

FEMA

Via Online Submission

Federal Register Notice Docket Number: **FEMA-2022-0037**

**PUBLIC COMMENTS ON HERMIT'S PEAK/CALF CANYON
FIRE ASSISTANCE ACT REGULATIONS**

Dear Madame Administrator,

The undersigned attorneys represent over 1,000 victims of the Hermit's Peak/Calf Canyon Fires and the subsequent flooding and debris flows that occurred. While we greatly appreciate FEMA's efforts in assisting the victims, we have reviewed the regulations and respectfully submit that the following changes should be made.

- 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.

With over 900 structures damaged and a burn area of over 340,000 acres, the number of potential claimants demands the appointment of an independent manager with enough staff to ensure an equitable and timely administration of funds to New Mexico's wildfire victims.

As we have seen in other fire-recovery claims processes (e.g., the Pacific Gas & Electric Bankruptcy cases in California), these claims processes are extremely complex, with many moving parts and unique issues. As a result, the claims process is best overseen by a claims manager familiar with fire-related claims processes, such as BrownGreer – a widely respected firm specializing in the evaluation and distribution of thousands of varying claims.

Moreover, an independent claims manager will increase participation in the claims process here. Many citizens of New Mexico lack confidence in FEMA due to the standard rejection process. Unique cultural dynamics in the affected communities further complicates trust in the federal government, including FEMA. 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. Many of the problems outlined below (in which the regulations are contrary to

New Mexico law) could have been avoided if the person in charge of the program would have been familiar with New Mexico law.

2. Hire BrownGreer as a contractor to help process claims

BrownGreer is one of the largest claims processing firms in America, and is far and away the most experienced in assessing fire damages. They have processed over 60,000 wildfire claims in the last 18 months for the Fire Victim Trust in California. We urge the Government to contact FVT Trustee Cathy Yanni for a recommendation.

FEMA is in the process of reinventing the wheel. Under Trustee Yanni's stewardship, BrownGreer has built an entire wildfire claims evaluation apparatus, including the development of claims portals, the ability to import millions of pages of support documentation, the internal staff to evaluate all forms of claims, the established relationships with experts of all types necessary to evaluate every possible claim, and basically already knows how to do everything FEMA is working to construct from scratch.

The victims would be best served by FEMA hiring the best fire processing firm in the country, BrownGreer. It will save a tremendous amount of time and allow the claims processing to be done by experts who know how to evaluate fire damages.

3. Noneconomic damages are recoverable under New Mexico law and, therefore, should be recoverable under the Act.

New Mexican citizens affected by the Hermit's Peak and Calf Canyon Fires are entitled to assert claims for nuisance and trespass for fire damage to their property. Under controlling New Mexico authority, they are clearly entitled to non-economic damages under a nuisance theory, and likely under a trespass theory too. *See Padilla v. Lawrence*, 685 P.2d 964, 968-69 (N.M. Ct. App. 1984) (non-economic damages are recoverable under nuisance); 87 C.J.S. § 114, n. 15 (collecting cases permitting recovery of non-economic damages under trespass).

Further, based on the federal government's negligence and the existence of a special relationship between the government (particularly the Forest Service) and the victims of the fire, we believe they would be able to assert a claim for intentional infliction of emotional distress. *See Baldonado v. El Paso Nat. Gas Co.*, 176 P.3d 277, 283 (N.M. 2007); Restatement (Second) of Torts § 46. Accordingly, those individuals who were within the fire's zone of danger and had a reasonable, objective fear of death or serious bodily injury should be able to recover non-economic, emotional distress damages as well. *See id.*; *Castillo v. City of Las Vegas*, 195 P.3d 870, 875 (N.M. Ct. App. 2008) (emotional distress damages available for intentional infliction of emotional distress).

Emotional distress is available under New Mexico law when there is a physical injury. *Higgins v Hermes*, 552 P.2d 1227,1129 (NM Ct App 1976). These victims suffered smoke inhalation which is a physical injury, and thereby makes them eligible for emotional distress damages under New Mexico law.

