

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

MICHELLE MONTOYA, HERMAN ROMERO,
DEBORAH VALENCIA, CANDACE
SEAVERNS, JOSEPH SEAVERNS, SEAVERNS
FAMILY LIVING TRUST, SAM ARTHUR,
TAMARA FRASER, GREGORY LUNGSTRUM,
JUDITH BUCKER-LUNGSTRUM, DANIEL
JOSLIN, VICKI JOSLIN, TOBIN DOLAN,
LYDIA DOLAN, DOROTHY JONES, TANGEE
DOLAN, NORMA NIX, MARY ANN FISHER,
JAMES NIX, ANTHONY BROTHERS, YVETTE
BROTHERS, KENNETH BACA, MARIA
ELENA BACA, DUANE OLLINGER, LEON
MARTINEZ, JOHN ELLIS III, LYNNITA
ELLIS, MANUAL CHACON, MARY CHACON,
CARLOS BUSTOS, ELIZABETH BUSTOS,
ELIZABETH JONES, DEBORAH LEYBA,
WILLIAM ZAMORA, BENSON DURUAKU,
ALVIN MARTINEZ, WILLIAM ROBINSON,
EMILY TORRES

Plaintiffs,

v.

FEDERAL EMERGENCY MANAGEMENT
AGENCY; NATIONAL RESOURCES
CONSERVATION SERVICES; ANGELA
GLADWELL, in her official capacity as
Administrator of the Federal
Emergency Management Agency,

Defendants.

No. 1:23-cv-00977

**AMENDED COMPLAINT FOR DECLARATORY
& INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs are individuals damaged by the Hermit's Peak and Calf Canyon Fire ("Fire"), which were started by the federal government. The historic fire, and subsequent flooding, had devastating impacts on residents of New Mexico.

2. Congress enacted the "Hermit's Peak/Calf Canyon Fire Assistance Act ("HPFAA" or the "Act") (Pub. L. 117-180, 136 Stat. 2168 (2022)) to compensate victims of the Hermit's Peak and Calf's Canyon Fires. Congress designated the Federal Emergency Management Agency's ("FEMA") as the administrator of claims under the HPFAA and directed FEMA to expedite payments to victims of the Fire.

3. Plaintiffs retained counsel to assist in the claims process with the Federal Emergency Management Agency's ("FEMA") Hermit's Peak/Calf Canyon Claims Office pursuant to the HPFAA.

4. All FEMA and other employees are required to maintain high standards of honesty, impartiality, character and conduct to ensure the proper performance of Government business and maintain public trust.

5. But FEMA harbors disdain for attorneys—and, thus, for claimants represented by legal counsel—ostensibly because it knows attorneys will enable claimants to achieve full compensation for their injuries. FEMA has a policy of treating represented parties unfairly, making dishonest statements regarding their claims, refusing to cooperate with counsel, processing claims of unrepresented parties before represented parties, and engaging in a campaign to separate claimants from counsel in an attempt to resolve their claims for significantly less value.

6. Specifically, FEMA and the U.S. Department of Homeland Security (“DHS”) have engaged and continue to engage in ethical violations, systematic failures, and misconduct in administering the claims process established under the HPFAA, which manifest in three distinct ways.

7. First, FEMA has delayed compensating Plaintiffs and other claimants in violation of the text and purpose of the HPFAA. Specifically, FEMA has failed to comply with the requirement to process claims within 180 days. In response to its delay, FEMA stated that it does not deem the 180-day requirement to start until FEMA

acknowledges receipt of the claim, allowing FEMA to decide when, what order, and which claims it will process for payment. FEMA's improper interpretation has also resulted in ethical violations of FEMA providing preferential treatment to certain claimants since it is not processing the claims as they are received. Particularly with claimants who are represented by counsel, FEMA has refused to acknowledge or process their claims. FEMA's improper interpretation has allowed FEMA to develop a policy of delaying claims submitted by claimants represented by counsel. This has resulted and will continue to result in delaying Plaintiffs' and other fire victims' desperately needed payments to repair or rebuild their damaged homes and property.

8. Second, FEMA has also refused to direct payments to New Mexico Supreme Court-approved IOLTA accounts when claimants are represented by counsel. FEMA has taken the position that such payments are unauthorized assignments. But FEMA has agreed to pay claimants Small Business Administration loans directly, or will pay the amount to the Claimant who will then pay the SBA loan. The decision to pay the SBA loan directly or to the Claimant is based on the discretion of FEMA, allowing FEMA to determine when assignments

will be allowed and when they will not. FEMA's decision is not based on a prohibition by the law, but again on its own bias determination.

9. Third, FEMA has and continues to inappropriately use its power to interfere with and hinder claimants right to counsel by: [1] purposefully contacting Plaintiffs and other represented parties directly, [2] urging claimants to terminate representation using payment of their claims as leverage, [3] improperly withholding funds rightly owed to Plaintiffs who are represented by counsel and refuse to terminate their relationship with their attorney, and [4] conditioning payment and processing of claims in a timely manner on whether the claimant is represented by counsel.

10. Plaintiffs seek declaratory, injunctive, and other appropriate reliefs against FEMA and NRCS to (1) comply with the 180-day payment deadline mandated under section 104(d)(1)(A)(i) of the HPFAA from the date the claim is submitted; (2) appoint an experienced and competent claims administrator; (3) direct payments to represented claimants' attorneys' IOLTA accounts; and (4) prohibit conditioning payment of claims under the HPFAA on whether a claimant is

represented by counsel, or otherwise refusing to engage with counsel in the processing and payment of claims.

JURISDICTION & VENUE

11. This Court has jurisdiction under 28 U.S.C. § 1331 because this is a civil action arising under the laws of the United States, and 28 U.S.C. §§ 1346 and 2671 because a United States agency is a defendant.

