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March 13, 2020

Peter R. Marksteiner
Clerk of Court
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

Re: *Caquelin v. United States*, No. 19-1385 (argued March 5, 2020);
response to Plaintiff's submission of supplemental authority re: *Mills v.*
United States, No. 15-1233L (Fed. Cl. Feb. 28, 2020).

Dear Mr. Marksteiner:

The United States responds to Plaintiff's letter submitting the CFC's decision in *Mills v. United States*, No. 15-1233L (Feb. 28, 2020). *Mills* is neither binding nor persuasive. It is another CFC decision illustrating the need to correct legal errors in *Caldwell* regarding the effect of a NITU.

Like *Caquelin*, *Mills* involves a NITU but no trail use agreement, trail conversion, trail use, or railbanking under Section 8(d) of the Trails Act, 16 U.S.C. § 1247(d). The CFC nonetheless incorrectly deemed the corridor a "trail," and weighed the effect of "trail use" and "conversion ... to a public

recreational trail,” Slip Op. 5, 16, 17. These analytical errors, and the CFC’s reliance on *Caldwell* for its conclusion that a NITU precludes the vesting of reversionary interests (Slip. Op. 5), demonstrate the need to correct *Caldwell*’s erroneous claim-accrual holding.

Moreover, the CFC wrongly stated that the NITU “prevented abandonment of the corridor.” Slip Op. 18. The NITU is a public “notice of interim trail use or abandonment” issued after the railroad has agreed to negotiate possible interim trail use at the request of a potential trail sponsor. *See* 49 C.F.R. § 1152.29. Non-abandonment during the NITU period is due not to the NITU, but to the railroad’s decision to negotiate with a potential trail sponsor. The NITU no more “prevents” railroad abandonment than any other decision by the railroad to extend consummation of abandonment. *See id.* § 1152.29(e)(2); *Baros v. Texas Mexican Railway*, 400 F.3d 228, 236 (5th Cir. 2005). Only if negotiations succeed does the Section 8(d) of the *statute*—not the NITU—“preclude[] the plaintiffs from their reversionary interests in the land underlying the right-of way.” Slip. Op. 18; *see also* 16 U.S.C. § 1247(d). If trail negotiations fail, the railroad may elect to consummate abandonment or may choose not to abandon.

Mills also reflects a capricious approach to NITU-only takings liability, presupposing the results of an *Arkansas Game*-style multi-factor analysis to

determine government liability, where the CFC has not engaged in the factfinding and application of those factors to the facts required for such an analysis. Slip Op. 18.

Respectfully submitted,

/s/Erika B. Kranz

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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I certify that I served a copy on counsel of record on March 13, 2020
by:

- U.S. Mail
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Erika B. Kranz

s/Erika B. Kranz

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