STATE OF MICHIGAN

COURT OF CLAIMS

KENNETH A. MCCREADY,

Plaintiff,

v

Case No. 25-000059-MM

Hon. Sima G. Patel

STATE OF MICHIGAN, GOVERNOR GRETCHEN WHITMER, in her official capacity, M. SCOTT BOWEN, Director of Michigan Department of Natural Resources, in his official capacity,

Defendants.
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OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY DISPOSITION AND GRANTING IN PART SUMMARY DISPOSITION IN PLAINTIFF'S FAVOR

I. BACKGROUND

At issue in this case is the right of the public to use navigable rivers for fishing and to enter private land to avoid obstacles in the river. MCL 324.73102 of the Natural Resources and Environmental Protection Act (NREPA) states, in relevant part:

> (1) Except as provided in subsection (4), a person shall not enter or remain upon the property of another person, other than farm property or a wooded area connected to farm property, to engage in any recreational activity or trapping on that property without the consent of the owner or his or her lessee or agent, if either of the following circumstances exists:
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> (a) The property is fenced or enclosed and is maintained in such a manner as to exclude intruders.

(b) The property is posted in a conspicuous manner against entry. . . .

(2) Except as provided in subsection (4), a person shall not enter or remain upon farm property or a wooded area connected to farm property for any recreational activity or trapping without the consent of the owner or his or her lessee or agent, whether or not the farm property or wooded area connected to farm property is fenced, enclosed, or posted.

(3) On fenced or posted property or farm property, a fisherman wading or floating a navigable public stream may, without written or oral consent, enter upon property within the clearly defined banks of the stream or, without damaging farm products, walk a route as closely proximate to the clearly defined bank as possible when necessary to avoid a natural or artificial hazard or obstruction, including, but not limited to, a dam, deep hole, or a fence or other exercise of ownership by the riparian owner.

(4) A person other than a person possessing a firearm may, unless previously prohibited in writing or orally by the property owner or his or her lessee or agent, enter on foot upon the property of another person for the sole purpose of retrieving a hunting dog. . . .

Plaintiff occupies land affected by this statutory right to enter private property. His family has owned and occupied the property at issue in this case (the Property) for 63 years and plaintiff has leased it from a relative since 2020. Plaintiff asserts that in addition to the lease, he "took, by absolute assignment, all right, title and interest in any cause of action whatsoever, under any theory of law, without reservation." The Property is a large, wooded tract of land on the southwest corner of the intersection between M-55 and the east branch of the Au Gres River (the River) in Grant Township. The River is the Property's eastern boundary. The Property is bounded by fencing on the other three sides.

Plaintiff asserts that every year "trespassers literally INVADE the property to fish during steelhead trout season." Plaintiff alleges that they have cut his fences and torn down "No Trespassing" signs, drive across the land leaving deep ruts in the mud, cut trees and branches, leave fires unattended, litter the land with food wrappers and smoking paraphernalia, and have destroyed the riverbank in several locations. Plaintiff notes that the nearest law enforcement office

is 35 miles away and the Iosco County Sheriff "won't respond to calls." Plaintiff admits that local Department of Natural Resources (DNR) officers have "ticketed numerous people on the property," but have limited staff to patrol the area, which is very remote. However, plaintiff states that DNR Director M. Scott Bowen and other high-ranking officials have erroneously advised its enforcement officers that the River is navigable (a claim that plaintiff challenges) and, therefore, the public is permitted to access it across the Property.

Plaintiff has also tried to rid the Property of trespassers on his own. On April 26, 2020, plaintiff encountered two trespassers who he was able to identify. He filed suit against them in *McCready v Wagner*, 81st District Court, Docket No. 2022-22263-GC. The district court dismissed the matter on May 31, 2023. Plaintiff did not appeal that dismissal.

Plaintiff filed suit on April 10, 2025, and filed an amended complaint with Court permission on July 3, 2025. In Count I, plaintiff seeks a declaratory judgment that the River is non-navigable and, therefore, no one is allowed to access the River or any part of his Property. Even if the river is navigable, plaintiff alleges, third parties have no right to trespass onto his Property beyond the riverbank.

In Counts II and III, plaintiff raises takings claims. Although plaintiff's general allegations include many complaints of private individuals leaving the riverbank and damaging his property, and of law enforcement at all levels inadequately enforcing the limits of the NREPA, plaintiff limits his takings claim in Count II to a claim that permitting fishers to enter private property and walk along the riverbank to avoid obstacles in the River amounts to a taking under an inverse condemnation theory. Stated differently, plaintiff contends that MCL 324.73102 is a regulatory

taking of his property. In Count III, plaintiff contends that the government has directly taken his property for public use to support fishing tourism, a lucrative industry for the State.