12. This Court has jurisdiction under 28 U.S.C. § 1361 because this action seeks to compel an officer or employee of the United States or any agency thereof to perform a duty owed to Plaintiffs.

13. This Court has jurisdiction under 5 U.S.C. §§ 701–706, and 28 U.S.C. § 2201–2202, because this action is brought by persons adversely affected by agency action and seeks to right a legal wrong due to agency action as set forth in 5 U.S.C. §§ 701 and 702. Defendant’s issuance of the Final Rule (RIN 1660-AB14; 44 CFR 296) (the “Rule”) on August 29, 2023, constitutes a final agency action subject to judicial review under 5 U.S.C. §§ 704 and 706. Further, the Rule shows an actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a). Accordingly, this Court has jurisdiction to grant

declaratory relief, injunctive relief, mandamus relief, and/or other relief pursuant to 5 U.S.C. §§ 701–706, and 28 U.S.C. §§ 2201–2202.

14. Venue is proper in this Court under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e)(1)(B)–(C) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district, a substantial part of property that is the subject of the action is situated in this judicial district, and/or Plaintiffs reside in this judicial district.

PARTIES

15. Plaintiffs Candace and Joseph Seaverns owned and resided in a single-family home on an approximately three-acre parcel in Sapillo, New Mexico. They lost their home and all personal belongings to the Hermit’s Peak Fire and submitted a claim to FEMA under the HPFAA on or about June 6, 2023.

16. Plaintiffs Sam Arthur and Tamara Fraser owned and resided in a single-family home in Rociada, New Mexico. The Hermit’s Peak Fire destroyed their home and personal possessions. They submitted a claim to FEMA under the HPFAA on or about May 15, 2023.

17. Plaintiffs Gregory Lungstrum and Judith Bucker-Lungstrum owned The Pecos Wilderness Ranch in New Mexico. The Hermit's Peak Fire destroyed the entire ranch, including their home, structures, personal possessions, and land. They submitted a claim to FEMA under the HPFAA on or about March 3, 2023.

18. Plaintiffs Daniel and Vicki Joslin owned and resided in a single-family home in Sapello, New Mexico. The Hermit's Peak Fire destroyed their home and personal possessions. They submitted a claim to FEMA under the HPFAA on or about April 12, 2023.

19. Plaintiffs Tobin and Lydia Dolan owned and resided in a single-family home in Rociada, New Mexico. The Hermit's Peak Fire destroyed their home and personal possessions. They submitted a claim to FEMA under the HPFAA on or about April 3, 2023.

20. Plaintiff Dorothy Jones owned a mobile home on land leased from Plaintiffs Tobin and Lydia Dolan in Rociada, New Mexico. The Hermit's Peak Fire destroyed her mobile home and personal possessions. She submitted a claim to FEMA under the HPFAA on or about March 7, 2023.

21. Plaintiff Tangee Dolan owned and resided in a single-family home in Las Vegas, New Mexico. The Hermit's Peak Fire destroyed her home and personal possessions. She submitted a claim to FEMA under the HPFAA on or about April 3, 2023.

22. Plaintiff Norma Nix, who owned and resided in a single-family home in Las Vegas, New Mexico, suffered the loss of her home, shed, personal possessions, and beloved cat to the Hermit's Peak Fire. She submitted a claim to FEMA under the HPFAA on or about January 30, 2023.

23. Plaintiffs Mary Ann Fisher and James Nix owned and resided in a single-family home in Las Vegas, New Mexico. The Hermit's Peak Fire burned their home, vehicles, and personal belongings, which devastated the surrounding fora, exposing their property to erosion and mudslide risks. They submitted a claim to FEMA under the HPFAA on or about January 30, 2023.

24. Plaintiffs Anthony and Yvette Brothers owned a cabin on an over 30-acre lot in New Mexico. They suffered the loss of the property and personal possessions to the Hermit's Peak Fire, which annihilated the area's vegetation, creating erosion and mudslide risks. They

submitted a claim to FEMA under the HPFAA on or about January 11, 2023.

25. Plaintiffs Kenneth and Maria Elena Baca owned real property in Rociada, New Mexico with a cabin, trailer, and shed. The Hermit's Peak Fire destroyed all structures and personal possessions on the property. They submitted a claim to FEMA under the HPFAA on or about February 2, 2023.

26. Plaintiff Duane Ollinger owned 1,040 acres of land in Montezuma Hot Springs, New Mexico. The Hermit's Peak Fire ravaged 90 percent of his land, devastating the area's vegetation, creating erosion and mudslide risks, and resulting in wildlife fatalities and personal property damage (including a tractor). He submitted a claim to FEMA under the HPFAA on or about March 21, 2023.

27. Plaintiffs Leon Martinez, Zakariah Ezekiel Martinez, Elyana Delia Martinez, and Delia Martinez owned real property used for agriculture in Rociada, New Mexico. The Hermit's Peak Fire destroyed structures, such as fencing, retaining walls, and roads, along with land and trees critical for crops cultivation and livestock. The property is

now susceptible to erosion and mudslides. He submitted a claim to FEMA under the HPFAA on or about May 2, 2023.

28. Plaintiffs John Ellis III and LynNita Ellis owned and resided in a single-family home on a parcel over six-acres in Las Vegas, New Mexico. The Hermit's Peak Fire damaged their home and destroyed their property, including trees and vegetation creating erosion and mudslide risks. They submitted a claim to FEMA under the HPFAA on or about May 30, 2023.

29. Plaintiffs Manual and Mary Chacon owned and resided in a single-family home on an approximately 90-acre parcel in Rociada, New Mexico. The Hermit's Peak Fire damaged their home, and destroyed two barns and their property, including over half the trees and vegetation creating erosion and mudslide risks. They submitted a claim to FEMA under the HPFAA on or about January 18, 2023.

