in petitioning to maintain the same lake level that the FERC - - with full knowledge of the spillway inadequacies - - had deemed proper for two decades *and* that a professional study (commissioned for the purpose) had recommended to be maintained. **(R. 59-8, Pg ID 3743, IFT Final**

Report, p. 55; R. 59-2, Pg ID 3110, Spicer Group Lake Level Study, p. 19).

This is particularly so, given that the feared consequence of the spillway inadequacies (i.e., overtopping) never occurred. **(R. 59-8, Pg ID 3672, 3731, IFT Final Report, pp. 5-4, 43)**. The actual dam failure mechanism (static liquefication) had never been deemed a risk by any of the multiple dam safety engineering analyses that had been conducted. **(R. 59-8, Pg ID 3776-3777, 3781, 3817, IFT Final Report, pp. 88-89, 93, 129; 56-12, Pg ID 2869-2810, Lyman Dep., pp. 129-130)**. Even indulging the Plaintiffs-Appellants' notion (contrary to the IFT Final Report) that a lower lake level would have been certain to prevent the dam failure, it was not an "abuse" of governmental power for the counties' to petition for the lake level that they did, given the history and the expert opinions when they did so.

With regard to the alternative assertion by the Plaintiffs-Appellants that the counties should have "immediately" increased the dam's spillway capacity, the record makes clear that the counties had neither the authority, nor the ability, to take such action. Neither the counties, nor the FLTF, owned or controlled the dam. Nor (even if they had) could they have obtained the statutorily required preliminary studies, engineering design work, EGLE permit approvals and construction work in anything less than a period of *years* - - as acknowledged by the Plaintiffs-Appellants' own expert. **(R. 56-12, Pg ID 2805-2808, Lyman Dep., pp. 65-68)**.

To its credit, the FLTF had commenced preliminary work and began gathering

funding, even before the agreement to purchase the dams from the Boyce entities had gone into effect. But neither the FLTF, nor the counties, had authority to do anything more.

Moreover, the Plaintiffs-Appellants' specifically complain that the counties *failed to undertake* the spillway upgrades that the Plaintiffs-Appellants insist were needed - - i.e., inaction. Under Michigan law, an inverse condemnation claim must be based on "action" by the defendant, not inaction. ***Blue Harvest, Inc.***, 288 Mich. App. at 277; 792 N.W.2d at 805. Inaction with regard to "immediate" work to increase the dam's spillway capacity cannot support an inverse condemnation claim.[4]

Furthermore, to the extent that the Plaintiffs-Appellants fault the counties for not "maintaining lower lake levels," the record demonstrates that the counties, through the FLTF, supported the request by Boyce to lower the lake level. **(R. 56-2, Pg ID 2427, 2430, Kepler Dep., pp. 15, 18)**. The FLTF went so far as to undertake a mussel recovery effort, in order to protect Boyce from retribution by the EGLE for environmental damage. **(R. 56-2, Pg ID 2459, Kepler Dep., p. 47)**. But the EGLE denied the permit for the draw down - - and then sued Boyce for lowering the lake level without its permission. **(R. 56-2, Pg ID 2427-2428, Kepler Dep., pp. 15-16;**

[4] As described below, federal "taking" law under the Fifth Amendment is governed by this same principle.

R. 56-13, Pg ID 2885-2887, EGLE Permit Denial).

The Plaintiffs-Appellants assert that Midland and Gladwin Counties "controlled the Dam for a public purpose." **(Plaintiffs-Appellants' Brief, p. 13).** The record demonstrates this accusation to be false. The Boyce entities had ownership control of the dam, while the EGLE had regulatory control over the dam, whereby it denied the Boyce request to lower the lake level. Midland and Gladwin Counties did not "control" the dam for any purpose - - public or otherwise.

The Plaintiffs-Appellants also assert that Midland and Gladwin Counties "pressured the dam owner to maintain dangerously high lake levels." **(Plaintiffs-Appellants' Brief, p. 15).** Again, this is demonstrably false. The counties, through the FLTF, supported the request by Boyce to *lower* the lake level a full eight feet. It was the EGLE that prevented such action - - and it was the EGLE that pressured the Boyce entities by filing a lawsuit against them. **(R. 56-13, Pg ID 2885-2887, EGLE Permit Denial; R. 56-2, Pg ID 2459, Kepler Dep., p. 47).**

In short, the Plaintiffs-Appellants have no evidence to sustain an "inverse condemnation" claim under Michigan law. They offer no evidence that Midland or Gladwin County took any "actions" that either "abused" governmental power or were "directly aimed" at the Plaintiffs-Appellants' property. Dismissal of the Plaintiffs-Appellants' inverse condemnation claim should be affirmed.

