

## Publications

### It is Your Land, But the Government is Flooding it: is Just Compensation Available in Eminent Domain?

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Thomas H. Fusonie

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Sadly, flooding happens throughout the United States of America, flooding farmland, residences, commercial buildings, etc. From small towns to big cities, it can affect anyone.

Flooding often is caused by natural disasters. But unfortunately, past flood events have also been caused or worsened by federal, state and local governments' actions or inactions. This can come from dam management or reservoir management. It can come from road construction projects – or even from “flood control” projects that in reality make the flood risk greater for some individuals.

When the government floods your land, under the United States Constitution and under state constitutions or other laws a landowner may be entitled to just compensation in eminent domain proceedings. Just compensation is a fundamental right and recognized as such in the Fifth Amendment to the United States Constitution. It ensures that while the government can take private property for a public use by way of eminent domain, it must justly compensate the landowner for doing so.

Experience shows that when the government floods private land, it does not always recognize its responsibility and duty to compensate private landowners for the flooding. When this happens, private landowners must consider whether they have an action against the government in “inverse condemnation”. Inverse condemnation is the right to recover just compensation against the government when it takes private land without formally exercising the power of eminent domain. Flooding can be a taking giving the government the right to ongoing flooding of private land.

When considering pursuing an inverse condemnation claim against the government for flooding, the following are generally important points for the landowner to think about:

- Has the flooding happened only one time? If so, has the flooding left a permanent invasion? The most obvious example is the flooding

has carved a new channel in an existing body of water through an owner's property.

- If a single flood has occurred and receded without a permanent invasion, then have there been multiple floods?
- If there have been multiple floods, then: How many? How long? How often? What impacts to the property have there been? Any impact to structures? Does the source of flooding remain, such as a dam or a reservoir, so that future flooding is likely? For periodic flooding to constitute a taking, it generally must be frequent and severe enough to be more than a minor trespass.
- If the land had some flooding prior to any government action or inaction that itself caused flooding, how does the government's flooding differ in frequency, duration and extent of impact?
- For both permanent and intermittent flooding, could the government have foreseen its flooding?

The above are some general questions a landowner should consider. The laws that apply to the land and the government actor may require additional questions. These questions may include how and, where, a landowner can pursue any inverse condemnation action against the government actor. Ultimately, if a landowner can prevail on showing the government owes just compensation for a taking by flooding, then the landowner is entitled to compensation for the area flooded and potentially damage to the market value of any remainder portion of the owner's property outside the flood area. Depending on the law involved, a landowner might also be entitled to other relief, including, as examples, attorneys' fees, interest on compensation and damages awarded and court costs.

**About the Authors:** [Tom Fusonie](#) is a partner in the Vorys Columbus office. He focuses his practice on eminent domain issues and has valuable experience representing property owners across Ohio. [Dan Shuey](#) is an associate in the Vorys Columbus office. He has experience helping clients protect their property rights.