30. Plaintiffs Carlos and Elizabeth Bustos owned real property in Guadalupita, New Mexico. The Hermit's Peak Fire damaged their property, destroying trees and vegetation, which in turn created erosion and mudslide risks. They submitted a claim to FEMA under the HPFAA on or about May 23, 2023.

31. Plaintiffs Nancy Martinez and Richard Martinez owned real property in Rociada, New Mexico. The Hermit's Peak Fire damaged their property, destroying trees and vegetation, which in turn created erosion and mudslide risks. They have also suffered flood damage to structures on their property. They submitted a claim to FEMA under the HPFAA on or about January 30, 2023.

32. Plaintiff Elizabeth Jones owned real property on a two-acre parcel in San Miguel, New Mexico. The Hermit's Peak Fire burned trees and vegetation creating erosion and mudslide risks. They submitted a claim to FEMA under the HPFAA on or about May 5, 2023.

33. Plaintiff Deborah Leyba owned real property in Guadalupita, New Mexico on a 15-acre parcel of land. The Hermit's Peak Fire burned trees and vegetation creating erosion and mudslide risks. They submitted a claim to FEMA under the HPFAA on or about May 4, 2023.

34. Plaintiff William Zamora owned two real properties in Rociada, New Mexico. The Hermit's Peak Fire damaged a single-family home on one of the properties, while on the second, the Fire destroyed trees and vegetation, increasing the likelihood of erosion and mudslides.

He submitted a claim to FEMA under the HPFAA on or about April 28, 2023.

35. Plaintiff Benson Duruaku owned real property in Santa Fe Mountain Ranch, New Mexico used for producing lumbar. The Hermit's Peak Fire burned and destroyed all the trees on the property creating erosion and mudslide risks. Plaintiff submitted a claim to FEMA under the HPFAA on or about February 9, 2023.

36. Plaintiff Alvin Martinez owned real property in Rociada, New Mexico. The Hermit's Peak Fire damaged his property. He submitted a claim to FEMA under the HPFAA on or about April 17, 2023.

37. Plaintiff William Robinson owned real property in Las Vegas, New Mexico on a 15-acre parcel of land. The Hermit's Peak Fire burned trees and vegetation creating erosion and mudslide risks. He submitted a claim to FEMA under the HPFAA on or about February 21, 2023.

38. Plaintiff Michelle Montoya owned real property in Rociada, New Mexico. The Hermit's Peak Fire destroyed her home, trees and vegetation creating erosion and mudslide risks.

39. Plaintiff Herman Romero owned real properties and a business in Chacon and Buena Vista, New Mexico. The Hermit's Peak Fire burned trees and vegetation creating erosion, mudslide risks, and business losses.

40. Plaintiff Deborah Valencia owned real property in Rociada, New Mexico. The Hermit's Peak Fire burned trees and vegetation creating erosion, flooding, and mudslide risks.

41. Plaintiff Emily Torres owned real property in New Mexico. The Hermit's Peak Fire burned trees and vegetation creating erosion, flooding, and mudslide risks. She submitted a claim to FEMA under the HPFAA on or about June 22, 2023.

42. Defendant FEMA is an executive agency of the United States government, and bears responsibility in whole or part for the acts or omissions complained herein, including promulgating the Rule. Under the HPFAA, FEMA is directed to receive, process, and pay claims in accordance with the HPFAA.¹ Mr. Adrian Sevier is Chief Counsel of FEMA. As the principal legal officer for FEMA, Mr. Sevier is legal

¹ See Hermit's Peak Fire Assistance Act, Pub. L. No. 117-180, § 104(a)(2), 136 Stat. 2168, 2170 (2022).

advisor to the FEMA Administrator and FEMA senior leadership, serves as the agency “Ethics Official”, and is responsible for the direction and management of the Office of Chief Counsel. He is ultimately responsible for the professional conduct of FEMA’s Hermit’s Peak/Calf Canyon Claims Office (“HPCC” or the “Claims Office”) Claims Office in New Mexico.

43. Defendant NRCS is a federal agency under the U.S. Department of Agriculture (“USDA”). The NRCS/USDA is operating under a “Memorandum of Understanding” with FEMA/DHS dated May 4, 2023:

The purpose of this Memorandum of Understanding (MOU or Agreement) is to coordinate activities between the Federal Emergency Management Agency (FEMA) and the Natural Resources Conservation Service (NRCS) (individually a Party or together, the Parties) related to compensation to persons that suffered injuries from the Hermit’s Peak/Calf Canyon Fire in New Mexico.

44. The NRCS/USDA contract with FEMA/DHS includes the NRCS contacting claimants to prepare conservation/restoration plans under the HPCC and make settlement offers to claimants.

45. Defendant Angela Gladwell, in her official capacity, is the Director of the Claims Office in New Mexico. Defendant Gladwell signed

the MOU with the NRCS on behalf of FEMA. She is the principal officer in charge of FEMA's Claims Office in New Mexico, directing represented claimants to terminate their representation and accept the NRCS valuation without advice of counsel.

BACKGROUND

1. **The federal government enacted the HPFAA to promptly compensate victims of the Hermit's Peak/Calf Canyon Fire.**

46. On April 6, 2022, the U.S. Forest Service initiated a prescribed burn on federal land in the Santa Fe National Forest in San Miguel County, New Mexico. The prescribed burn got out of control, resulting in a wildfire that spread to adjacent, non-federal land, and merged with another fire.² The fire, known as the Hermit's Peak/Calf Canyon Fire, is the largest fire in New Mexico history. It forced thousands of residents to evacuate and ultimately destroyed 903 structures, including several hundred homes, and burned 341,471 acres of land, trees, and vegetation.

47. The President declared the Hermit's Peak Calf Canyon Fire "a major disaster," and Congress acknowledges its impact, recognizing

² *Id.*, § 102(a)(1)–(4), 136 Stat. at 2168.

forced evacuations, and damage or destruction of state, local, tribal, and private property in Colfax, Mora, and San Miguel counties in New Mexico.³ The President reaffirmed that the people of New Mexico will have the full support of the federal government, and that every effort will be made to provide immediate help to people in the impacted communities and support the State throughout its recovery.