In Count IV, plaintiff raises a judicial takings claim. Plaintiff raises this claim against the State and Governor Whitmer based on the 81st District Court's dismissal of his suit against private individuals who trespassed on the Property. He states that he is not asking this Court to review the district court's decision in place of an appeal or as a collateral attack of the dismissal of his suit. Rather, he claims he is asking this Court to apply the law of takings to the district court's decision and recognize that the district court deprived him of his valuable property rights.

Defendants have moved for summary disposition under MCR 2.116(C)(4), (7), (8), and (10).[1]

II. PLAINTIFF HAS NOT STATED A CLAIM THAT THE RIVER IS NON-NAVIGABLE

Plaintiff asserts in his amended complaint and his response to the motion for summary disposition that the navigability of a river is a federal question and that navigability must be measured on the date Michigan gained statehood. These propositions are not true under Michigan law.

It has long been established in Michigan law that a river is deemed "navigable" and open for public use if "in [its] natural state" it has "a capacity to float logs and rafts." *Collins v Gerhardt*,

[1] Defendants filed a reply brief in support of their motion for summary disposition on September 17, 2025, and a corrected reply brief on October 23, 2025. On March 9, 2026, plaintiff filed a motion to strike, characterizing the corrected reply brief as a prohibited sur-reply. The Court acknowledges defendants' response to the motion to strike in which they indicate they filed a corrected reply brief in response to an error discovered by plaintiff. The Court DENIES plaintiff's motion to strike.

237 Mich 38, 43-44; 211 NW 115 (1926), citing *Moore v Sanborne*, 2 Mich 519 (1853). Plaintiff made no allegation in his amended complaint regarding the depth and width of the River adjacent to his property. In ¶ 40, plaintiff contends that the Army Corps of Engineers responded to a Freedom of Information Act request on April 14, 2023, and indicated that the River is navigable from the mouth of Lake Huron upstream to Noble Road in Arenac County. Plaintiff asserts that his Property is several miles away from the navigable portion of the River. But plaintiff did not attach this material to his complaint, amended complaint, or summary disposition response.

With their motion for summary disposition, defendants presented the permit plans for a bridge repair project on M-55 over the River at the north end of the Property. Those documents demonstrate that the River is approximately two feet deep and 30 to 40 feet in width in this area. Defendants cite *Attorney General ex rel Director of Conservation v Taggart*, 306 Mich 432; 11 NW2d 193 (1943), in which the Supreme Court found a river with an average depth of only one foot and average width of 30 feet to be navigable under the log-float test.

Plaintiff, on the other hand, continued to erroneously argue in response to the summary disposition motion that the Court must consider the navigability of the River under federal law and at the time Michigan became a state. He asserted that *Collins*, which adopted the log-float test in Michigan, was wrongly decided and should be overruled. This Court has no authority to overrule precedent set by the highest court in our state. See *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 142; 863 NW2d 344 (2014). Moreover, when a defendant presents evidence in support of its motion for summary disposition under MCR 2.116(C)(10), a plaintiff may not merely rely on the allegations in his complaint in response. MCR 2.116(G)(4).

Given plaintiff's failure to make any allegation or present any evidence to demonstrate that a log could not be floated on the River, defendants are entitled to summary disposition of Count I to the extent plaintiff seeks a declaratory judgment that the River is non-navigable.

III. PLAINTIFF HAS ADEQUATELY ALLEGED THAT PRIVATE INDIVIDUALS HAVE ENTERED HIS PROPERTY

In Count I, plaintiff also alleges that defendants' agents have erroneously advised trespassers about their rights to use plaintiff's property. The Property in question is wooded, although it is unclear if it is connected to a farm property. In any event, plaintiff fenced the Property and posted conspicuous signs warning against trespassing. Plaintiff alleges that he has given no one consent to enter his Property and has ordered several individuals to leave his land.

Both *Collins* and the statute make clear that public use of the River adjacent to plaintiff's property was limited to fishers using the stream itself. Fishers may leave the stream without plaintiff's permission under the limited circumstance of avoiding a natural or manmade hazard or obstruction in the riverbed but must walk closely to the bank and not cause any damage to the Property.

