IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHESHIRE HUNT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 18-111L
	)	
UNITED STATES OF AMERICA,	)	Hon. Edward Meyers
	)	
Defendant.	)	

LANDOWNERS' REPLY IN SUPPORT OF MOTION TO SEVER CLAIMS UNDER RULE 21 AND FOR TRIAL SETTING

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INTRODUCTION

This is a consolidated action involving claims for compensation by the owners of ten properties in Sarasota, Florida. The owners of nine properties and the Government have agreed upon that compensation the owners are due. These owners of the nine properties ask this Court to sever their claims so they can proceed to final judgment and payment. The owner of the one remaining property, Wynnstay Hunt, asks this Court to set the compensation the Government owes for trial.

All authority and this Court's rules support the owners' request to sever the tentatively-settled claims and to promptly proceed to trial to resolve the one remaining property.

BACKGROUND

A. The Government agrees it must pay these owners for that private property the Government took for a federal rail-trail corridor.

The Government violated the Fifth Amendment when it took fifteen properties from twelve Florida landowners (some plaintiffs own more than one property). The Government took these owners' private property in December 2017, when the Surface Transportation Board (the Board) issued an order invoking the Trails Act[1] to establish a federal rail-trail corridor from Sarasota to Venice, Florida.[2]

[1] Section 8(d) of the National Trails System Act Amendments of 1983 (Trails Act), codified as 16 U.S.C. §1247(d).

[2] The Government's invocation of section 8(d) of the Trails Act takes private property for which the United States must pay the owner "just compensation." See U.S. Const. Amend. V; *Preseault v. I.C.C.*, 494 U.S. 1, 8 (1990) (*Preseault I*); *Preseault v. United States*, 100 F.3d 1525, 1542-43 (Fed. Cir. 1996) (*en banc*) (*Preseault II*); *Toews v. United States*, 376 F.3d 1371, 1376, 1381 (Fed. Cir. 2004).

At the time the Board issued its December 2017 order invoking the Trails Act, the Government *knew* it was taking private property.[3] Because the government violated the Fifth Amendment's Taking Clause and did not comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §4601, *et seq*. (URA), the only way these owners could vindicate their constitutional right to be justly compensated was to bring this lawsuit under the Tucker Act, 28 U.S.C. §1491.[4] The owners filed this lawsuit less than a month after the Government issued its order taking the owners' property. See ECF No. 1.

More than two years ago this Court held, "*Cheshire Hunt* is in the damages phase, as the Government has already stipulated to liability." ECF No. 100 (Opinion and Order), p. 4. The Government admits it is constitutionally obligated to compensate these owners. See ECF No. 21 ("the parties stipulate as to...whether the plaintiff owned the corresponding parcel on...the date the Surface Transportation Board issued its Notice of Interim Trail Use ('NITU');...the manner by which the property was originally obtained by the railroad; and...the nature of the interest acquired by the railroad pursuant to the original conveyance"). This Court held, "Since the Government

[3] *Preseault I*, 494 U.S. at 8 (The Trails Act "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests."); *Rogers v. United States*, 90 Fed. Cl. 418, 432 (2009) (citing *Preseault II*, 100 F.3d 1525, 1542; *McCann Holdings, Ltd. v. United State*s, 111 Fed. Cl. 608, 613 (2013) ("As established in this Court's liability decision, Plaintiff's property was taken [for the Legacy Trail] when the railroad easement on Plaintiff's land was converted to a recreational trail easement under the Rails to Trails Act.") (citing *Rogers,* 90 Fed. Cl. at 433); *Childers v. United State*s, 116 Fed. Cl. 486, 496-97 (2014) ("In a rails-to-trails case, the imposition of a recreational trail creates a new easement for a new purpose across the landowner's property, which constitutes a taking entitling the landowners to just compensation") (citing *Rogers*, 90 Fed. Cl. at 433).