48. Congress determined that “the United States should compensate the victims of the Hermit’s Peak Fire.”⁴

49. On September 30, 2022, Congress enacted—and the President signed—the HPFAA.⁵

50. The HPFAA’s stated purposes are “to compensate victims of the Hermit’s Peak/Calf Canyon Fire, for injuries resulting from the fire” and “to provide for the expeditious consideration and settlement of claims for those injuries.”⁶ To that end, the HPFAA states that

³ *Id.*, § 102(a)(5)–(6), (9), 136 Stat. at 2168–69.

⁴ *Id.*, § 102(a)(10), 136 Stat. at 2169.

⁵ Hermit’s Peak/Calf Canyon Fire Assistance, 88 Fed. Reg. at 59,731.

⁶ Hermit’s Peak Fire Assistance Act, Pub. L. No. 117-180, § 102(b)(1), 136 Stat. 2168, 2169 (2022).

claimants are entitled to “payment under this Act” for “actual compensatory damages.”⁷

51. Congress allocated \$3.95 billion to compensate victims of the Hermit’s Peak/Calf Canyon Fire under the HPFAA.⁸

2. As the administrator of claims under the HPFAA, FEMA is required to follow ethical standards of fairness and integrity.

52. The HPFAA designated FEMA as the administrator of claims under the Act. To that end, the HPFAA directed FEMA to establish a “Claims Office” to “receive, process, and pay claims in accordance with this Act.”⁹

⁷ Hermit’s Peak Fire Assistance Act, Pub. L. No. 117-180, § 104(c)(3), 136 Stat. 2168, 2170 (2022).

⁸ FEMA, FAQ: Hermit’s Peak/Calf Canyon Fire Assistance Act Final Rule (Aug. 28, 2023), <https://www.fema.gov/fact-sheet/faq-hermits-peakcalf-canyon-fire-assistance-act-final-rule#:~:text=The%20Hermit%27s%20Peak%2FCalf%20Canyon,major%20concerns%20from%20the%20community>.

⁹ Hermit’s Peak Fire Assistance Act, Pub. L. No. 117-180, § 104(c)(3), 136 Stat. 2168, 2170 (2022).

53. The Office shall be funded from funds made available to the Administrator for carrying out processing and paying claims under the HPFAA.¹⁰

54. The Administrator is authorized to appoint an independent claims manager to head the Office and assume the duties of the Administrator under the HPFAA.¹¹

55. In determining and settling a claim under the HFPAA, the Administrator shall determine only: [1] whether the claimant is an injured person; [2] whether the injury that is the subject of the claim resulted from the Fire; [3] whether the person or persons are otherwise eligible to receive payment; and [4] whether sufficient funds are available for payment and if so, the amount, if any to be allowed and paid under the HFPAA.¹²

56. In discharging its duties under the HPFAA, FEMA is required to act in accordance with its own policies, procedures, mission

¹⁰ Hermit's Peak Fire Assistance Act, Pub. L. No. 117-180, § 104(c)(3), 136 Stat. 2168, 2170 (2022).

¹¹ Hermit's Peak Fire Assistance Act, Pub. L. No. 117-180, § 104(c)(3), 136 Stat. 2168, 2170 (2022).

¹² Hermit's Peak Fire Assistance Act, Pub. L. No. 117-180, § 104(c)(3), 136 Stat. 2168, 2171 (2022).

statement, and ethical standards, as well as policies, procedures, and ethical standards for federal agencies and employees generally.

57. FEMA's stated mission is to help people before, during, and after disasters. Whatever the disaster, FEMA is supposed to lead the federal government's response, and provide disaster assistance to individuals, families, and businesses whose property has been damaged or destroyed.¹³ The FEMA Administrator is the principal advisor to the President, the Homeland Security Council, and the Secretary of Homeland Security for all matters relating to emergency management in the United States.

58. FEMA's Core values of Compassion, Fairness, Integrity, and Respect guide the actions and behavior of its employees. Public service is a public trust. Maintaining strong standards of behavior and ethical conduct also maintains public trust and confidence in FEMA and its workforce.¹⁴ All FEMA and other federal employees are required to maintain especially high standards of honesty, impartiality, character,

¹³ <https://www.dhs.gov/employee-resources/federal-emergency-management-agency-fema>

¹⁴ FEMA Directive 123-0-2-1

and conduct to ensure the proper performance of Government business and the continual trust and confidence of the nation’s citizenry.¹⁵ Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. Employees shall put forth honest effort in the performance of their duties. Employees shall act impartially and not give preferential treatment to any private organization or individual. Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.¹⁶

3. FEMA has violated—and will continue to violate—the HPFAA provision that entitles claimants to compensation within 180-days of filing a Notice of Loss.

59. The HPFAA expressly states that “[n]ot later than 180 days after the date on which *a claim is submitted* under this Act, the Administrator shall determine and fix the amount, if any, to be paid for the claim.”¹⁷ Accordingly, FEMA must pay claims within 180-days of the claim being submitted.

¹⁵ *Id.*

¹⁶ 5 CFR § 2635.101

¹⁷ Hermit’s Peak Fire Assistance Act, Pub. L. No. 117-180, § 104(c)(3), 136 Stat. 2168, 2171 (2022), italics added.

60. On or about August 29, 2023, FEMA issued its Final Rule and regulations for the administration of the claims process.¹⁸ In its final rule, FEMA indicated it would not process claims 180 days after it receives a claim. Instead, FEMA unilaterally decided it would only process claims within 180 days after FEMA “acknowledges” the claim, an interpretation of the HPFAA that allows FEMA to delay payments indefinitely and arbitrarily.¹⁹

61. This interpretation has allowed FEMA to develop a policy against processing claims submitted by claimants who are represented by attorneys by simply refusing to “acknowledge” the claim. Accordingly, FEMA has failed to pay claims within 180 days as required.

