

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
Electronically filed October 30, 2015

ST. BERNARD PARISH GOVERNMENT)
AND OTHER OWNERS OF REAL)
PROPERTY IN ST. BERNARD PARISH)
OR THE LOWER NINTH WARD OF THE)
CITY OF NEW ORLEANS,)

Plaintiffs,)

v.)

UNITED STATES OF AMERICA,)

Defendant.)

No. 05-1119 L

Honorable Susan G. Braden

UNITED STATES' MOTION TO CERTIFY INTERLOCUTORY APPEAL AND STAY
PROCEEDINGS AND MEMORANDUM IN SUPPORT

Pursuant to 28 U.S.C. § 1292(d)(2) and this Court's Order of October 13, 2015, ECF No. 281, the United States moves the Court to certify for interlocutory appeal its May 1, 2015 Memorandum Opinion and Order on Liability Regarding a Temporary Taking by Flooding, *St. Bernard Parish Gov't v. United States*, 121 Fed. Cl. 687 (2015) ("*Liability Opinion*"). Pursuant to 28 U.S.C. § 1292(d)(3), the United States also moves the Court to stay proceedings in this matter until the Federal Circuit resolves the United States' petition for interlocutory appeal.

As discussed below, the requirements for interlocutory appeal under 28 U.S.C. § 1292(d)(2) are satisfied here. To facilitate certification, the United States respectfully requests that the Court amend its *Liability Opinion* to include the following express findings required by Section 1292(d)(2), and to address the requested stay of proceedings:

Because this order involves controlling questions of law with respect to which there are substantial grounds for difference of opinion, and an immediate appeal from this order would materially advance the ultimate termination of the litigation, the court certifies to the United States Court of Appeals for the Federal Circuit for its consideration whether to permit an appeal to be taken from this order should a

timely application be made to that court. This case is stayed pending further order. The United States shall file a status report within ten days of any action on its application by the Federal Circuit.

A memorandum in support of this motion follows.

MEMORANDUM

I. Background

On May 1, 2015, the Court issued its *Liability Opinion*, and an accompanying opinion that resolved several evidentiary issues disputed by the parties. The *Liability Opinion* holds the United States liable for imposing a flowage easement over Plaintiffs' properties for the period August 28, 2005, through July 2009. *Liability Opinion*, 121 Fed. Cl. at 743-47.

The operative complaint identifies 128 properties owned by the named plaintiffs. Plaintiffs' pending motion for class certification, if granted, would expand the case to include thousands of "property owners residing in, owning property in and/or engaging in commercial enterprises in St. Bernard Parish, Louisiana or the Lower Ninth Ward of the City of New Orleans[.]" Third Am. Class Action Compl. ¶ 61, July 6, 2011, ECF No. 115.

In a settlement conference convened by this Court on May 6, 2015, the Court and the parties discussed three options: mediation, interlocutory appeal, or "proceeding to final judgment." Order of May 13, 2015, ECF No. 277. The Court's August 4, 2015 Order directed the United States to inform the Court by October 9, 2015 of the option it intends to pursue. *See* Order of Aug. 4, 2015, ECF No. 279. On October 9, 2015, the United States timely notified the Court that the Solicitor General has authorized that the government pursue an interlocutory appeal. *See* U.S. Notice Regarding Further Proceedings, ECF No. 280.

II. Standard for Interlocutory Appeal

Section 1292(d)(2) of Title 28 provides in pertinent part that:

[W]hen any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

Id. The statute “establishes a three-part test for certification that ‘is “virtually identical” to the statutory standard of certification utilized by the United States district courts [under 28 U.S.C. § 1292(b)].’” *Marriott Int’l Resorts, L.P. v. United States*, 63 Fed. Cl. 144, 145 (2004) (quoting *Am. Mgmt. Sys., Inc. v. United States*, 57 Fed. Cl. 275, 276 (2003)), *rev’d on other grounds & remanded*, 437 F.3d 1302 (Fed. Cir. 2006).

The multi-factor test “is designed to weigh the relative benefits of an immediate appeal.” *Am. Tel. & Tel. Co. v. United States*, 33 Fed. Cl. 540, 541, *interlocutory appeal granted*, 66 F.3d 344 (Fed. Cir. 1995). Once certified, the Federal Circuit has discretion whether to accept an appeal. *In re Convertible Rowing Exerciser Patent Litig.*, 903 F.2d 822, 822 (Fed. Cir. 1990).

III. Discussion

Interlocutory appeal of the Court’s *Liability Opinion* is appropriate because that ruling (1) involves “controlling question[s] of law,” (2) about which there exists “substantial ground[s] for difference of opinion,” and (3) immediate appeal will “materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(d)(2).

A. The Court’s Ruling That the United States is Liable for a Violation of the Fifth Amendment for Temporary Hurricane-Caused Flooding Presents Controlling Questions of Law

Interlocutory appeal is proper when the decision to be appealed involves “a controlling question of law.” 28 U.S.C. § 1292(d)(2). A question is “controlling” when it “materially affect[s] issues remaining to be decided in the trial court.” *Marriott Int’l Resorts*, 63 Fed. Cl. at

145 (quoting *Pikes Peak Family Hous., LLC v. United States*, 40 Fed. Cl. 673 (1998); *see also* 16 Charles Alan Wright, et al., *Federal Practice & Procedure* § 3930 (3d ed. 1996).