[4] Among other things, the URA requires the government to first appraise owners' property, provide the owners a copy of the appraisal and pay the appraised amount into the court registry before the government (or the government's designee) takes possession of an owners' private property. See ECF No. 109, pp. 5-9 (detailing and quoting the relevant provisions of the URA).

has already stipulated to liability, it is clear that property rights do exist." ECF No. 100, p. 7. This Court further held,

> [T]he Government does not dispute that the Honoré deed created an easement limited to railroad use and the underlying land would have reverted to landowners upon the abandonment of railroad use if the Government had not invoked the Trails Act. According to the Government, "[t]he parties agree that under Florida law, the railroad originally acquired only an easement for railroad purposes in the segments of the corridor adjacent to the True North Plaintiffs' property, and that Plaintiffs own the fee underlying the corridor to the centerline."
>
> ECF No. 120, p. 4.[5]

The *only* issue in this lawsuit is the specific *amount* of compensation the government must pay each owner. These owners have been waiting almost a half-decade to be paid that compensation the Fifth Amendment guarantees them. But the Government keeps delaying and frustrating the owners' constitutional right to compensation.

B. Despite acknowledging its constitutional obligation to pay these owners, the Government seeks to indefinitely delay paying these owners.

1. This Court denied the Government's first effort to indefinitely stay this lawsuit.

The Government took these owners' properties in December 2017. The landowners filed this lawsuit less than a month later in January 2018. The Government responded by filing a "motion to stay this case pending the resolution of a quiet title action in the Middle District of Florida that concerns part of the railroad right-of-way." ECF No. 100 (Opinion and Order), p. 1. The district court case, *William Grames, et al. v. Sarasota County*, did not involve any of the owners who are plaintiffs in this case. Yet, on the basis of this district court quiet title case, the Government asked this Court to indefinitely stay this lawsuit.

[5] Citing ECF No. 120, p. 1 (ECF No. 145 (Hearing Tr.), p. 7:25-8:8).

Judge Wheeler, who was then-assigned this case, was having none of it. Judge Wheeler recognized that "[e]ach trial court has the discretion to determine how to manage the cases before it. ...[And i]n deciding whether to stay a case, the burden is on the proponent to establish the need for a stay." ECF No. 100 (Opinion and Order), p. 3. Judge Wheeler also correctly noted that, "[t]hough this Court has broad discretion to stay cases, when the proposed stay would be indefinite, the Court must subject it to a higher level of examination and justification. A stay is considered indefinite when it is issued pending final resolution of another case." *Id*. (citations omitted).

Judge Wheeler held that, "since the Government has already stipulated to liability, it is clear that property rights do exist. Though their nature may impact compensation, concerns about judicial economy are not sufficient to justify a stay." ECF No. 100, pp. 6-7. Judge Wheeler further noted, "[i]t is not enough for the Court to grant a stay merely to resolve the disputes in as few proceedings as possible. Resolving the disputes with an eye towards timeliness is more important." *Id.* at 7. Judge Wheeler denied the Government's motion for a stay. Judge Wheeler issued his decision more than two years ago in July 2020.

2. The Government repeatedly opposed the owners' request for a trial setting.

After Judge Wheeler denied the Government's motion for an indefinite stay, the owners asked this Court to set these owners' claims for a valuation trial in which the specific compensation due each owner would be established. ECF No. 106. The Government opposed *any* trial setting, arguing, "[t]his scramble towards trial blocks the United States from engaging in fact and expert discovery on just compensation." *Id.* at 1. The Government said it needed to conduct discovery. *That was in two years ago* in October 2020.

Even before October 2020, the property taken from each owner was appraised (at the owners' expense), the Government was given every appraisal report, and the Government

reviewed every appraisal.[6] Had the Government wanted discovery concerning the value of these owners' property, the Government could have sought such discovery or retained its own appraiser to value these properties. The Government could also have sought discovery into any other matter relevant to the amount of compensation the Government owed each owner.[7] But the Government did not do so. The Government's failure to pursue discovery is no justification for continuing to confine these owners in a litigation purgatory. In the Government's scheme, these owners are in *Hotel California*, where "you can check out anytime you want but you can never leave."

> When this Court denied the owners' request for a trial setting, this Court noted,
>
> As the Court previously concluded, a trial setting is not appropriate until such discovery is completed. That was *two years* ago. The lack of discovery is wearing thin as a reason not to proceed to trial. But we are not yet at a point that the Court is willing to move forward without allowing the Government discovery on damages issues.
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> ECF No. 165 (emphasis in original; citation omitted).