62. Plaintiffs submitted their claims to FEMA between January and June of 2023. Many of the Plaintiffs claims submitted are well-past the 180-days from submission and the deadline for the remaining claims is quickly approaching in December. As of the date of filing this

¹⁸ 44 CFR 296, also 88 FR 59730

¹⁹ FEMA, FAQ: Hermit’s Peak/Calf Canyon Fire Assistance Act 44 CFR 296, 88 FR at 59761.

action FEMA has not issued a settlement offer to any claim submitted by Plaintiffs.

63. FEMA has also relayed the disheartening message that claimants—particularly those who have counsel assisting in the claims process—should not expect full payment of their claims anytime in the near future.

64. On October 17, 2023, FEMA held an Advocate’s Meeting to discuss the claims process under the HPFAA. Plaintiffs’ counsel, Jacob Payne, attended the meeting and confirmed that: [1] FEMA had not issued a settlement offer to a single claimant represented by an attorney; [2] FEMA still had not retained the necessary experts to review and evaluate Proof of Losses with real property damage; [3] FEMA had not started reviewing Proof of Losses with real property damages; and [4] FEMA *could not* comply with the 180-day payment deadline mandated under the HPFAA for claims with certain real property damage. This message left desperate, displaced victims with little trust that its government will compensate them for their loss as promised.

65. FEMA's decision to avoid processing claims as they are received has also enabled FEMA to improperly give certain claimants preferential treatment. In particular, FEMA has refused to acknowledge claims or improperly delayed acknowledging claims when a claimant is represented by counsel. FEMA has also refused to proceed with processing and investigating claims when the claimant is represented by counsel and has been unwilling to speak with attorneys about the claims. Recently, FEMA has encouraged Claimants and their counsel, who submitted timely claims, to request from FEMA an extension for claims in which the 180-day deadline for FEMA to process the claim is upcoming. Specifically, FEMA has emailed Claimants advising that if not all the documents are readily available before the deadline, even due to circumstances beyond their control, such as FEMA or NRCS's failure to provide an NRCS plan, the Claimants will need to request an extension before the deadline. FEMA has also recently told Claimants they will need to seek a 120-day extension because FEMA is unable to process the arborist and erosion reports.

66. Additionally, NRCS and FEMA published a statement that third-party estimates of damages will take longer to process in

comparison to NRCS evaluations. However, NRCS evaluations provided have been incorrect, not included all the damages or even the correct acreage of the property, and are a fraction of the Claimants damages.

67. The HFPAA was published with the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023 that allocated over \$775,000,000 to the Department of Defense to respond to the situation in Ukraine.²⁰ Thus, while the United States rushes aid to assist in matters overseas, Americans suffering displacement from the Fires have yet to receive any of the promised funding.

68. Plaintiffs, as victims of the Fire, trust and rely on its government, FEMA, and its agents to treat them fairly, impartially, and ethically. FEMA has not done so. FEMA's actions are in violation of the HFPAA, FEMA's core values, and code of ethics. FEMA's actions in the claims process created discord and distrust among the public with its government.

²⁰ See Hermit's Peak Fire Assistance Act, Pub. L. No. 117-180, § 104(a)(2), 136 Stat. 2127 (2022).

4. FEMA improperly refuses to pay claims to New Mexico approved IOLTA accounts.

69. Representation by, and the advice of, legal counsel is integral to proper functioning of the American civil-justice system. Claimants under the Act have the right to be represented by legal counsel.²¹

70. FEMA harbors disdain for attorneys—and, thus, for claimants represented by legal counsel—ostensibly because it knows attorneys will enable to claimants to achieve full compensation for their injuries.

71. To that end, FEMA has undertaken efforts to frustrate the attorney–client relationship between victims of the Fire and their attorneys.

72. For example, the standard practice in New Mexico (and elsewhere) is to pay settlement money to an approved IOLTA account maintained by a plaintiff’s attorney. Among other things, this ensures that attorneys can account for litigation costs and fees before dispersing

²¹ See e.g., FEMA Final Rule, 44 CFR 296 at 61; Hermit’s Peak Fire Assistance Act, Pub. L. No. 117-180, § 104(j)(1), 136 Stat. 2127 (2022).

settlement funds. Without this process, attorneys may be deprived of costs and fees, and thereby dissuaded from representing Fire victims.

73. With that very outcome in mind, FEMA has asserted in its Final Rule that it will not disburse HPFAA-awarded funds to an attorney's IOLTA account. FEMA claims that doing so constitutes an impermissible "assignment" of the claim, as prohibited by "the regulations" and the Anti-Assignment Act, 31 U.S.C. section 3727.²²

74. In its letter to Plaintiffs' counsel, dated October 2, 2023, FEMA reiterated that 44 C.F.R. § 296.14 "prohibit[s] the assignment of claims and the assignment of the right to receive compensation from the Claims Office," and it "does not have the authority to assign claims or payments to third party representatives."

75. However, FEMA's Frequently Asked Questions states that it will reimburse claimants for interest paid on loans, including Small Business Administration disaster loans and can coordinate directly with the SBA to repay the loan.²³

²² See 88 Fed. Reg. No. 166 at 59742, 59747.

²³ <https://www.fema.gov/disaster/current/hermits-peak/frequently-asked-questions>, p. 8.

76. FEMA's inconsistent position in deeming payments to IOLTA accounts as an assignment, but not to SBA, is another example of its biased approach to handling claims when claimants are represented by counsel. FEMA's position in refusing payments to claimants represented by attorneys results in additional delays in payments to Plaintiffs and other represented claimants.