Two controlling questions of law underlie the Court’s liability ruling: (1) whether Plaintiffs’ claims are cognizable under the Fifth Amendment and (2) whether the Court correctly applied the relevant legal standards in its evaluation of Plaintiffs’ claims. Both questions materially affect the outcome of the case and are essential to the Court’s liability ruling. These questions are “controlling” for purposes of Section 1292(d)(2) since they are determinative of the United States’ liability. *See* *Federal Practice & Procedure* § 3930 (question is undoubtedly “controlling” if its incorrect disposition would require reversal of a final judgment).

B. There Are Substantial Grounds for Differences of Opinion Regarding this Court’s Resolution of the Controlling Questions

Section 1292 also requires that there exist “a substantial ground for difference of opinion” on the controlling question of law. 28 U.S.C. § 1292(d)(2); *see Vereda, Ltda. v. United States*, 271 F.3d 1367, 1373-74 (Fed. Cir. 2001) (permitting interlocutory appeal because there is a “substantial ground for difference of opinion”); *Neb. Pub. Power Dist. v. United States*, 74 Fed. Cl. 762, 764 (2006) (certifying interlocutory appeal because “the state of the law is such that there plainly are ‘substantial grounds for difference [of] opinion’ that warrant further explication by the Federal Circuit”). That standard is also satisfied here.

First, substantial grounds for difference of opinion exist with respect to the Court’s conclusion that temporary, hurricane-caused flooding can form the basis of a Fifth Amendment takings claim, even where the government takes action that the Court finds increased the risk of flooding. Plaintiff’s legal theory and the Court’s ruling are without direct precedent, and the *Arkansas Game and Fish* decision upon which the Court based its decision involved intentional

government-caused flooding over a period of several years. *See Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012).

Second, even if the multi-factor analysis set forth in *Arkansas Game* applies here, substantial grounds for difference of opinion exist with respect to the Court’s application of that legal standard to the very different facts of this case. The Court’s ruling is the first since *Arkansas Game* to hold the United States liable for a temporary taking by flooding, and there are substantial grounds for disagreement concerning how courts should interpret and apply the multifactor analysis the Supreme Court announced in its *Arkansas Game* opinion, especially in this distinct setting.

The United States’ position with respect to these questions is set forth in detail in its prior briefing, including its post-trial memoranda. Although the United States recognizes that this Court rejected those arguments in its *Liability Opinion*, the United States respectfully submits that its briefing establishes that, at a minimum, there are substantial grounds for difference of opinion with this Court’s conclusion.

C. Certification Will Advance the Ultimate Termination of the Litigation

Finally, Section 1292 requires the Court to consider whether certification will “materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(d)(2). Resolution of this issue “depends in large part on considerations of ‘judicial economy’ and the need to avoid ‘unnecessary delay and expense’ and ‘piecemeal litigation.’” *Coast Fed. Bank, FSB v. United States*, 49 Fed. Cl. 11, 14 (2001) (citation omitted), *aff’d*, 323 F.3d 1035 (Fed. Cir. 2003).

An interlocutory appeal at this stage of proceedings may result in a ruling that the United States is not liable for a taking, and obviate the need for further proceedings. Specifically, it would allow for final resolution of whether the government can be held liable for a taking in

these circumstances without the need for the Court to determine any further liability issues that could arise as to the individual landowners or any questions of just compensation, and without the need for the Court and the parties to engage in any class-certification or joinder process for thousands of landowners. And even if the Court's *Liability Opinion* is affirmed, a ruling by the Federal Circuit may resolve or clarify disputes between the parties concerning just compensation that turn on the extent of the United States' liability, and facilitate this Court's analysis of the remaining issues in the case.

If the parties are instead required to resolve all claims in this case, those proceedings will be lengthy and complex. The Court will need to resolve Plaintiffs' motion for class certification. Joinder of additional plaintiffs, if approved by the Court, will require additional discovery, and resolution of just compensation may require multiple trials. The United States anticipates that such proceedings will be expensive, require complex expert analyses, and take several years to complete. If the Federal Circuit ultimately reverses this Court's liability decision or remands for further proceedings, those multi-year valuation proceedings will have served no purpose. Certification of an interlocutory appeal at this stage, therefore, will materially advance the ultimate resolution of the case.

D. The Court Should Stay Proceedings in this Matter Until the Federal Circuit Resolves the United States' Petition for Interlocutory Appeal

An interlocutory appeal does not automatically suspend the trial court's jurisdiction. *See* 28 U.S.C. § 1292(d)(3) ("Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the . . . Court of Federal Claims . . . unless a stay is ordered by a judge . . . of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court."). To conserve judicial and attorney resources and to minimize unnecessary expense by the parties, the United States requests that the Court stay

proceedings in this matter until the Federal Circuit resolves the United States' petition for interlocutory appeal.

IV. Conclusion

For the reasons discussed above, the Court should certify for interlocutory appeal its finding of liability to the Federal Circuit under 28 U.S.C. § 1292(d)(2). In addition, pursuant to 28 U.S.C. §1292(d)(3), the Court should stay proceedings in this matter until the Federal Circuit resolves the United States' petition for interlocutory appeal.

In order to facilitate certification, the United States respectfully requests that the Court amend its *Liability Opinion* to include the express findings required by 28 U.S.C. § 1292(d)(2):

Because this order involves controlling questions of law with respect to which there are substantial grounds for difference of opinion, and an immediate appeal from this order would materially advance the ultimate termination of the litigation, the court certifies to the United States Court of Appeals for the Federal Circuit for its consideration whether to permit an appeal to be taken from this order should a timely application be made to that court. This case is stayed pending further order. The United States shall file a status report within ten days of any action on its application by the Federal Circuit.

Respectfully submitted this October 30, 2015,

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