

Dam Collapse/Flooding: Federal Appellate Court Addresses Whether Michigan Counties' Efforts to Preserve Lake Depth Constitute a Taking



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The United States Court of Appeals for the Sixth Circuit (“Sixth Circuit”) in a June 20th Opinion addressed a taking issue arising out of flooding due to a dam collapse. See *Bruneau v. Midland County, et al.*, No. 23-1761.

The question considered was whether two Michigan Counties’ efforts to keep the water behind the Edenville Dam at existing levels constituted a take of the property owners whose land was flooded.

The Edenville Dam was built in 1924 and had historical flood control issues. In more recent years, the Federal Energy Regulatory Commission (“FERC”) had attempted to force the dam owners to comply with applicable regulations addressing such issues. The FERC eventually revoked the existing owners’ license and transferred regulatory authority over the dam to the Michigan Department of Environment, Great Lakes, and Energy.

The Michigan counties of Midland and Gladwin assembled a taskforce to manage the lake above the dam in compliance with the Michigan Natural Resources and Environmental Protection Act. Michigan laws (as described by the Sixth Circuit) require any entity with “delegated authority” maintain a Court-determined normal water level. Therefore, the two counties filed a petition with the Midland County Circuit Court to keep the lake levels at their historical height. The State Court subsequently granted the two counties’ request.

In 2020, several days of historic rainfall raised the water level three feet above its previous maximum. The dam failed. The flood overwhelmed another dam downstream and impacted many property owners.

The property owners alleged that the two counties violated the federal and Michigan taking clauses when the floodwaters adversely affected their homes and personal possessions. They argued that the counties “took” their properties by urging the State Court to maintain the dam’s historic water levels. This argument was premised on the idea that the counties knew that the spillway system was at risk of overflowing.

The FERC undertook an investigation to determine the cause of the dam’s collapse. It determined that the collapse was due to “static liquefaction”. This was described as saturated sands prompting the slope to collapse, compromising the dam’s structure. As a result, the water did not spill over the top of the dam as the property owners argued but instead caused the undergirding of the slope to give in.

The United States District Court granted the counties' motion for summary judgment. It concluded that their efforts to keep the water behind the dam at existing levels did not show they intended to flood the downstream properties. As a result, the counties' activities did not constitute a take of the property owners' land.

The Sixth Circuit therefore in reviewing the decision, assessed whether the counties' efforts to maintain existing water levels behind the Edenville Dam amounted to a taking under the Federal or Michigan Constitutions. It upheld the United States District Court concluding that no such taking occurred.

As to a Federal taking, the Sixth Circuit held that the counties' petitioned for the State Court to simply preserve the lake depth at the same level that it existed for roughly a century. This was held to not constitute the intent to flood the downstream properties. They were held to have played no part in regulating or controlling the dam's infrastructure. Also noted was the fact that the lake levels were not a material factor in the dam's collapse.

A similar conclusion was reached in regards to whether there was a State taking. The Sixth Circuit held that the property owners do not meet the first imperative of state takings claim – causation. Static liquefaction as opposed to a spill over caused the dam's collapse.

While heavy rains played a role in the dam's collapse, the counties were not responsible for the precipitation. In addition, the Sixth Circuit states that the FERC's investigation determined that lowering the lake level would not necessarily have stopped its eventual failure from static liquefaction.

A copy of the Opinion can be downloaded [here](#).