5. FEMA and NRCS engage in unethical communications with represented claimants and condition payment on claimants agreeing to separate from their attorneys.

77. On paper, FEMA acknowledges that claimants, including Plaintiffs, are entitled to representation by legal counsel in claims submitted under the HPFAA.

78. FEMA, the USDA, the NRCS, the Department of Homeland Security and their government attorneys are ethically bound by 28 U.S.C. § 530B, entitled "Ethical Standards for attorneys for Government." The statute provides "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a).

79. FEMA employees and agents, who are not attorneys must maintain high standards of honesty, impartiality, character and conduct. In doing so, FEMA employees and agents are ethically obligated to comply with Federal laws and regulations.²⁴ FEMA employees are bound by the Administrative Procedures Act (“APA”).

80. The APA codifies the fundamental right of persons to be represented by legal counsel in proceedings before federal agencies. And the federal agency is required to communicate with a person represented by counsel only through their legal counsel.²⁵ This is consistent with FEMA’s ethical obligations of fairness, instilling public trust, placing loyalty in the Constitution, federal laws, and due process.²⁶

81. But in furtherance of its desire to deprive Fire victims of the benefit of legal counsel, FEMA has attempted to separate Plaintiffs from their counsel in a variety of ways.

²⁴ FEMA Directive 123-0-2-1, p. 9

²⁵ 5 U.S.C. § 500.

²⁶ FEMA Directive 122-0-2-1, pp. 9-10

82. For example, FEMA has refused to engage with claimants' attorneys, and has conditioned payment of claims on Plaintiffs terminating their attorneys.

83. FEMA has also advised claimants that their claim will be expedited if they are not represented by counsel and if Claimants accept NRCS damages evaluations instead of their own third-party expert damages evaluations. NRCS evaluations are incorrect, do not include all of Claimants property, acreage, and significantly under value Claimants damages.

84. In addition, FEMA and NRCS representatives routinely contact claimants who they know are represented by legal counsel with offers to settle their claims if they terminate their attorney. In some instances, a FEMA or NRCS representative will contact the claimant directly, make an offer, and then advise FEMA or NRCS can pay claimants immediately if they sign a release without involving their attorney. In other instances, a FEMA or NRCS representative will offer to pay claimants within 10 days if they first agree to terminate their attorney. However, regardless of the circumstances in which the

unethical conduct is initiated, the common denominator is that the claimant is offered pennies on the dollar for their claim.

85. Plaintiff Michelle Montoya was contacted by FEMA personnel pressuring her to terminate her attorneys and offering to pay Ms. Montoya's damages at a discounted value. Ms. Montoya refused, but FEMA continued to contact her so frequently that Ms. Montoya blocked the number. After blocking the number, an old friend who worked at the Claims Office texted Ms. Montoya's personal cell phone saying, "call me, it's an emergency." When Ms. Montoya returned the call, her friend said that she could get her money immediately if she fired her attorneys. As of the filing of this action, neither FEMA nor NRCS have engaged with Ms. Montoya's counsel and have refused to timely process Ms. Montoya's claim as required under the HPFAA.

86. In June or July 2023 Plaintiff Herman Romero received a call that the NRCS was paying out claims after completing a property inspection. The NRCS visited Mr. Romero's property and asked for a map of his property and the deed. Once he provided this information, the NRCS representative told Herman his deeds and maps were not sufficient, and they were going to use its own program "onX" instead.

But the NRCS assessment based on its program was incorrect and included a neighboring property. Mr. Romero took NRCS more maps of his property and met with them several times to get the correct acreage. Then, a representative from NRCS called Mr. Romero and said that it would have an offer for him shortly and he “can just take this money and go on vacation, retire or just do whatever you want.” In September Mr. Romero went to the Claims office and they told him they were “dropping” him because he had legal representation.

87. Plaintiff Emily Torres sustained significant property loss and damage. She obtained a third-party arborist report of \$1,000,000 and her total third-party erosion report shows \$8,084,028 in damages. However, NRSC offered her \$548,000 and told her she can get the money now and go on a vacation.

88. Plaintiff Deborah Valencia received an unsolicited call from a FEMA representative to discuss her claim. Ms. Valencia advised the FEMA representative that she had counsel representing her in the claim. The FEMA representative responded that they could still offer her a settlement directly.

89. FEMA and NRCS have made it clear that they refuse to coordinate with claimants' attorneys and insisted on only direct communications with claimants without their counsel. This pattern of conduct reveals a deliberate strategy of evading property assessments associated with HPFAA claims unless claimants communicate directly with FEMA and NRCS and without counsel.

90. FEMA's attempts to dissuade claimants from obtaining assistance from counsel in navigating the claims processing and ensuring claimants receive full and fair compensation is in contravention to their ethical obligations, federal law, and the goal of instilling public trust in a federal agency designed to provide disaster relief to taxpayers. FEMA should be working with claimants' counsel to ensure the funds appropriated by the government to compensate victims of the Fire is distributed fairly, adequately, and timely. Instead, FEMA is deliberately attempting to separate claimants from their counsel in order to settle claims for pennies on the dollar that fairly deserve significantly more compensation.

91. On September 7, 2023, undersigned counsel wrote a letter to FEMA representative Angela Gladwell detailing the concerns regarding

the claims process and requesting FEMA not contact or communicate with represented claimants outside the presence of their counsel.

92. In response, FEMA stated in a letter that should a claimant who is represented contact the Claims Office directly with questions, FEMA is prepared to assist the claimant directly.

COUNT I
(Declaratory Relief for Violation of APA; 5 U.S.C. § 706)

93. All foregoing paragraphs of this Complaint are realleged and incorporated herein by reference.

94. The APA requires courts to “hold unlawful and set aside” agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”²⁷

95. FEMA and NRCS are “agencies” under the Administrative Procedures Act (“APA”).

96. The Rule constitutes “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.”²⁸

²⁷ 5 U.S.C. § 706(2)(A).

