



U.S. Department of Justice

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June 5, 2020

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

Re: *Hardy v. United States*, No. 19-1793 (argued May 8, 2020);
response to Plaintiffs' submission of supplemental authority re: *Caquelin*
v. United States, No. 19-1385 (decided May 29, 2020).

Dear Mr. Marksteiner:

The United States responds to Plaintiffs' letter submitting this Court's decision in *Caquelin v. United States*, No. 19-1385 (May 29, 2020). Contrary to Plaintiffs' assertions, *Caquelin* establishes that there can be no takings liability for the properties east of milepost E65.80 in this case.

Here, Plaintiffs' argument that the NITU caused a taking of properties east of milepost E65.80 is based on an error in the NITU that did not actually change the terminus of the section of rail line covered by the NITU. Simply put, the NITU had no effect on any property east of that terminus.

As the United States explained in this case (Opening Br. 52, Reply Br. 24-25), physical takings liability requires a demonstration that the government action alleged to be a taking has actually caused an invasion of a protected property interest. *Caquelin* confirms that a takings claim based on a NITU (and allegedly-resulting delay in the railroad's abandonment of its easement under state law) is not exempt from this requirement. *See* Slip Op. 18-21. Although the *Caquelin* decision does not address which party must establish causation (*see* Slip Op. 21), this Court's decision in *St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1359-60, 1362 (Fed. Cir. 2018), resolves that question: the takings claimant holds the "burden of proof to establish that the government action caused" any injury, meaning that what "would have occurred" absent the government action is different from what did occur.

Plaintiffs understandably resist any causation requirement because there was unquestionably no causation here: the error in the NITU in this case caused no interference whatsoever with any Plaintiff's property east of milepost E65.80. *All evidence* in this case points to a single, undisputed and undeniable fact: the railroad *never had any intention of abandoning* any rail line or right of way east of milepost E65.80 and the NITU had zero effect on the railroad's behavior or the underlying owners' property rights. *See* Opening Br.

47-49, 51; Reply Br. 23-25. Under the longstanding causation principle recognized in *Caquelin*, there is no takings liability here.

Respectfully submitted,

/s/Erika B. Kranz

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

I certify that I served a copy on counsel of record on June 5, 2020
by:

- U.S. Mail
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Erika B. Kranz

s/Erika B. Kranz

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