The Government has had the appraisal reports for more than two years. In its October 2020 reply, the Government acknowledged that "[t]he next four joint status reports similarly reflect that the United States was reviewing True North's settlement proposal and appraisals. See ECF No. 71, 69, 67, and 64." ECF No. 113, p. 3. The Government acknowledged, it had received and had been reviewing the appraisal reports since before January 2020. *Id.* at 3 ("These joint status reports

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[6] The Justice Department has its own in-house group of appraisers. One of the Justice Department's in-house appraisers was J.D. Eaton, who wrote the authoritative text, REAL ESTATE VALUATION IN LITIGATION (Appraisal Institute 2nd ed. 1995).

[7] See RCFC Appendix A (Case Management Procedure), Part V; *Haehn Mgmt. Co. v. United States,* 15 Cl. Ct. 50, 52 (1988), aff'd, 878 F.2d 1445 (Fed. Cir. 1989) ("defendant can no more avoid the consequences of failure to conduct its discovery within the time prior counsel requested than could a private firm that was required to transfer a case from one of its attorneys to another several months before trial and found that discovery commitments had not been honored"); *Dodson v. Runyon*, 957 F. Supp. 465, 470 (S.D.N.Y. 1997) (failure to conduct discovery for almost two and one-half years was "of his own making" and therefore his due process rights were not violated).

show that True North sent the United States its settlement proposal and appraisal reports for review."); ECF No. 64. *This was more than two years ago.* If the Government believed some additional discovery was appropriate, the Government could have requested that discovery. The Government did not. In its more recent order of July this Court held, "This case will not linger on the Court's docket in perpetuity (there is a rule against that)." ECF No. 165.

3. The Government further delayed paying these owners by making a discredited "exclusivity" argument.

In November 2020, the Government told this Court and the owners that the Government would not settle any claims nor agree to a trial setting until this Court first resolved the Government's "exclusivity" argument. See ECF No. 113, p. 3 ("The United States is willing to negotiate settlement with the True North Plaintiffs, but first seeks the Court's resolution of the nature of the railbanked and interim trail use easements."). The Government also asked, again, for an indefinite stay and asked this Court to reconsider Judge Wheeler's denial of the Government's motion for an indefinite stay. The Government wrote,

> The United States previously explained why a stay that permits the district court [in the Middle District of Florida case involving owners who are not parties to this litigation] to resolve ownership issues – most significantly whether the trail use easement created by law under the Trails Act and held by Sarasota County is or is not exclusive – would be efficient and would avoid inconsistent rulings. … The United States continues to believe that this would be the best course. Although the Court did not grant the United States' request to stay, it would be within the Court's discretion to reconsider that decision. See RCFC 54(b).
>
> ECF No. 115, p. 5

The Government cites "RCFC 54(b)." The Government's citation must be either a typographical error or the Government didn't read Rule 54(b). Rule 54(b) has nothing to do with reconsideration of Judge Wheeler's prior denial of the Government's motion asking for an

indefinite stay.[8] Rather, Rule 54(b) concerns "Judgment on Multiple Claims or Involving Multiple Parties." Rule 54(b) *supports* these landowners' motion that, under Rule 21, this Court should sever the claims of those owners who have agreed to accept a tentative settlement allowing the settlement to be finalized and final judgement entered as provided by Rule 54(b).

First, the government never filed a motion for reconsideration of Judge Wheeler's order denying the Government's motion for an indefinite stay. *Second*, should the Government ask this Court to reconsider Judge Wheeler's denial of the Government's motion for an indefinite stay, the rule governing such a motion for reconsideration is Rule 59, not Rule 54(b). *Third*, under Rule 59, the Government has no basis upon which to seek reconsideration. In *Drake v. United States*, 138 Fed. Cl. 488, 490 (2018), this Court explained,

> The court may reconsider and alter or amend its judgment, if the movant can show that: (1) there has been an intervening change in controlling law; (2) previously unavailable evidence is now available; or (3) the motion is necessary to prevent manifest injustice. See RCFC 59(a)(1); see also *Dairyland Power Co-op v. United States*, 106 Fed. Cl. 102, 104 (Fed. Cl. 2012) ("Reconsideration is not to be construed as an opportunity to relitigate issues already decided. Rather, the moving party must demonstrate either an intervening change in controlling law, previously unavailable evidence, or a manifest error of law or mistake of fact." (citation omitted)). A motion for reconsideration requires "a showing of extraordinary circumstances." *Caldwell v. United States,* 391 F.3d 1226, 1235 (Fed. Cir. 2004) (citation omitted), *cert. denied*, 546 U.S. 826, (2005). Moreover, it is not intended to give an "unhappy litigant an additional chance to sway" the court. See *Matthews v. United States*, 73 Fed. Cl. 524, 526 (Fed. Cl. 2006). Nor may a party prevail by raising an issue for the first time on reconsideration, when it was ripe for adjudication at the time the complaint was filed.