²⁸ 5 U.S.C. §§ 551(4), (13), 704.

97. The Rule is not in accordance with the law because the HPFAA entitles claimants to be paid no later than 180 days after the date on which a claim is submitted under the HPFAA.

98. FEMA's position that the mandatory 180-days deadline would not start until claims were "acknowledged" is in excess of FEMA's statutory jurisdiction, authority, and limitations. The HPFAA requires FEMA to determine and fix the amount, if any, to be paid for the claim within 180 days after the date on which a claim is submitted under this Act.

99. FEMA has also taken this position in its Rule that it "does not believe a Notice of Loss can be submitted until it has been reviewed for sufficiency and receipt has been acknowledged by FEMA."

100. The Rule harms Plaintiffs and other similarly situated Hermit's Peak/Calf Canyon Fire victims by depriving them of timely compensation to which they are entitled under the HPFAA.

101. The Rule also results in ethical violations of FEMA's requirements to process the claims fairly and impartially.

102. By choosing to categorically delay processing and paying claims FEMA exceeds its statutory authority and infringes on

Congress's power to enact legislation and allocate funds for designated purposes.

103. FEMA's reason that the Claims Office was not properly staffed is not justified. The HPFAA established the Office and allocated funds for the Administrator to efficiently process and pay claims under the Act. Moreover, delaying payment longer than intended results in more funds being paid toward staff, the Administrator, the Claims Office, and other administrative functions rather than to the victims of the Fire.

104. Plaintiffs request this Court to declare, under 28 U.S.C. § 2201, that the HPFAA's 180-day deadline begins from the date a claimant submits his/her claim, not when FEMA "acknowledges" the claim.

105. Plaintiffs requests this Court to declare, under 28 U.S.C. § 2201, that FEMA must immediately pay Plaintiffs' claims that exceed the 180-day deadline from the date of submission.

106. Plaintiffs seek this Court to declare, under 28 U.S.C. § 2201, that FEMA must determine and settle the amount payable for a claim within 180 days following the claim's submission under the HPFAA.

107. Plaintiffs seek this Court to declare, under 28 U.S.C. § 2201, that FEMA must appoint an experienced and competent claims administrator to ensure timely processing and payment of claims under the HFPA.

COUNT II

(Violation of APA; 5 U.S.C. § 706—Arbitrary, Capricious, and Abuse of Discretion Refusing to Pay Claims to IOLTA Accounts)

108. All foregoing paragraphs of this Complaint are realleged and incorporated herein by reference.

109. The HPFAA provides for attorneys' fees within the limitations of the FTCA.

110. The HPFAA is silent on the mechanism of payment and assignments to attorneys, although the Act contemplates that claimants will use the services of attorneys.

111. On or about August 29, 2023, FEMA issued its Final Rule and regulations for the administration of the claims process (44 CFR 296; *see also* 88 FR 59730). The Final Rule precludes payment to claimants and their counsel: "Assignment of claims and the right to receive compensation for the claims under this Act is prohibited and will not be recognized by FEMA." 44 CFR 296.14, also 88 FR 59779.

FEMA has construed this prohibition to extend to the assignment of the right to receive payment for claims. FEMA intends to make the Act's compensation payments only to claimants.

112. The Final Rule at § 296.21 Allowable damages, (b) Exclusions, states: "...attorney's fees and agents' fees incurred in prosecuting a claim under the Act ... are not recoverable from FEMA. The cost to a claimant of prosecuting a claim under the Act does not constitute compensatory damages and is not recoverable from FEMA, except as provided in § 296.31(b)." 44 CFR 296.21(b), also 88 FR 59779.

113. FEMA Final Rule, 44 CFR 296, at § 9, Comments on § 296.14 Assignments, *see also* 88 FR 59742. FEMA's general counsel have misconstrued seminal U.S. Supreme Court case law, U.S. Circuit Court case law and the standard practice of payments under the FTCA making payments directly into the clients/attorneys' IOLTA accounts.

114. The APA requires courts to "hold unlawful and set aside" agency action that is "arbitrary," "capricious," or an "abuse of discretion."²⁹

²⁹ 5 U.S.C. § 706(2)(A).

115. The Rule is arbitrary, capricious, and an abuse of discretion: FEMA mischaracterizes the Anti-Assignment Act, 31 U.S.C. § 3727, and deviates from longstanding practice in FTCA litigation to pay judgments and settlements jointly to a claimant and his/her attorney for deposit into the attorney's trust account for disbursement under the terms of the applicable retainer agreement between them.

116. FEMA's arbitrary and capricious abuse of discretion harms Plaintiffs and other represented claimants by delaying and depriving them of compensation due under the HPFAA.

117. By promulgating the Rule, without a proper factual or legal basis, Defendants have acted arbitrarily and capriciously, abused their discretion, acted contrary to law, and violated the APA. The Rule is therefore unlawful and should be set aside under 5 U.S.C. § 706(2)(A).

118. Plaintiffs seek this Court to declare, under 28 U.S.C. § 2201, that under federal and state law HPFAA claimants may direct that the payments of their settlements may be made into a New Mexico Supreme Court approved IOLTA account, which are not "assignments" in violation of the Anti-Assignment Act (31 U.S.C. § 3727).

119. Plaintiffs seek this Court to declare that the Anti-Assignment Act, 31 U.S.C. § 3727, does not preclude payment of awards to claimants and their attorneys, and Defendants' interpretation is inconsistent with federal and New Mexico laws, which require FEMA to jointly pay awards upon direction by the claimants.

120. Make such other and further declarations of law consistent with the New Mexico Code of Professional Conduct, the Anti-Assignment Act (31 U.S.C. § 3727), the APA, 5 U.S.C.A. § 500, the FTCA as incorporated into the HPCC, 28 U.S.C. § 530B(a), and the New Mexico Supreme Court approved IOLTA.