Plaintiff has clearly alleged that private individuals have violated this law. Plaintiff has even filed suit against two trespassers in district court. Plaintiff has alleged that agents of defendants, such as Michigan State Police troopers and DNR officials have advised individuals that their rights to enter plaintiff's land are broader than actually permitted. In this regard, defendants are not entitled to summary disposition. Rather, plaintiff is entitled to summary disposition under MCR 2.116(I)(2) limited to the following declaratory judgment:

Third parties may only enter the Property from the River itself, may only do so to avoid an obstacle in the riverbed, and must walk as close as possible to the riverbank. Defendants and their agents may not advise third parties inconsistent with this declaration.

IV. TAKINGS CLAIMS

As noted, plaintiff files suit against the State of Michigan, Governor Whitmer, and DNR Director M. Scott Bowen alleging a governmental taking of his property on three separate grounds. Defendants seek summary dismissal of these counts on various grounds.

First, defendants contend that plaintiff failed to plead his takings claims in avoidance of governmental immunity. However, a takings claim arises under the Constitution and is not a matter of tort law. Accordingly, "the immunity doctrine does not insulate the government from liability." *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989).

Second, defendants assert that plaintiff's takings claims sound in federal law and could be raised in federal court under 42 USC 2201(a), thus divesting this Court of jurisdiction under MCL 600.6440 ("No claimant may be permitted to file claim in [the Court of Claims] against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts . . . ."). But the Michigan Supreme Court has repeatedly upheld the Court of Claims' exercise of jurisdiction over takings claims. See *Mays v Governor*, 506 Mich 157; 954 NW2d 139 (2020); *AFT Mich v State*, 497 Mich 197; 866 NW2d 782 (2014).

Third, defendants contend that plaintiff has not stated an actionable takings claim because he took his leasehold subject to the right of the public to fish in the River. Defendants also contend that these fishers are permitted by statute to enter plaintiff's land.

The Court of Appeals comprehensively and articulately summarized the law regarding the unconstitutional taking of property in *Gym 24/7 Fitness, LLC v Michigan*, 341 Mich App 238, 258-263; 989 NW2d 844 (2022):

> Under the United States Constitution, private property shall not be taken "for public use, without just compensation." US Const, Am V. "The Takings Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment." *Cedar Point Nursery v Hassid*, 594 US 139, 147; 141 S Ct 2063; 210 L Ed 2d 369 (2021). And under the Michigan Constitution, "private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2. "While we draw on authority discussing and interpreting both clauses, we must keep in mind that Michigan's Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain." *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 449-450; 952 NW2d 434 (2020).
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> With respect to the analysis regarding an alleged taking under the Fifth Amendment, the United States Supreme Court in *Cedar Point Nursery*, 549 US at 147-148, recently set forth the following analytical framework:
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> > When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. The Court's physical takings jurisprudence is as old as the Republic. The government commits a physical taking when it uses its power of eminent domain to formally condemn property. The same is true when the government physically takes possession of property without acquiring title to it. And the government likewise effects a physical taking when it occupies property—say, by recurring flooding as a result of building a dam. These sorts of physical appropriations constitute the clearest sort of taking, and we assess them using a simple, per se rule: The government must pay for what it takes.
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> > When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies. Our jurisprudence governing such use restrictions has developed more recently. Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property. In *Pennsylvania Coal Co v Mahon*, 260 US 393; 43 S Ct 158; 67 L Ed 322 (1922), however, the Court established the proposition that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. This framework now applies to use restrictions as varied as zoning ordinances, orders barring the mining of gold, and regulations prohibiting the sale of eagle feathers. To

> determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*[*Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978)], balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. [Quotation marks and citations omitted.]

The Takings Clauses of the Michigan and United States Constitutions both "prohibit the taking of private property for public use without just compensation." *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010). "The Taking Clauses do not prohibit the government's interference with a private individual's property, but require that interferences amounting to a taking be compensated." *Id*. Generally speaking, the government takes private property from the owner by way of formal condemnation proceedings, but regulations issued by the government that overburden property can also result in a compensable taking. *Id*. A "categorical" taking occurs "when there has been a physical invasion of a landowner's property or when a regulatory taking has deprived an owner of all economically and beneficial use of the land." *Id*. at 261 n 5 (emphasis added). "Regulatory taking claims that do not rise to the level of a categorical taking are governed by the standard set out in *Penn Central*." *Id*. at 261.10. "A mere reduction in the value of regulated property is insufficient by itself to establish that a compensable taking has occurred." *Id*. at 262.

The Michigan Supreme Court in *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998), similarly observed that a person's property may effectively be taken when it is overburdened by regulations. Taking actions require a case-specific inquiry, and land-use regulations can effectuate a taking when they deny a landowner economically viable use of his or her property. *Id*. As indicated, a "categorical" taking occurs when a regulation deprives an owner of all economically productive or beneficial use of property. *Id*. at 576-577. And a noncategorical regulatory taking can occur upon application of the *Penn Central* balancing test. *Id*. at 577.

