



Attorney General of New Mexico

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Attorney General

STATE OF NEW MEXICO'S COMMENTS ON HERMIT'S PEAK/CALF CANYON FIRE ASSISTANCE ACT REGULATIONS

Dear Madame Administrator,

The State of New Mexico (New Mexico) incurred significant damages from the Hermit's Peak/Calf Canyon Fires and the subsequent flooding and debris flows that occurred. While New Mexico greatly appreciates FEMA's efforts in assisting the many victims of the fires, New Mexico has reviewed the regulations and recognizes that as written, the regulations leave the State vulnerable to ongoing and unmitigated challenges resulting from the Fires. New Mexico respectfully submits that the following changes should be made to protect the interest of the State, its residents, and its natural resources.

- 1. FEMA should appoint an independent claims manager under Section 104(a)(3) of the Hermit's Peak/Calf Canyon Fire Assistance Act who is a New Mexico lawyer and/or retired judge**

Section 104(a)(3) of the Hermit's Peak/Calf Canyon Fire Assistance Act permits FEMA to appoint an independent claims manager to assume its duties as the Director of the Claims Office under the Act.

New Mexico's Attorney General's Office recently filed a Notice of Loss on behalf of the New Mexico which included a list of New Mexico's damages from the fire and flooding: damages to transportation and roads; damage to watersheds, water supply, water contamination/drinking water; lost taxes or any revenues the state may receive from lost timber (or other) resources, including losses resulting from a reduction to local tourism; and lost rents/fees associated with damages to state-owned properties. New Mexico also incurred damages and costs associated with local and state government in fighting the fire as well as costs for additional public services such as fire, health and safety services both during the fire and in its aftermath; costs and damages associated with local and state employee time (including overhead for deployment of emergency crews); as well as fire debris removal. Also, over 900 structures were damaged in the burn scar area of over 340,000 acres. The number of significant and complex claims demands the appointment of an independent manager with enough staff to ensure an equitable and timely administration of funds to all of the wildfire victims.

As we have seen in other fire-recovery claims processes (e.g., the Pacific Gas & Electric Bankruptcy cases in California involving billions of dollars of claims), these claims processes are

extremely complex, with many moving parts and unique issues. Moreover, an independent claims manager will increase participation in the claims process here. FEMA has not yet established a strong sense of confidence in New Mexico's citizens because FEMA's standard rejection process. For these reasons, we strongly believe participation in the claims process will be significantly enhanced with the appointment of an independent claims manager to oversee the process.

Most importantly, the only realistic way the program can fulfil the bill's requirement to reflect New Mexico law is to hire a manager who is a New Mexico attorney. While the best choice would be a retired supreme court justice or judge of the court of appeals, the individual in charge must, at minimum, be an attorney licensed by the state of New Mexico. There is simply no way an individual who is not a New Mexico attorney can adequately discharge the Act's requirement to follow New Mexico law.

2. The arbitrary 25% limit on tree and/or mitigation damages violates New Mexico law

The value of the New Mexico's property is the land and trees, not the structure on the State's properties. A 25% limit on tree damages tied to the value of the structure or lot is arbitrary, patently unfair, and violates New Mexico law.

The Act imposes no caps on tree or mitigation damages. To the contrary, section (c)(3) of the Act – “extent of damages” – requires payment of “actual compensatory damages measured by injuries suffered.” Similarly, section 4(a)(v) requires payment of the “cost of reforestation or revegetation.”

Section (c) of the Act states “the laws of the State of New Mexico shall apply to the calculation of damages under subsection (d)(4).”

New Mexico law does not cap tree or mitigation damages. To the contrary, over 100+ years of New Mexico law allows plaintiffs to recover the full value of any trees destroyed on their property. *See Mogollon Gold & Copper Co. v. Stout*, 91 P. 724, 729 (N.M. 1907); *see also McNeill v. Burlington Res. Oil & Gas Co.*, 153 P.3d 46, 54–55 (N.M. Ct. App. 2006) (“[T]he purpose of awarding damages . . . is to *fully* compensate a plaintiff, or restore plaintiff to his rightful position.” (italics added)); 87 C.J.S. trespass § 111 (“One whose rights have been invaded by a trespass can recover for *all* the damage which has been occasioned by the trespass.”(italics added)); NM Section 30-14-1.1 (D) (When an individual trespasses on the land of another, “he shall be liable . . . in an amount equal to double the amount of the appraised value of the damage of the property injured or destroyed.”).