[8] Rule 54(b) provides, "When an action presents more than one claim for relief...or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

The Government has not satisfied (or even alleged) any of these requirements for reconsideration. Yet, this Court indulged the Government – to a point – and held, "in order to resolve the exclusivity issue expeditiously, the Government shall file its motion regarding the exclusivity of the Government's taking on or before December 18, 2020." ECF No. 116, p. 2. The Government filed its motion (ECF No. 120), and the Government lost. This Court rejected the Government's "exclusivity" argument and denied the government's motion for summary judgment. ECF No. 161 (Opinion and Order), p. 14 (158 Fed. Cl. 101, 112 (2022)).

This Court described the government's position as follows: "The Government argues that it is not liable for the value of the encroaching betterments in this case." ECF No. 161, p. 1. The "the Government argues that its taking was narrow and does not prevent the Plaintiffs from maintaining their previously existing encroachments into the railway corridor so long as those encroachments do not interfere with potential reactivation of rail use or interim trail use." *Id*. The government's "exclusivity" argument concerned only four of the ten properties with existing improvements that Sarasota County demanded the owners remove existing structures from the rail-trail corridor right-of-way. *Id.* at 3-4 (158 Fed. Cl. at 103).[9]

This Court denied the Government's motion because it found, "there is nothing in the record indicating that the Plaintiffs' encroachments do not interfere with trail use...." ECF No. 161, p. 1. This Court continued and held,

> the Trails Act serves two purposes – *i.e.*, the reactivation of rail use *and* interim trail use. The lawful use of the burdened property under a trail use easement is not necessarily the same as it was under the [abandoned] rail easement because an

[9] The four properties with encroachments subject to the government's exclusivity argument are the properties owned by Argos Ready Mix, Charleen Rosin Trust, Ducks in a Row Enterprises, LLC, and Group W Properties. ECF 161 p. 3-4.

> encroachment that does not interfere with rail use may well interfere with trail use.

Id. at 9 (emphasis in original).

This Court concluded, "This would support a finding in this case that the easement holder — *i.e.*, the trail operator — maintains the right to order the removal of encroachments if they interfere with trail use even if they did not interfere with rail use." *Id.* at 11.

This Court held the trail operator (here Sarasota County) effectively defines the scope of the Trails Act easement that the Board granted for recreational trail use – including the authority to demand owners remove existing structures that encroach upon the right-of-way. This Court explained,

> the new easement entitles the trail operator to use the *entire* easement for trail purposes if it chooses unless some portion of the easement has been ceded back to the servient landowners. In other words, *Palmetto* [*Conservation Foundation v. Smith*, 642 F. Supp.2d 518 (D.S.C. 2009)], stands for the common sense understanding that an easement holder may use the entirety of the burdened property for the purpose of the easement.

ECF No. 161, p. 13 (emphasis in original).

The Court then held, "the exclusivity issue does not resolve the Government's liability because the question here is whether the Plaintiffs had the right to maintain encroachments that conflicted with the trail operator's right to use its easement." *Id*. As the Federal Circuit held in *Preseault II*, "we conclude that the taking that resulted from the establishment of the recreational trail is properly laid at the doorstep of the Federal Government." *Preseault II*, 100 F.3d at 1531. This Court denied the government's motion for partial summary judgment. ECF No. 161, p. 14 (158 Fed. Cl. 101, 112 (2022)).

4. The Government delayed the non-encroaching owners' claims by holding non-encroaching owners hostage to the Government's "exclusivity" argument concerning the encroaching owners.