III. THE PLAINTIFFS-APPELLANTS CANNOT MAINTAIN A FIFTH AMENDMENT "TAKING" CLAIM AGAINST EITHER MIDLAND OR GLADWIN COUNTY.

As acknowledged by the Plaintiffs-Appellants, a Fifth Amendment "taking" claim may assume "one of two forms." ***McCarthy v. City of Cleveland***, 626 F.3d 280, 284 (6th Cir. 2010). There may be either a "physical taking" whereby the government "physically intrudes upon a plaintiff's property" or a "regulatory taking" whereby the government encroaches upon use of property. ***Id.***

The Plaintiffs-Appellants' Fifth Amendment claim is predicated upon a physical intrusion, i.e., flooding of their properties as a consequence of the failure of the Edenville Dam. Because this falls in the category of a physical taking, it must be analyzed in light of precedential cases that likewise involve physical takings. It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluations of a claim that there has been a regulatory taking, and vice versa." ***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency***, 535 U.S. 302, 323 (2002).

In fact, Fifth Amendment taking claims arising from instances of alleged governmentally caused flooding are numerous. And, as recognized by this Court, much of the instructive case law has been developed in the United States Court of Claims (now the Court of Federal Claims). ***Lenoir v. Porters Creek Watershed District***, 586 F.2d 1081, 1094 (6th Cir. 1978).

The Plaintiffs-Appellants cite ***Pumpelly v. Green Bay Co.***, 80 U.S. 166 (1871), for the proposition 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." ***Id.***, at 181. **(Plaintiffs-Appellants' Brief, p. 22)**. But the case law that has developed during the 150 years following the ***Pumpelly*** decision is not so absolute as this statement from ***Pumpelly*** would suggest. The Plaintiffs-Appellants must prove more than the mere happening of a flood upon their properties.

This Court should not be misled by Plaintiffs-Appellants' citation to ***Arkansas Game and Fish Commission v. United States***, 568 U.S. 23 (2012) for the proposition that "[a] taking can occur when a person's property is damaged by a temporary flooding." **(Plaintiffs-Appellants' Brief, p. 22)**. Although the Supreme Court has rejected the "a categorical bar to temporary-flooding takings claims," ***Arkansas Game and Fish Commission***, 568 U.S. at 36, both the duration and frequency of flooding remain critical factors to consider.

As long-established by the Supreme Court, "it is the *character* of the invasion, not the amount of damage resulting from it . . . that determines the question whether it is a taking." ***United States v. Cress***, 243 U.S. 316, 328 (1917), *emphasis added*. The ***Arkansas Game and Fish Commission*** decision rejected "*only*" categorical

exclusion against temporary floodings being considered as takings. ***Arkansas Game and Fish Commission***, 568 U.S. at 38. And the Court then admonished that "*[t]ime is indeed a factor in determining the existence vel non of a compensable taking*." ***Id.***

Moreover, the Court expressly observed that:

> To reject a categorical bar to temporary-flooding takings claims, however, is scarcely to credit all, or even many, such claims. It is of course incumbent upon courts to weigh carefully the relevant factors and circumstances of each case, as instructed by our decisions.
>
> ***Id.***, at 36.

And case law thus far has concluded that "isolated" temporary invasions, such as one (or even two) flooding incidents, "do not make a taking." ***Ridge Line, Inc. v. United States***, 346 F.3d 1346, 1357 (Fed. Cir. 2003), ***Baird v. United States***, 5 Ct. Cl. 324, 329 (1984), ***Hartwig v. United States***, 202 Ct. Cl. 801, 809 (1973).

Significantly, both ***Baird*** and ***Hartwig*** involved claims based upon one-time temporary floods that allegedly resulted from the government having chosen to impound too much water behind dams - - with the consequence that heavier than normal rains resulted in the release of excessive amounts of water that could have been prevented had the reservoir levels not been kept so high. ***Baird***, 5 Ct. Cl. at 326-7, ***Hartwig***, 202 Ct. Cl. at 805-6. In both of these cases - - with circumstances analogous to those of the present case - - the courts held that no "taking" had occurred.

The Plaintiffs-Appellants misperceive the district court decision (by reference to the magistrate's report and recommendation) as focused solely upon whether the taking of the Plaintiffs-Appellants' property was for a "public purpose." **(Plaintiffs-Appellants' Brief, pp. 22-26)**. Certainly the district court answered that question in the negative. **(R. 81, Pg ID 7026-7027, Report and Recommendation, p. 12-13)**. And the district court was correct, as described below.

