IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ST. BERNARD PARISH AND OTHER OWNERS OF REAL PROPERTY IN ST. BERNARD PARISH OR THE LOWER NINTH WARD OF THE CITY OF NEW ORELANS, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 05-1119L Hon. Susan G. Braden

PLAINTIFFS' RESPONSE TO UNITED STATES' MOTION TO CERTIFY INTERLOCUTORY APPEAL AND STAY PROCEEDINGS

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PLAINTIFFS' RESPONSE TO UNITED STATES' MOTION TO CERTIFY INTERLOCUTORY APPEAL AND STAY PROCEEDINGS

In its May 1, 2015 opinion in this case, the Court urged the parties to consider mediating the remaining issues in dispute following its decision finding that the Government's actions in constructing, expanding, operating, maintaining, and failing to maintain the Mississippi River-Gulf Outlet ("MRGO") caused flooding that effected a temporary taking of Plaintiffs' properties. *St. Bernard Parish Gov't v. United States*, 121 Fed. Cl. 687, 747 (2015) (the "Liability Decision"). After taking more than five months to consider the Court's request, the Government has chosen not even to attempt mediation, but rather has asked the Court to certify an immediate interlocutory appeal of the Liability Decision.

We must oppose the Government's motion. In advocating for an *immediate* interlocutory appeal, the Government urges the course most likely to lead to inefficiencies and delays in the resolution of this important, long-pending matter. Put simply, given the present posture of this litigation, an interlocutory appeal at this time will, almost by definition, substantially delay the ultimate resolution of this action while providing little if any countervailing benefits in terms of efficiency. Because interlocutory appeals "are only reserved for 'exceptional cases,'" *American Airlines, Inc. v. United States*, 71 Fed. Cl. 744, 745 (2006) (citing *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996)), and because the Government has not come close to demonstrating that this case merits such exceptional treatment at this time, the Court should reject the Government's recommendation, and should instead proceed to decide the damages issues that have already been tried to the Court. While an interlocutory appeal covering both liability and damages issues may well be appropriate *after* the Court issues a decision on the damages issues that have been fully tried and briefed, an immediate interlocutory appeal at this time is not justified.

ARGUMENT

Under 28 U.S.C. § 1292(d)(2), certification of an interlocutory appeal should be allowed only if the Government demonstrates, and the Court finds, that all of the following criteria are satisfied: (1) the decision to be appealed presents "a controlling question of law"; (2) that question is one "with respect to which there is a substantial ground for difference of opinion"; and (3) "an immediate appeal . . . may materially advance the ultimate termination of the litigation." *See American Airlines*, 71 Fed. Cl. at 745. *See also Ahrenholz v. Board of Trs. of the Univ. of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000) ("Unless *all* these criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b)." (emphasis in original)).[1] Taken together, these statutory criteria are "designed to weigh the relative benefits of an immediate appeal." *American Telephone and Telegraph Co. v. United States*, 33 Fed. Cl. 540, 541 (1995) ("*AT&T*"). The analysis and weighing of these statutory criteria is committed to the sound discretion of this Court. *Petro-Hunt, LLC v. United States*, 91 Fed. Cl. 447, 452 (2010); *Starr Int'l Co. v. United States*, 112 Fed. Cl. 601, 603 (2013).

As this Court has emphasized, these standards are "to be applied strictly to preserve the important policies that underlie the final judgment rule, *i.e.*, avoiding piecemeal litigation, avoiding harassment due to separate appeals from the same litigation, and promoting efficient judicial administration." *American Airlines*, 71 Fed. Cl. at 745 (citations omitted) (internal quotation

[1] The *Ahrenholz* decision interpreted 28 U.S.C. § 1292(b), the provision governing certification of interlocutory appeals from district court decisions. As the Government acknowledges, United States' Mot. to Certify Interlocutory Appeal and Stay Proceedings and Mem. in Supp. at 3 (Oct. 30, 2015) Doc. 282 ("Cert. Motion"), the standards for certification under Sections 1292(b) and 1292(d) are "virtually identical," *Marriott Int'l Resorts, LP v. United States*, 63 Fed. Cl. 144, 145 (2004), and thus decisions interpreting and applying section 1292(b) are instructive in analyzing certification requests under section 1292(d).

marks omitted). For these reasons, "[i]t is well-accepted that interlocutory appeals under [Section 1292(d)(2)] are reserved for 'exceptional' or 'rare' cases and should be authorized only with great care." *Klamath Irrigation Dist. v. United States*, 69 Fed. Cl. 160, 161 (2005) (citations omitted).