As this Court noted, the Government's "exclusivity" argument concerned those four owners on whose property existing structures encroached upon the rail-trail corridor. See ECF No. 161, pp. 3-4. The four properties with existing encroachments were owned by Argos Ready Mix, Charlene Rosin Rev. Trust, Ducks in a Row Enterprises, and Group W. Properties. Because the Government's "exclusivity" argument concerned only these four properties, the owners of the other properties without any existing structure encroaching on the right-of-way asked this Court in October 2021 to sever the claims of the non-encroaching properties and set these owners' claims for trial. ECF No. 153. Severing the non-encroaching properties would allow the owners of these properties to resolve the compensation the Government owes them without being held captive to the Government's "exclusivity" argument that concerned the four owners with encroaching properties.

But the Government opposed severing the non-encroaching owners' claims because, "creat[ing] a second case would complicate it, increasing the total time and costs for resolving all claims." ECF No. 155, p. 3. The Government never explained why this would be so. This Court accepted the Government's position that the owners of the non-encroaching claims be delayed until the Court resolved the Government's "exclusivity argument. ECF No. 161, p. 14.

This past January, this Court rejected the Government's "exclusivity" argument and denied the Government's motion. See the discussion above. The owners immediately sought to pursue trial. See ECF No. 170.

5. The Government inconsistently agreed three owners' claims should be severed and paid but these owners should not be severed and should be indefinitely stayed.

All of these owners engaged Thor Hearne as their counsel of record and retained his firm, Arent Fox, to represent them in this matter. In January 2019, two associates with Arent Fox, Lindsey Brinton and Meghan Largent, left Arent Fox's employment. Brinton and Largent solicited owners that Hearne represented. The owners didn't want Brinton and Largent to represent them. See ECF No. 40, p. 9. But, the owners of three properties completed a "check-the-box" solicitation form transferring their representation to Brinton.[10] The other owners emphatically opposed Brinton representing them. See *id.* See also ECF No. 40-2 (Culverhouse decl.) ¶6 ("I do ***not*** want to be represented by Lindsay Brinton, Meghan Largent, or the Lewis Rice firm.") (emphasis in original).

Brinton settled these three owner's claims on terms the Government found favorable. The Government agreed to sever these three claims so final judgment, including attorney fees and settlement, could be entered. See ECF No. 151. But, since Arent Fox, and not Brinton, provided all of the work representing these three owners, Arent Fox filed a notice of attorney lien to protect its right to be paid for its fees and expenses. ECF No. 41. This Court noted that the three "Lewis Rice Plaintiffs have reached a tentative settlement agreement with the Government on all issues other than Arent Fox's attorneys' fees...." ECF No. 116, n.1. The Arent Fox attorney fees were subsequently resolved by mediation and final judgment was entered in October 2021. See ECF No. 151.

[10] The three owners were B&R of Sarasota, Inc., Whetsel Enterprises, LLC, and Krol Ventures, LLC.

6. The Government now wants to indefinitely delay paying the nine owners who have tentatively settled their claims.

The remaining owners and the Government continued to negotiate a settlement. In their joint status report of May 25, 2022, the parties reported they had been "actively engaged in settlement discussions," and that "the United States responded to Plaintiffs' offer and made a counter-offer," which the owners were reviewing. ECF No. 162. Negotiations continued, and in July the parties reported,

> Since the parties' last status report, the parties have come to a tentative settlement agreement on the just compensation owed to the owners of six additional properties. This brings the number of tentatively settled claims to nine properties (Argo Ready Mix, LLC, Palmer Ranch Holdings, Culverhouse Limited Partnership, Donald and Diane LaGasse, Charlene Rosin, Becca Properties, Bildy Holdings, Ducks-in-a-Row, and Witzer-Group W Properties) of the 10 remaining properties. The Wynnstay Hunt property is the lone property for which the parties have yet to reach a tentative settlement agreement. The parties have continued negotiations concerning the Wynnstay Hunt property with some success. The parties' positions are closer, but some significant disagreements remain. To see if those disagreements can be resolved without litigation, Plaintiffs have agreed to provide the United States with additional information, which they did on July 22, 2022. The United States is reviewing that information and intends to conduct a teleconference with Plaintiffs' counsel in the next two weeks to see if the parties can come to an agreement.
>
> Joint Status Report, ECF No. 167, p. 1.