But the Plaintiffs-Appellants fail to address other critical elements of a Fifth Amendment takings claim raised in the Defendants-Appellees' motion below (and touched upon the R&R). Nor can they sustain those elements on the evidentiary record developed in the district court.[5]

Addressing the "public purpose" element of a takings claim, the district court recognized that "to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner" - - quoting ***Golf Village North, LLC v. City of Powell, Ohio***, 14 F.4th 611, 621, 623 (6th Cir. 2021), quoting ***Ridge Line, Inc.***, 346 F.3d at 1356. **(R. 81, Pg ID 7026, Report and Recommendation, p. 12)**. The flooding and resulting damage did not benefit either the public (or any

[5] The additional elemental issues raised by the counties below are (1) that there be a causal connection between the governmental action and the "taking," i.e., specific intent that the government's action effectuate a taking or intentional governmental action of which a taking is the "direct, natural, or probable" and (2) that the taking result from something more than mere negligence. **(R. 56, Pg ID 2397-2398, Defendants' District Court Brief, pp. 13-14)**.

private parties) at all, much less for any public purpose. Therefore, no taking occurred. **(R. 81, Pg ID 7027, Report and Recommendation, p. 13)**.

With regard to this "public purpose" element of the takings claim, the Plaintiffs-Appellants improperly shift focus away from the flooding itself to the earlier lake level petition and the "public purpose" that the Plaintiffs-Appellants identify as the basis for that petition. But even by the Plaintiffs-Appellants' interpretation, the lake level petition did not arise from any purpose by Midland County or Gladwin County either to cause failure of the dam or to flood the Plaintiff-Appellants' properties. The Plaintiffs-Appellants identify the "purpose" as being "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." **(Plaintiff-Appellants' Brief, p. 23)**. The destructive flooding would be directly *contrary* to such purpose.

The lack of any "public purpose" behind the alleged "taking" (i.e., the flooding) of the Plaintiffs-Appellants' properties is, by itself, dispositive against their Fifth Amendment claim. But the other arguments raised by the counties below are each also dispositive against the Plaintiffs-Appellants' claim.

"[A] property loss compensable as a taking only results [1] when the government intends to invade a protected property interest or [2] the asserted invasion is the direct, natural, or probable result of an authorized activity and not the

incidental or consequential injury inflicted by the action." ***Golf Village North, LLC***, 14 F.4th at 620-1, quoting ***Ridge Line, Inc.***, 346 F.3d at 1355. The lake level petition fits neither prong.

There is absolutely no evidence of any "intent" on the part of Midland or Gladwin County "to invade a protected property interest" of any of the Plaintiffs-Appellants (*by flooding or otherwise*), regardless of whatever purpose or action the Plaintiffs-Appellants ascribe to the counties. Even the Plaintiffs-Appellants themselves do not go so far as to make such accusation.

But neither does the record support any claim that the flooding of the Plaintiffs-Appellants' properties was a "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action."

In the context of a Fifth Amendment taking claim, the Plaintiffs-Appellants' allegations regarding failure by the counties to upgrade the spillways are irrelevant. As is true with regard to the inverse condemnation claim under Michigan law, a Fifth Amendment taking claim likewise requires "*action*" on the part of the government. "On a takings theory, the government cannot be liable for failure to act, but only for affirmative acts," because "[t]he government's liability does not turn, as it would in tort, on its level of care." ***St. Bernard Parish Government v. United States***, 887 F.3d 1354, 1360 (Fed. Cir. 2018). "[T]he government cannot be liable on a takings

theory for inaction." ***Id.***, at 1357. As illustratively held by the Federal Circuit in a "taking" case alleging flood damage due to the government's "failure" to install pumps or additional floodway capacity in a levee system, "takings liability must be premised on affirmative government acts." ***Bd. of Supervisors of Issaquena County, Mississippi v. United States***, 84 F.4th 1359, 1365 (Fed. Cir. 2023).

In this case, the only "affirmative" act of the counties was the lake level petition. Any failure to perform spillway upgrades or to lower the lake level - - i.e., "inaction" - - cannot be a basis for Fifth Amendment "taking" liability.

Furthermore, this Court has distinguished between actions to impound water behind a dam and actions that release water onto lands below a dam. In ***Miller v. United States***, 583 F.2d 857 (6th Cir. 1978), this Court observed that permanent loss of land by raising the level of water impounded behind a dam can constitute a taking, but damage from release of water is "merely a consequential or incidental result" that at most constitutes a tort, not a taking. ***Id.***, at 863-4.

Indeed, it is long established that there is a "distinction" between tortious damage and a taking. ***Id.***, at 863, ***Bedford v. United States***, 192 U.S. 217, 224-5 (1904). "An accidental or negligent impairment of the value of property is not a taking." ***Columbian Basin Orchard v. United States***, 132 Ct. Cl. 445, 452 (1955), *accord* ***Thune v. United States***, 41 Fed. Cl. 49, 52 (1998). And "[d]amage due to a random event induced more by a natural phenomenon than by Government

interference does not give rise to a taking even if there is permanent damage to property partially attributable to Government activity." ***Thune***, 41 Fed. Cl. at 53.