Thus, the 25% cap violates New Mexico law and therefore violates the Act itself.

3. Expert Costs

Pursuant to the regulations, “it is the claimant’s responsibility to develop and submit whatever evidence they think is appropriate to support the claim.” Despite this, section 296.31 only permits the reimbursement of expert expenses *if* the claims administrator requests the claimant obtain a third-party opinion. If FEMA has the discretion to allow for payment of expert reports it desires, then FEMA also has the discretion to pay for expert reports the victim’s desire.

New Mexico law allows the prevailing party to recover costs including expert costs. N.M. R. Civ. P. Dist. Ct. 1-054 D. The victims who recover on their claims should be viewed as prevailing parties and awarded expert and other claim preparation costs. The Act also provides the authority to pay expert and claim expenses as, “Any other loss that the Administrator determines to be appropriate for inclusion as financial loss.” Claims expenses and expert costs are an example of an “other” financial loss, as they would not have been required but for the fires caused by the Forest Service.

New Mexico will not be made whole if the State must incur thousands of dollars for experts to prove the State’s numerous losses and not be able to recover these “other” financial losses. This is patently unfair. Without an expert, it is impossible for the State and victims to know the true value of their losses. *See City of Santa Fe v. Komis*, 845 P.2d 753, 759 (N.M. 1992) (only expert witnesses are qualified to testify concerning the value of property).¹ And, therefore, a victim is left with the option of either (1) foregoing an expert opinion and significantly undervaluing their claim or (2) bearing the cost of an expert for damage caused by defendant(s). Permitting recovery of these costs is essential to ensuring New Mexico and the victims of the fire are fairly compensated. FEMA should encourage well documented claims. Therefore, we strongly urge you reconsider this exclusion.

4. Regulations should reflect New Mexico law (as the Act requires), rather than copying the 2000 Cerro Grande Fire regulations.

The Act required FEMA to create regulations within 45 days, which is a very short period of time. Accordingly, FEMA appears to have largely copied the regulations from the 2000 Cerro Grande Fire. The problem with this approach is that the Act explicitly states that victims must be able to recover the full extent of damages that are available under New Mexico law and there are several sections of the regulations that directly contradict New Mexico law (e.g., the prohibition on noneconomic damages and assignment of rights).

¹ Here, the nature of the damages suffered by the State and its public trust resources necessarily raises unique concerns with the ability to value its actual losses, which include both damages to natural resources and economic losses. The regulations as written do not account for the State’s duty to act as a trustee and its related restoration obligations.

The Cerro Grande Fire was almost exclusively a house loss fire and properties with significant tree and erosion losses were rare. Hermits Peak and Calf Canyon have the opposite type of loss profile, as the majority of the victims' losses are "tree and erosion" losses. As stated above, the State has various and complex losses that do not just include tree losses. The regulations created for Cerro Grande are both inapplicable and violate the Act's requirement that the program allow victims to recover all damages available under New Mexico law.

5. There must be a clearly defined appellate process.

Under the regulations: "If the claimant is not satisfied with the decision, an Administrative Appeal may be filed with the Director of the Claims Office. If the claimant is not satisfied after appeal, the dispute may be resolved through binding arbitration or heard in the United States District Court for the District of New Mexico."

The regulations are unclear as they do not outline under which circumstances a victim can appeal FEMA's decision, nor do they set forth a timeline of the appeals process.

For example, if a claimant wishes to appeal, must the claimant appeal the entire award, or can the appeal be limited to the portion of the award to which the claimant objects? Similarly, if a claimant wishes to have their case heard in the United States District Court, does this mean that the claimant must file a Federal Tort Claim and begin the process from square one, or is the District Court simply reviewing the award given by FEMA for legal error? If so, what standard is used, is it de novo, abuse of discretion, clear error, etc.? Is there an opportunity for appellate review thereafter? Finally, if the claimant wishes to arbitrate, how is the arbitrator selected, and what standard of review is the arbitrator using?

All of these issues must be clearly spelled out in order for the claimant, and the claimant's attorney, to make an intelligent decision regarding whether or not to appeal.

Sincerely,



Hector Balderas