On August 1 this Court issued an order directing, "[i]f no tentative settlement is reached by [August 26], then the Parties shall include in their [joint status] report a proposed schedule for discovery and further proceedings." ECF No. 168.

The owners of the Wynnstay Hunt property and the Government were unable to agree upon the compensation the Government owed the owners. But, as reported in the July joint status report, the owners and Government tentatively agreed upon the compensation due all the other owners. See ECF No. 167, p. 1 ("Since the parties' last status report, the parties have come to a tentative settlement agreement on the just compensation owed to the owners of six additional properties.

This brings the number of tentatively settled claims to nine properties...of the 10 remaining properties.").

Shortly thereafter, the landowners filed a motion asking this Court to sever the nine tentatively-settled properties from the claim of the Wynnstay Hunt property – the single remaining property where there is no settlement agreement. See ECF No. 170. The landowners asked this Court to schedule a valuation trial for the Wynnstay Hunt property with any remaining pre-trial discovery to be concluded before the end of November and trial in January. See ECF No. 169 (joint status report), p. 4; ECF No. 170 (motion to sever). The Government opposed severing the nine tentatively-settled claims and provided a schedule that would indefinitely delay a trial to resolve the compensation for the Wynnstay Hunt property.[11] The Government proposed the parties "submit...their views as to how the case should proceed" *in June 2023*. ECF No. 169, p. 9.

Earlier this month the Government filed a response opposing the owners' motion to sever the nine tentatively-settled claims. See ECF No. 172. The Government opposed severing the tentatively-settled claims "because severing the claims would be inefficient and costly [and would] require that the parties shift resources otherwise more efficiently allocated to discovery to the resource-depleting series of procedural steps inherent in settling nine claims – only to likely repeat those same steps months later to settle the one severed claim, assuming the parties had already signed a settlement agreement and funds were disbursed to the property owners associated with those nine claims." *Id.* at 1.

[11] The parties use the term "tentatively settled" to describe the nature of the agreement. The meaning of this is that Department of Justice practices prevent trial attorneys from committing to a settlement. The settlement must be approved by Justice Department management more senior than the Government's trial attorneys. Thus, a "tentatively" approved settlement is one recommended by the Government's trial counsel but not yet approved by the career management in the Department of Justice.

THE RELEVANT RULES

These owners' claims were joined under Rule 20 of this Court's Rules. Rule 20(a)(1) allows for the permissive joinder of claims that provides:

> Persons may join in one action as plaintiffs if: (A) [their right to relief]...aris[es] out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action.[12]

Rule 21 provides that, "on motion, or on its own, the court may at any time, on just terms, add or drop a party. The court may sever any claim against a party." Rules 20, 21, and 54 (as with all of this Court's other rules) "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Rule 1.

There is no requirement that once joined claims may never be severed. To the contrary, Rule 21 provides that this Court may always sever a claim "to secure the just, speedy, and inexpensive determination of every action or proceeding." Rule 54(b) contemplates resolving consolidated claims (even claims by the same party) separately. See, *supra*, note 8.

Severance is the proper method to accomplish this result. *Allied Elevator, Inc. v. East Texas State Bank*, 965 F.2d 34, 36 (5th Cir. 1992) ("Severance under Rule 21 creates two separate actions or suits where previously there was but one. Where a single claim is severed out of a suit, it proceeds as a discrete, independent action, and a court may render a final, appealable judgment in either one of the resulting two actions notwithstanding the continued existence of the unresolved claims in the other.").

[12] The joinder of these claims was not made, nor sought, under Rule 19, applicable to the "required joinder of claims.

ARGUMENT

I. The Government asks this Court to violate this Court's Prime Directive.

The 1960s and 1970s television series *Star Trek* involved an intergalactic expedition of Starship *Enterprise*. All Starfleet officers, including Captain Kirk, were required to swear allegiance to the "Prime Directive." The Prime Directive prevented interference with the development of civilizations that are less technologically developed.[13] This Court's "Prime Directive," the Court's *Raison d' etre*, was famously declared by President Lincoln in his first state of the union message – "It is as much the duty of government to render prompt justice against itself, in favor of its citizens, as it is to administer the same, between private individuals." Abraham Lincoln, *First Annual Message to Congress*, December 3, 1861, Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). It was for this purpose that this Court was created.