Even if the lake level established through the counties' petition played some causative role in the static liquefaction of the embankment of the Edenville Dam, such was no more than an incidental consequence - - and it was due more to excessive natural rain than due to the pre-event lake level itself. After all, the lake level requested by the Counties was no higher than had been maintained by mandate of the FERC for two decades, with no static liquefaction having occurred during any prior rain event. There was no reason for the counties to have foreseen static liquefaction even as a consequential incident of the lake level petition - - particularly given the assurances of the "good to excellent" condition of the embankments in the multiple engineering reports. **(R. 59-8, Pg ID 3817, IFT Final Report, p. 129)**.

And foreseeability is critical. First, in determining causation for purposes of "taking" liability, "government actions must be directed to the *same risk* that is alleged to have caused the injury to the plaintiffs." ***St. Bernard Parish Government***, 887 F.3d at 1365, *emphasis added*. Second, it must be shown that "it was within the contemplation of or reasonably to be anticipated by the government" that its specific action would cause the taking. ***John Horstmann Co. v. United States***, 257 U.S. 138, 145-6 (1921), ***Sanguinetti v. United States***, 264 U.S. 146, 149-50 (1924).

In this case, the governmental "action" of petitioning to maintain the existing

FERC prescribed lake level was not directed toward the "same risk" that caused the injury (i.e., static liquefaction). Nor, in light of the reports from the multiple dam inspections over the years - - together with the FERC's own maintenance of the lake level and the recommendation by the engineers retained by the FLTF - - was it in any way "reasonably to be anticipated" by the counties that their petition would result in any taking.

In short, as concluded by the district court, the absence of a "public purpose" for the flooding of the Plaintiffs-Appellants' properties is dispositive against the Plaintiffs-Appellants' Fifth Amendment claim. But the Plaintiffs-Appellants have no evidence to support the other requisite conditions for a Fifth Amendment taking claim either. As a consequence, the district court's grant of summary judgment in favor of Midland and Gladwin Counties should be affirmed.

CONCLUSION AND RELIEF REQUESTED

For the reasons described above, the record will not sustain the Plaintiffs-Appellants' Michigan "inverse condemnation" claim or Fifth Amendment "taking" claim against either Midland County or Gladwin County. Summary judgment in favor of the counties should be affirmed.

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Dated: January 31, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to the 6th Cir. R. 32(a)(7(c), the undersigned certifies this brief complies with the type-volume limitations of 6th Cir. R. 32(a)(7)(B).

1. Exclusive of the exempted portions in 6th Cir. R. 32(a)(7)(B)(iii), the brief contains:

   A. 9,969 words.

2. The brief has been prepared:

   B. in proportionally spaced typeface using: "Times New Roman" in font size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2024, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following: All Attorneys of Record; and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: N/A.

s/Marie E. Jones
Legal Assistant
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RECORD APPENDIX MAKING DESIGNATION OF DOCUMENTS

Record Entry No./Page ID	Description
R. 32, Pg ID 538-569	Amended Complaint
R. 56, Pg ID 2377-2409	Defendants' Motion and Brief Seeking Summary Judgment
R. 56-2, Pg ID 2412-2467	David Kepler Deposition
R. 56-5, Pg ID 2477-2488	Petition
R. 56-6, Pg ID 2489-2495	Lake Level Order
R. 56-7, Pg ID 2496-2511	Agreement Between Counties and FLTF
R. 56-8, Pg ID 2512-2554	Original Purchase Agreement
R. 56-9, Pg ID 2555-2558	First Amendment to Purchase Agreement
R. 56-11, Pg ID 2706-2738	Richard Anderson Deposition
R. 56-12, Pg ID 2739-2883	Tracy Lyman Deposition
R. 56-13, Pg ID 2884-2887	EGLE Permit Denial
R. 56-17, Pg ID 2925-2992	Ayres Design Flood Hydrologic Analysis
R. 59-1, Pg ID 3067-3070	FLTF Press Releasee, 6/8/20 [Attachment 6 to Lyman Report]
R. 59-2, Pg ID 3089-3111	Spicer Group Lake Level Study
R. 59-3, Pg ID 3422-3442	FLTF 2019 Annual Report
R. 59-7, Pg ID 3634-3663	FERC Order Revoking Boyde Hydro License

Record Entry No./Page ID	**Description**
R. 59-8, Pg ID 3664-3843	IFT Final Report
R. 81, Pg ID 7015-7032	Magistrate's Report and Recommendation
R. 83, Pg ID 7044-7046	District Court Opinion and Order
R. 84, Pg ID 7047	District Court Judgment