Inverse condemnation is a de facto taking in which the government effectively takes property absent formal condemnation proceedings. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 125; 680 NW2d 485 (2004). "An inverse condemnation claim may be based upon the government's 'regulatory taking' of private property." *Dorman v Clinton Twp*, 269 Mich App 638, 646; 714 NW2d 350 (2006). Inverse condemnation concerns the taking of private property, and pursuant to the Taking Clauses, "a victim of such a taking is entitled to just compensation for the value of the property taken." *Hart v Detroit*, 416 Mich 488, 494; 331 NW2d 438 (1982).

Finally, . . . a temporary taking can be compensable under the Taking Clauses. *First English Evangelical Lutheran Church of Glendale v Los Angeles Co*, 482 US 304, 321; 107 S Ct 2378; 96 L Ed 2d 250 (1987); *Cummins v Robinson Twp*, 283 Mich App 677, 704; 770 NW2d 421 (2009). To summarize, there are

> physical takings and regulatory takings. A physical taking of private property is a categorial taking that requires the payment of just compensation. A regulatory taking involving the deprivation of all economically productive or beneficial use of property is also a categorical taking, requiring the payment of just compensation. The second type of regulatory taking—a noncategorical taking—is one that is determined upon application of the *Penn Central* balancing test. Additionally, inverse condemnation arises when the government takes property, either by physical invasion or regulation, absent formal condemnation proceedings. Finally, a taking can be either temporary or permanent. [Cleaned up.]

In Count II of his amended complaint, plaintiff alleges that defendants took his property through inverse condemnation. He claims that MCL 324.73102 effectuates a taking of private property by permitting individuals who would otherwise be trespassers to enter property to avoid obstacles in the river. And in Count III, plaintiff asserts that defendants have physically taken the land along his riverbed for use by the public. However, the common law has long upheld that the waters of navigable rivers belong to the State and are held in the public trust for the citizenry. A riparian owner holds title to the land adjacent to the waterway and may even own the land underneath the water. The water itself and the fish swimming in that water do not belong to the landowner. See *Collins*, 237 Mich at 47-48.

The Michigan Supreme Court declared in *Collins*, 237 Mich at 49, "Of course, in exercising this right people cannot go upon the uplands of riparian owners in order to gain access to the water. If they do that they are guilty of trespass." Although it is clear from plaintiff's factual allegations that members of the public have trespassed on his land by using "the uplands . . . to gain access to the water," nothing in the NREPA permits that level of trespass. The right to access private property has been carefully limited by the statute: a fisher may enter private property and walk as close as possible to the riverbed only in order to avoid an obstacle in the river. Because the statute limits entries onto private lands for the reasons long set forth in the common law, it does not effectuate a taking, either regulatory or otherwise, of plaintiff's Property. The violation of the

limited right to access private property by private individuals is a legal quandary separate and distinct from a takings claim. Defendants are entitled to summary disposition of plaintiff's Counts II and III.

Plaintiff's judicial takings claim in Count IV alleges that by refusing to consider plaintiff's civil trespass claims against interlopers on the Property, the district court has taken his Property for the State's use. The Court is sympathetic to plaintiff's plight. If third parties are truly crossing his Property; damaging the soil, trees, fences, and signs; and strewing litter, plaintiff has every right to the protection of law enforcement and the court system. But the law does not support the application of the judicial takings doctrine to a district court action. The United States Supreme Court has recognized the judicial takings doctrine only when "a State's court of last resort took property without just compensation." *Stop the Beach Renourishment, Inc v Florida Dep't of Environmental Protection*, 560 US 702, 707; 130 S Ct 2592; 177 L Ed 2d 184 (2009). The proper method to challenge the dismissal of his district court lawsuit was to file an appeal in the circuit court. The current action is an improper collateral attack of the district court decision.

IT IS ORDERED:

1. The Court DENIES plaintiff's March 9, 2026 motion to strike defendants' amended reply brief.
2. The Court GRANTS IN PART summary disposition to plaintiff limited to the following declaratory judgment under Count I: Third parties may only enter the Property from the River itself, may only do so to avoid an obstacle in the riverbed, and must walk as close as possible to the riverbank. Defendants and their agents may not advise third parties inconsistent with this declaration.
3. The Court GRANTS summary disposition to defendants in all other regards.
4. The Court having resolved all claims in plaintiff's amended complaint, CLOSES this action.

5. This is a final order resolving all issues in this action.

Date: August 24, 2026

Sima G. Patel
Judge, Court of Claims