Rule One of this Court's Rules provides, "These rules....should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

When the government takes private property the government has violated the owners constitutional right at the moment the government takes the owners' private property, and the violation is ongoing until it is cured by the government paying the owner "just compensation." *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071-72 (2021); *Knick v. Township of Scott*, 139 S.Ct. 2162, 2170 (2019); *Horne v. Department of Agriculture*, 576 U.S. 350, 367 (2015); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314 (1987). This is a self-executing constitutional right. The government's obligation to justly

[13] See Janet D. Stemwedel, *The Philosophy of Star Trek: Is the Prime Directive Ethical?* FORBES (Aug. 20, 2015), available at: https://www.forbes.com/sites/janetstemwedel/2015/08/20/the-philosophy-of-star-trek-is-the-prime-directive-ethical/?sh=102a030d2177.

compensate the owner is a "categorical" *per se* obligation. As Chief Justice Marshall observed in *Marbury v. Madison*, 5 U.S. 137, 166 (1803), "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

While the government may take private property without paying the owner before or at the moment the government takes the owner's property, the government must *promptly* pay the owner. In *Bragg v. Weaver*, the Supreme Court stated, "where adequate provision is made for the certain payment of the compensation *without unreasonable delay* the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just." 251 U.S. 57, 62 (1919) (emphasis added). Likewise, in *Joslin Mfg. Co. v. City of Providence*, the Court explained, "the taking of property for public use...need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a *reasonably prompt ascertainment and payment*, and there is adequate provision for enforcing the pledge." 262 U.S. 668, 677 (1923) (citing *Sweet v. Rechel*, 159 U.S. 380, 400, 404, 407 (1895)) (emphasis added).

The Government's half-decade delay honoring its constitutional obligation to pay these owners is not "prompt" or "timely." As John Maynard Keynes said in his 1923 work, *A Tract on Monetary Reform*, "in the long run we are all dead."

The Government's response asking this Court to indefinitely delay these owners being paid would needlessly and further perpetuate this litigation on the order of *Jarndyce and Jarndyce*.[14]

[14] "This 'suit has, in course of time, become so complicated, that...no two...lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;" and,

Justice is not accomplished by paying an owner's *estate* the compensation the Government owed the deceased owner for property the Government took decades earlier. Former Solicitor General Lehmann said, "the Government wins its point when justice is done in its courts." This quote is engraved on the frieze over the Attorney General's Office in the Department of Justice.

Fundamentally, the Government's failure to timely and cost-efficiently resolve the obligation the Government owes these owners falls upon the shoulders of taxpayers who pay the salaries of the Government lawyers, pay the costs for this Court, and reimburse the owners for the attorney fees and litigation expenses the owners incur.

II. The Government's response is an incomprehensible word salad.

The Government says this Court should not sever the nine tentatively-settled owners' claims and should not set the one remaining claim of Wynnstay Hunt for an expeditious trial. This is so, the Government claims, "because severing the claims would be inefficient and costly [and would] require that the parties shift resources otherwise more efficiently allocated to discovery to the resource-depleting series of procedural steps inherent in settling nine claims – only to likely repeat those same steps months later to settle the one severed claim, assuming the parties had already signed a settlement agreement and funds were disbursed to the property owners associated with those nine claims." ECF No. 172, p. 1.

What does this mean? The Government's response is incomprehensible. A "resource-depleting series of procedural steps inherent in settling nine claims?" Borrowing from Justice Scalia's dissent in *Obergefell v. Hodges*, 576 U.S. 644, 720, n.22 (2015), "If...I ever [wrote] a[

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sadly, the original parties "have died out of it." A "long procession of [judges] has come in and gone out" during that time, and still the suit "drags its weary length before the Court.' Those words were not written about this case, see C. Dickens, *Bleak House*, in 1 *Works of Charles Dickens* 4-5 (1891), but they could have been." *Stern v. Marshall*, 564 U.S. 462, 468 (2011).

brief] that began: '[require that the parties shift resources otherwise more efficiently allocated to discovery to the resource-depleting series of procedural steps inherent in settling claims],' I would hide my head in a bag." This type of reasoning degrades "disciplined legal reasoning...to the mystical aphorisms of the fortune cookie." *Id.*

The question before this Court is "why shouldn't this Court sever the nine settled claims from the lone unsettled claim so that the settled claims can proceed to payment and the Wynnstay Hunt can proceed to a valuation trial?' The Government's doesn't answer this question, and its response is as cogent and clear as the lyrics of the Kingsmen's song *Louie Louie*.[15]

The Government's response offers this Court two reasons why the Government says this Court should not sever the nine settled claims. First, the Government claims, doing so would require "duplicative discovery." And, second, "reviewing and negotiating attorney's fees and litigation costs is a time-intensive process that would inevitable require a shift of resources away from discovery to complete, both in the short and long-term." Government's response, ECF No. 172, p. 3.