As discussed below, the Government has not established that *any* of the statutory criteria are met here. While the Government offers up a superficially plausible formulation of the "controlling question[s] of law" supposedly raised by the Liability Decision, its discussion of this factor, somewhat paradoxically, is both too generalized and lacking in detail, and, at the same time, too focused on questions concerning the *application* of settled law to the particular facts of this case, to satisfy the first statutory criterion. And the Government does not come close to satisfying either of the remaining criteria. It provides no meaningful support for its naked assertion that there is "a substantial ground for difference of opinion" with respect to any controlling issue of law decided by the Court, and its surface-level discussion of whether "an immediate appeal . . . may materially advance the ultimate termination of the litigation" completely ignores the history of proceedings and the present posture of this case, both of which compel the conclusion that certification of an interlocutory appeal *at this time* would actually likely significantly delay the ultimate termination of this long-pending litigation.

I. THE GOVERNMENT HAS NOT ESTABLISHED THE EXISTENCE OF CONTROLLING QUESTIONS OF LAW RELATING TO THE LIABILITY DECISION.

The Government purports to identify two "controlling questions of law" that are implicated by the Liability Decision: (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." Cert. Motion at 4. The Government's description of these

questions is so broad and vague as to render them virtually meaningless. Formulating such generic questions—which essentially reduce to the inquiry "Should Plaintiffs win?"—simply does not assist the Court in its analysis of the first statutory criterion.

Moreover, the Government's questions focus not on a "controlling question *of law*," 28 U.S.C. § 1292(d)(2) (emphasis added), but rather on whether the Court properly *applied* the applicable legal standards to the facts supporting Plaintiffs' claims.[2] Such questions concerning the application of law to facts, however, are rarely appropriate candidates for certification:

> The term "question of law" does not mean the application of settled law to fact. It does not mean any question the decision of which requires rooting through the record in search of the facts or of genuine issues of fact. Instead, what the framers of § 1292(b) had in mind is more of an abstract legal issue or what might be called one of "pure" law, matters the court of appeals "can decide quickly and cleanly without having to study the record."

McFarlin v. Conseco Servs., LLC, 381 F.3d 1251, 1258 (11th Cir. 2004) (citations omitted) (citing *Ahrenholz*, 219 F.3d at 676–77). Because the issues posed by the Government do not "lift the question[s] out of the details of the evidence or facts of a particular case and give [them] general relevance to other cases in the same area of law," *McFarlin*, 381 F.3d at 1259, they do not support certification.

In any event, the most that the Government has demonstrated with its broadly worded "controlling questions" is the truism that a successful appeal from the Liability Decision could

[2] As noted, the Government's second question explicitly concerns whether the Court correctly "applied" the law to the facts. But even the Government's first question—concerning whether Plaintiffs' takings "claims are cognizable under the Fifth Amendment"—is best understood, in the absence of any clarifying explanation from the Government, as focusing on the application of takings law principles to the facts of this case. That is especially true given the settled notion that except in certain well-defined categories of takings jurisprudence, the cognizability of a takings claim is dependent upon a fact-intensive analysis. *See, e.g.*, *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511, 521 (2012) ("Flooding cases, like other takings cases, should be assessed with reference to the particular circumstances of each case, and not by resorting to blanket exclusionary rules.") (citations omitted) (internal quotation marks omitted).

materially affect the outcome of the case. Cert. Motion at 4. To be sure, reversal of the decision might end the litigation, but because that is always the case with respect to decisions establishing a defendant's liability, even run-of-the-mill liability decisions, under the Government's position, would always satisfy the "controlling question of law" criterion. Such a result would be inconsistent with the notion that certification should be reserved for "exceptional" cases. *Cf. American Airlines*, 71 Fed. Cl. at 747. Perhaps more importantly, as discussed in more detail below, the Government's position ignores the unusual posture of this case, in which reversal (however unlikely) on interlocutory appeal of the Liability Decision would not have the effect of avoiding proceedings on damages issues, since a damages trial has already taken place.

II. THE GOVERNMENT HAS NOT ESTABLISHED THE EXISTENCE OF A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION WITH RESPECT TO ANY CONTROLLING QUESTIONS OF LAW.

