

## Potential Future Takings Do Not Give Rise to Liability

by [Brad Kuhn](#)

A new Court of Federal Claims opinion was handed down this month coming right out of our own Southern California backyard. The case, [Stueve Bros. Farms, LLC v. the United States](#), deals with whether a "physical taking of title" has occurred when a government agency's activities create a risk of flooding. The answer, according to the Court, is no.

Stueve Bros. Farms owns property in San Bernardino County within the Prado Dam Flood Control Basin. In the 1940's, the federal government condemned flowage easements over the property to an elevation of 556 feet above sea level. More recently, the U.S. Army Corps of Engineers embarked on a multi-phased update to the Prado Dam which would ultimately raise the flood inundation level by 10 feet (to 566 feet). The first phase involved improvements to the Prado Dam, which was completed in 2008. The second phase involved acquiring the necessary property interests to raise the flood inundation level.

During the second phase, many parcels encircling and neighboring Stueve Bros. Farms' property were acquired. Stueve Bros. Farms received an offer in the \$6 million range, and it countered at \$21 million. Negotiations broke off. Nevertheless, the Army Corps stated publicly that the flood inundation level would be increased and even released flood plain maps with the new inundation line. The City of Chino, where the property lies, amended its zoning plans and called for property in between the 556 foot and 566 foot flood inundation level to be used solely for agricultural purposes, while Stueve Bros. Farms' property above 566 feet became entitled for high density, mixed-use residential, commercial, office and industrial uses.

Stueve Bros. Farms filed an inverse condemnation action seeking \$60 million in damages, alleging that the Army Corps' actions resulted in the taking of physical and title flowage easement across the property. No claim was made for a regulatory taking, a de facto taking, or for precondemnation damages. The United States filed a motion to dismiss, claiming that there was no valid "physical takings claim" because there had been no flooding or physical invasion of the property.

The Court granted the United States' motion to dismiss, holding that a physical taking does not occur in this circumstance unless there has been permanent flooding, or multiple, actual physical invasions of water that are inevitably recurring. Stueve Bros. Farms countered that by subjecting the property to the government's right to flood, the government had imposed a physical taking of a flowage easement. It claimed that it was the easement that resulted in the permanent physical taking, not the flooding that will eventually occur. The Court rejected this argument, concluding that such flooding may never occur and the project may never even be completed.

While the apprehension of future flooding may influence property value, zoning decisions, and flood plain maps, the bottom line is that such apprehension is insufficient to establish a taking. It is unclear whether Stueve Bros. Farms would have had any greater success going the route of a regulatory taking or seeking precondemnation damages. While it may have lost this battle, the

valuation dispute is likely one that will come sometime in the future if the project ever finally moves forward.