Not intending to disparage the Government's counsel, this statement is nonsensical. Every day that goes by without these owners being paid, the Government must pay additional interest of at least $426.[16]

Furthermore, until these owners have been paid the government's obligation to pay the owners' attorney fees and litigation costs continues and increases. Just this reply to the Government's response in opposing these nine owners' claims being severed has required more

[15] In 1964 the FBI opened an investigation into the lyrics of the Kingsmen's song *Louie Louie* to determine whether the song was obscene. No one could ever agree on what the lyrics were. See https://genius.com/Federal-bureau-of-investigation-louie-louie-files-excerpts-annotated.

[16] Using the initial appraisals as a baseline and the Moody's Aaa rate to calculate interest, the Government's *per diem* interest increases by $426.

than sixty hours of the owners' counsels' and paralegal's time which will cost the Government at least $40,000 or more in additional attorney fees and expenses.

The Government then claims that denying the motion to sever the settled claims will require "duplicative discovery." This makes no sense. The nine tentatively settled claims will – because they are settled – require no additional discovery. Should the Government approve the tentative settlement of these nine owners' properties, there will be no additional discovery for these properties. And the one remaining property, Wynnstay Hunt, has already been appraised and the appraisal provided to the Government. Any additional discovery would be limited to just the Wynnstay Hunt property and would not be "duplicative."

Finally, the Government repeatedly raises the point that one of its lead trial counsel, Dustin Weisman, serves in the National Guard and has obligations that require him to travel overseas. See ECF No. 167, p. 7. These owners (and every American) deeply appreciate Mr. Weisman's military service. But the Department of Justice is the nation's largest law firm with more than 9,500 lawyers. To-date the Environmental Natural Resources Division has serially assigned six attorneys of record to represent the Government in this litigation. They are, in order of appearance, Dean Dunsmore, Brent Allen, David Harrington, Zachary West, Dustin Weisman, and Christopher Chellis. Certainly the United States Department of Justice has the resources necessary to appraise and resolve the compensation due the owner of a single property in Sarasota, Florida, in less than a year.

This case concerns one of the most fundamental constitutional rights the United States owes its citizens – the right to be justly compensated when the Government takes private property. See James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3rd ed. 2008), p. 4.

III. The Government's position is contrary to how the Government has agreed to resolve this and other Trails Act claims.

We noted, above, the resolution of three claims for compensation in this case. These owners were also permissively joined as parties in this case. See ECF No. 151 (stipulation for dismissal). So, why did the Government consent – indeed support – the severance and payment of these owners' claims but oppose the severance and payment of these nine owners' claims. The Government never says. There is no material difference between the owners of the three properties the Government supported severing and the owners of these nine properties that are also subject of a tentative settlement. All of these owners should be treated equally.

CONCLUSION

These owners request a status conference to discuss how to promptly resolve this case.[17] From Pearl Harbor to Hiroshima was less than four years (December 7, 1941, to August 9, 1945). There is no reason why it should take the federal Government longer to resolve the Government's constitutional obligation to these Florida landowners than the United States took to win the Second World War. The Government's effort to indefinitely perpetuate this litigation can be explained by one of only two reasons. The Government's position is either the result of profound negligence by the Justice Department in its conduct of this litigation, or the Government's position results from malice toward owners seeking compensation for property the Government has taken.

Neither explanation is satisfactory. The task falls to this Court to bring this litigation to a final conclusion. The most efficient manner to do so is to sever the nine owners' claims that have been tentatively settled and adopt the owners' proposed trial and pre-trial schedule to resolve the compensation due the owner of the Wynnstay Hunt property.

[17] The government, in its response, does not object to the owners' request for status conference.

Respectfully submitted,

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