The second criterion under the statute focuses on whether "there is a substantial ground for difference of opinion" with respect to the controlling questions of law identified under the first criterion. 28 U.S.C. § 1292(d)(2). Numerous decisions of this Court summarize the relevant considerations required under this criterion:

> The Federal Circuit has held that one basis for this "substantial ground" may be two different, but plausible, interpretations of a line of cases. *See Vereda, Ltda. v. United States*, 271 F.3d 1367, 1374 (Fed. Cir. 2001) . . . . More often, however, this criterion manifests itself as splits among the circuit courts, an intracircuit conflict or a conflict between an earlier circuit precedent and a later Supreme Court case, or, at very least, a substantial difference of opinion among the judges of this court.

Klamath, 69 Fed. Cl. at 163 (citations omitted). *See also American Airlines*, 71 Fed. Cl. at 746; *Petro-Hunt*, 91 Fed. Cl. at 452–53.

The Government does not even attempt to make the above showing. Other than including a reference to the Supreme Court's decision in *Arkansas Game*, Cert. Motion at 4–5, the Government does not identify a line of cases that is relevant to the issues raised by the Liability

Decision, let alone identify two competing plausible interpretations of such a line of cases that would be relevant to any analysis of the Court's decision. Nor does it attempt to identify, much less discuss, any relevant intercircuit or intracircuit conflict, or any relevant conflict between an earlier precedent of this Court or the Federal Circuit and any Supreme Court decision. Nor does the Government try to establish what the case law suggests is necessary, at the very least, to satisfy this prong of the certification standard, *i.e.*, that different "judges of this court" have different views regarding the relevant legal questions. *Klamath*, 69 Fed. Cl. at 163. The Court is thus left with little more than the Government's *own* difference of opinion with "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." Cert. Motion at 4. But the Government's contention is unsupported by reference to *any* applicable precedent that would call the Court's analysis of this issue into question. In fact, the one precedent that the Government does cite, *Arkansas Game*, directly *supports* the Court's analysis, as the Supreme Court squarely held that "government-induced flooding of limited duration may be compensable" under the Fifth Amendment. 133 S. Ct. at 519.[3]

[3] To the extent that the Government is seeking, through its description of the Court's analysis, to revive its earlier argument that the Government is categorically exempt from takings liability whenever its activities cause a single instance of flooding, no matter how severe such flooding may be, its argument is again foreclosed by *Arkansas Game*, which repeatedly emphasized that such categorical exemptions from liability are fundamentally incompatible with Fifth Amendment principles. *See id.* at 521 ("Flooding cases, like other takings cases, should be assessed with reference to the particular circumstances of each case, and not by resorting to blanket exclusionary rules." (citation omitted) (internal quotation marks omitted)); *id.* at 518 ("In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area."). Any such argument would also mischaracterize the Liability Decision. In addition to holding, in accordance with the Supreme Court's guidance in *Arkansas Game* and other decisions, that "a temporary taking may arise from one occasion of flooding, in light of its character," this Court found that many of Plaintiffs' properties also experienced inevitably recurring Government-induced flooding. Liability Decision, 121 Fed. Cl. at 739.

The Government attempts to distinguish *Arkansas Game* on the ground that that case involved "intentional government-caused flooding over a period of several years," Cert. Motion at 4–5, but merely pointing to supposed factual differences between that case and this one does not suffice to establish the existence of substantial grounds for a difference of opinion. In any event, the Government's attempted distinction is foreclosed by *Arkansas Game* itself, since the Supreme Court made clear not only that temporary flooding could rise to the level of a taking, but also that such flooding does not need to be "intentional" to be compensable. *Arkansas Game*, 133 S. Ct. at 522 ("Also relevant to the takings inquiry is the degree to which the invasion is intended *or is the foreseeable result of authorized government action.*") (emphasis added).

The Government also suggests that substantial grounds for difference of opinion exist with respect to the Court's "application" of *Arkansas Game*'s "multi-factor analysis" to the facts of this case. Cert. Motion at 5. This argument also fails on multiple levels. As an initial matter, the fact "[t]hat settled law might be applied differently does not establish a substantial ground for difference of opinion." *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). To the contrary, "[t]he antithesis of a proper § 1292(b) appeal is one that turns on . . . whether the district court properly applied settled law to the facts or evidence of a particular case." *McFarlin*, 381 F.3d at 1259. But assuming that the Court's application of the takings law principles discussed in *Arkansas Game* to the facts of a particular case is even susceptible to the type of analysis that is required to demonstrate the existence of substantial grounds for difference of opinion, the Government has not even attempted to conduct that analysis here.