COUNT III
(Declaratory Relief for Violation of APA; 5 U.S.C. § 706 –
Unauthorized Contact with Represented Claimants)

121. All foregoing paragraphs of this Complaint are realleged and incorporated herein by reference.

122. FEMA is an "agency" under the APA. FEMA employees are bound by the Administrative Procedures Act ("APA").

123. All FEMA employees and agents, regardless of whether they are attorneys, must maintain high standards of honesty, impartiality, character and conduct. In doing so, FEMA employees and agents are

ethically obligated to comply with Federal laws and regulations, including the APA.³⁰

124. The APA, 5 U.S.C.A. § 500, and common law, codify the fundamental right of persons to be represented by legal counsel in proceedings before federal agencies. An agency is required to communicate only with a represented person through his/her counsel.

125. The provisions of 5 U.S.C. § 500, et seq., were enacted to enable, as far as possible, persons to be represented by any attorney in good standing in matters before federal agencies and to require the agencies to deal with the representative.

126. Section 500(f) is essentially a codification in the APA of the “no contact” rule applicable to lawyers pursuant to the ABA and New Mexico Rules of Professional Conduct.

127. In addition, 28 U.S.C. § 530B, entitled “Ethical Standards for attorneys for Government,” provides “[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney

³⁰ FEMA Directive 123-0-2-1, p. 9

engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."³¹

128. When governmental agencies adjudicate or make binding determinations of individuals' legal rights, it is imperative that those agencies follow the procedures traditionally used in the judicial process. The "no contact rule" is clearly such a procedure. Making settlement offers through counsel is required by that rule and is a critical safeguard designed to ensure claimants are fully informed of the settlement's implications.

129. Upon information and belief, it is the official policy of FEMA to seek to dissuade claimants from being represented by counsel, and to interfere with the attorney-client relationship, including making settlement offers to represented clients without their counsel's involvement. It is apparently FEMA's and NRCS's practice to openly urge represented claimants to "let go of" their attorneys.

130. Plaintiffs seek this Court to declare under 28 U.S.C. § 2201 that Defendants' (FEMA/NRCS') must immediately cease their practice

³¹ 28 U.S.C. § 530B(a).

of direct communication with represented claimants and cease any and all interference with the attorney-client relationship.

131. Make such other and further declarations of law consistent with the New Mexico Code of Professional Conduct, the APA, 5 U.S.C.A. § 500, and FEMA's ethical requirements.

**COUNT IV
(Injunctive Relief)**

132. All foregoing paragraphs of this Complaint are realleged and incorporated herein by reference.

133. Plaintiffs have unique statutory damages to their real property for which there is no adequate remedy at law, including the reforestation and revegetation of their property.

134. Plaintiffs have entered into an attorney-client relationship with the undersigned counsel. The attorney-client relationship is a fiduciary relationship owned by the claimant/client.

135. Interference with the attorney-client relationship by Defendants will cause the claimants to suffer irreparable harm and injury.

136. The threatened injury to Plaintiffs' attorney-client relationship and/or the remediation of their unique real property under

the HPFAA outweighs whatever damage the proposed injunction may cause to Defendants.

137. The Defendants' violations of the state and federal rules of professional conduct and interference with the attorney-client relationship are adverse to the public interest. Without an injunction, Plaintiffs will suffer irreparable harm contrary to the prompt remedial purpose of HPFAA, which is adverse to the public interest.

138. There is a substantial likelihood of success on the merits should Plaintiffs seek a preliminary injunction.

139. Defendants should be enjoined from unauthorized contacts with represented claimants, including the presentment of settlement offers without advice of counsel.

140. Defendants should be enjoined from interfering with claimants' directives that FEMA issue HPFAA settlement awards to New Mexico Supreme Court-approved IOLTA accounts.

141. Defendants should be enjoined from interfering with the placement of HPFAA settlement proceeds into New Mexico Supreme Court created IOLTA accounts.

142. Defendants should be enjoined from any further unlawful conduct as alleged herein.

PRAYER FOR RELIEF

Wherefore Plaintiffs respectfully request that this Court:

1. Issue a declaratory judgment that the mandatory 180-day deadline under section 104(d)(1)(A)(i) of the HPFAA begins from the date a claimant submits its claim, not when FEMA “acknowledges” the claim;

2. Issue a declaratory judgment that FEMA must immediately pay Plaintiffs’ claims that exceed the 180-day deadline from the date of submission;

3. Issue a declaratory judgment that FEMA must comply with the 180-day payment deadline mandated under section 104(d)(1)(A)(i) of the HPFAA;

4. Issue a declaratory judgment that FEMA must appoint an experienced and competent claims administrator to ensure timely processing and payment of claims under the HPFAA;

5. Issue a declaratory judgment that Defendants’ (FEMA/NRCS’) must immediately cease their practice of direct

communication with represented claimants and cease any and all interference with the attorney-client relationship;

6. Issue an order enjoining Defendants from violating the rules of professional conduct under federal and New Mexico law by contacting or communicating with represented HPFAA claimants;

7. Issue a declaratory judgment that the Final Rule is arbitrary and capricious and/or not in accordance with law insofar as it refuses to issue payments into a New Mexico Supreme Court approved IOLTA account;

8. Issue an order vacating and setting aside the portion of the Rule that refuses to issue payments into a New Mexico Supreme Court approved IOLTA account in accordance with the APA;

9. For a declaration that HPFAA that under federal and state law HPFAA claimants may direct that the payments of their settlements may be made into a New Mexico Supreme Court approved IOLTA account, which does not violate the Anti-Assignment Act;

10. For all other declaratory relief as set forth herein;

11. Award Plaintiffs costs and reasonable attorney's fees; and

12. Grant such other relief as the Court deems just and proper.

Dated: December 4, 2023

Respectfully submitted:
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