Rather, the Government simply asserts that the Liability Decision is the first since *Arkansas Game* to hold the United States liable for a temporary taking by flooding. Cert. Motion at 4-5; *see also* Cert. Motion at 4 ("Plaintiff's [*sic*] legal theory and the Court's ruling are without

direct precedent."). Even if true, however, "[a]n issue of first impression, standing alone, does not establish a substantial ground for difference of opinion." *Kislev Partners, LP ex rel. Bahar v. United States*, 84 Fed. Cl. 378, 385 (2008). *See also Klamath*, 69 Fed. Cl. at 163 (same); *Rochester Gas and Elec. Co. v. United States*, 2006 WL 5628796, at *2 (Fed. Cl. Mar. 29, 2006) (same); *Couch*, 611 F.3d at 634 ("It is well settled that 'the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion.' ") (quoting *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996)).

Finally, the Government invites the Court to review "its prior briefing, including its post-trial memoranda," in search of a substantial ground for a difference of opinion with the Court's decision. Cert. Motion at 5. But even if the Government's effort to farm out its responsibilities in this manner were appropriate, the vast bulk of the parties' liability-related briefing (including the Government's "post-trial memoranda") was filed *before* the Supreme Court rendered its decision in *Arkansas Game* and is thus singularly unhelpful. Since the Court's liability analysis was premised largely (though of course not exclusively) on the guidance provided by the Supreme Court in *Arkansas Game*, and since *Arkansas Game* is the only precedent discussed by the Government in its motion, the Government's attempt to incorporate by reference lengthy briefs that were filed before *Arkansas Game* was decided contributes nothing to the certification analysis.

III. THE GOVERNMENT HAS NOT ESTABLISHED THAT AN IMMEDIATE INTERLOCUTORY APPEAL WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.

Finally, even assuming that the Government can show that the first two criteria are met, it cannot demonstrate that an immediate appeal from the Liability Decision "may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(d)(2). Of course, interlocutory appeals may be appropriate when they would allow the parties and the trial court to avoid

prematurely devoting substantial time and resources to follow-on proceedings that might be obviated by the appellate decision. *See, e.g.*, *AT&T*, 33 Fed. Cl. at 540 (granting certification in a case where parties would otherwise face "protracted trial proceedings" that could be obviated by reversal on appeal). Even then, however, the potential efficiencies that might result from the avoidance of such follow-on proceedings must be balanced against the substantial actual and potential inefficiencies associated with the interlocutory appeal itself, which include both the significant delay that would result from the appeal, the piecemeal litigation that it occasions, and the increased prospect that a second appeal may later be required after the conclusion of any proceedings on remand from such an appeal. *Cf. Petro-Hunt*, 91 Fed. Cl. at 453. *See also SEC v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 226 (S.D.N.Y. 2000) ("The efficiency of both the district court and the appellate court are to be considered, and the benefit to the district court of avoiding unnecessary trial must be weighed against the inefficiency of having the Court of Appeals hear multiple appeals in the same case.").[4]

In the unusual circumstances of this case, the relevant balance tilts overwhelmingly against an *immediate* interlocutory appeal, for the simple reason that the parties and this Court have *already* devoted significant time and resources to the three-day damages trial held in late 2013, at which the Court heard live testimony from seven witnesses and the parties offered more than 300 exhibits into evidence. The parties engaged in extensive fact and expert discovery in preparation for that trial, and also submitted extensive pretrial and post-trial briefing. The Court

[4] As this Court has noted, the mere fact that an interlocutory appeal from a liability decision may obviate the need for subsequent damages proceedings does not ordinarily support certification: "[I]f every case, in which liability has been determined and damages have yet to be quantified, was considered to meet the standard of 'materially advanc[ing] the ultimate determination of this litigation,' the policy limiting interlocutory appeal to 'exceptional cases' would be severely eroded." *American Airlines*, 71 Fed. Cl. at 747 (second alteration in original).

need only issue a decision on the record that has already been created, although the Court might benefit from short supplemental briefs addressing any implications the Liability Decision might have for the resolution of the damages issues that have already been tried. This action therefore stands in a starkly different posture from those cases in which it makes sense to certify a path-breaking liability decision for appeal before any significant work has been performed on damages issues. Here, no paths have been broken and a damages trial has already been held.

For these reasons, it is all but certain that an interlocutory appeal at this time would materially frustrate rather than "materially advance" significant litigation efficiencies. *See McFarlin*, 381 F.3d at 1259 ("materially advance" factor "means that resolution of a controlling legal question would serve to *avoid a trial or otherwise substantially shorten the litigation*") (emphasis added). An immediate interlocutory appeal would impose a time-consuming layer of appellate proceedings on this action, with all the attendant delays and inefficiencies such piecemeal litigation would bring to a case that has already been pending for ten years. The balance thus tips decidedly against any prospect that the course of action advocated by the Government would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(d)(2). *See Petro-Hunt*, 91 Fed. Cl. at 453 (denying certification where "an interlocutory appeal would not appreciably hasten the termination of this case and, more likely, would unduly delay the resolution of a case which has been pending for nearly a decade"); *Klamath*, 69 Fed. Cl. at 163 (same); *American Airlines*, 71 Fed. Cl. at 747 (denying certification of liability ruling where only 6–12 months of discovery would be needed before damages trial could be held).[5]

[5] *See also Matlack, Inc. v. Hupp Corp.*, 57 F.R.D. 151, 159 (E.D. Pa. 1972) (denying certification where case was eight years old, relevant events had taken place thirteen years ago, and case could be ready for trial in several weeks); *United States v. 9,947.71 Acres of Land*, 220 F. Supp. 328, 337 (D. Nev. 1963) (denying certification where condemnation proceedings were eleven years old and "an early trial can be had on the merits so that a final decision should not be

The more efficient course, by far, would be for the Court to proceed to issue a decision on the damages issues that have already been fully tried and fully briefed. If, at that point, an appeal is taken by either party, the Court of Appeals would have the benefit of a full record, addressing both liability and damages issues, on which it can base a decision. Moreover, the chances that a second appeal, or significant proceedings on remand to this Court, might someday prove necessary will be substantially reduced if both liability and damages issues are presented in a single appeal.

To be sure, a decision on the damages issues addressed in the 2013 damages trial would not by itself resolve the entire case, both because that trial focused on eleven "Trial Properties" rather than the entire universe of affected Plaintiff properties, and because there remain numerous additional properties owned by members of the putative class. Such a damages decision, therefore, likely would not itself constitute an appealable final judgment. However, at that time, the parties and the Court can better assess whether it makes sense for the Court either to certify an interlocutory appeal as to both liability and damages issue pursuant to Section 1292(d)(2), or to direct the entry of an appealable final judgment as to one or more claims or parties pursuant to RCFC 54(b).

Notably, even though the Government acknowledges that the certification inquiry includes a "weigh[ing of] the relative benefits of an immediate appeal," Cert. Motion at 3 (citing *AT&T*, 33 Fed. Cl. at 541), the Government nowhere even acknowledges that a damages trial has already taken place, much less attempt to explain how that fact affects the analysis of this factor. The Government does suggest that even if the Liability Decision is affirmed, the Federal Circuit may provide guidance "concerning just compensation" that could "facilitate" the resolution of

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delayed for the additional time it would take for an interim [interlocutory] appeal").

remaining issues in the case, Cert. Motion at 6, but if that point is correct, it only serves to highlight why the Federal Circuit would benefit from a more complete record covering all of the issues that have already been tried, including the damages issues.

Finally, in addition to the obvious benefits, in terms of efficiency and judicial economy, of delaying any appeal until the Court issues a decision on the damages issues that have been already tried, there are other significant advantages to proceeding in this manner. Plaintiffs remain of the view that the Court was correct to suggest that this case is a candidate for mediation. *See, e.g.*, Liability Decision, 121 Fed. Cl. at 747. While Plaintiffs are disappointed that the Government has, for the time being at least, taken that option off the table, we are hopeful that the issuance of a damages decision will provide additional guidance to the parties that could prove helpful in any later effort to achieve a negotiated resolution of this case.

CONCLUSION

In issuing its Liability Decision and suggesting the possibility of a mediated resolution of the remaining issues in this case, the Court observed that "further litigation in this matter . . . will not serve the interests of justice" and concluded that it was "time for this final chapter of the MR-GO story to come to an end." *Id.* While the Government's refusal to attempt mediation means, regrettably, that "further litigation" is now inevitable, its proposal that it be immediately allowed to pursue an inefficient and time-consuming piecemeal appeal will needlessly delay the ultimate resolution of this long-pending litigation and will cause unnecessary expense for all concerned. If the "final chapter" of this saga is to be closed in a manner consistent with the "interests of justice," *id.*, the Government's proposal—which will needlessly put off the day on which the Government may be held accountable for the devastation suffered by the numerous in-

dividuals, businesses, and other entities whose properties were taken, over ten years ago, as a result of the Government's MRGO-related activities—should be rejected.

November 16, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that by filing the foregoing pleading via the ECF for the United States Court of Federal Claims, a copy of the above and foregoing will be served upon counsel for the United States, pursuant to the E-Noticing System this 16th day of November, 2015.

s/Charles J. Cooper
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