Finally, in *Castillo v. City of Las Vegas*, 195 P.3d 870, 875 (N.M. Ct. App. 2008), while the Court recognized emotional distress was not available for property damage, that Court found that property loss claims can include damages for loss of sentimental value. *Id.* (“his sentimental attachment to his home justified a damage award greater than the market value of the home.”). New Mexico law allows recovery of sentimental value for personal and real property. The loss of the family bible has a sentimental value far in excess of its economic value. The victims are not made whole unless they recover both the economic value of contents, structures, and trees, plus their sentimental value.

In support of this position, please see the attached memorandum by former New Mexico Supreme Court Chief Justice Vern Payne (attached).

4. FEMA should not impose an arbitrary 25% limit on tree or mitigation damages as it violates New Mexico law

A 25% limit on tree damages tied to the value of the home on the land is arbitrary and patently unfair. For many New Mexicans impacted by the fire, the ratio of land to real property square footage is vastly disproportional.

For example, it is not uncommon for a citizen to have a 500-1,000 square foot property on several hundred acres of land. The value of the property is the land and trees, not the structure. The current calculation would value the trees on a 10-acre property with a million-dollar home at a disproportionately higher value than the same trees on a neighboring 10-acre lot housing a trailer. Wealthy claimants' trees simply cannot be valued more than those who are financially struggling.

The Act imposes no caps on tree or mitigation damages. The Act section (c)(3) “extent of damages” requires payment of “actual compensatory damages measured by injuries suffered” not 25% of actual damages nor 25% of injuries suffered. The Act section 4(a)(v) requires payment of the “cost of reforestation or revegetation”, and not 25% of reforestation or revegetation.

The Act section (c) 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. New Mexico law allows plaintiffs to recover the full value of any trees destroyed on their property. *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)).

The laws of the State of New Mexico provide: “D. In the event any person enters upon the lands of another without prior permission and injures, damages or destroys any part of the realty or its improvements, including buildings, structures, trees, shrubs or other natural features, he shall be liable to the owner, lessee or person in lawful possession for damages in an amount equal to double the amount of the appraised value of the damage of the property injured or destroyed.” NM Section 30-14-1.1. New Mexico law allows as compensatory damages double the value of tree damages. While the Act prohibits “punitive damages” it does not prohibit statutory compensatory damages but requires application of New Mexico law which includes Section 30-14-1.1. A 25% limit violates New Mexico law, and therefore is contrary to the Act itself.

For many New Mexicans impacted by the fire, the ratio of land to real property square footage is vastly disproportional. For example, it is not uncommon for a citizen to have a 500-1,000 square foot property on several hundred acres of land. The value of the property is the land and trees, not the structure. Numerically, there are ten times as many properties with ‘tree and erosion only loss’ as compared to properties with structure loss. The vast majority of the claims will be properties with tree and erosion loss as the major component of their loss. Capping the largest category of loss is unnecessary and violates the Act and New Mexico law.

5. Assignment of rights cannot be prohibited.

Assignments of rights are permissible under New Mexico law and, therefore, they cannot be prohibited by the regulations. *See Leger v. Leger*, 503 P.3d 349, 361 (N.M. 2021) (indicating the assignment of property- and contract-based claims is permissible in New Mexico); *Parker v. Beasley*, 54 P.2d 687, 689 (N.M. 1936) (“The general rule now is that choses in action are assignable, the few exceptions are those for personal wrongs and contracts of a personal nature involving confidence, skill, and others of like nature.”); 6A C.J.S. Assignments § 50 (“[A] right of action in tort which involves directly or indirectly a violation of a property right or damage to real or personal property is ordinarily assignable.”).

The Act contemplates clients will employ and pay attorneys a portion of the recovery as a 20% contingency fee. In fact, Congress doubled the legal fee from the first draft of the Act, an obvious desire to increase the likelihood claimants would be able to employ attorneys by doubling their fee. This fee should be collectable by direct recovery of the fee rather than cursing claimants and lawyers with collection actions. This law is

intended to free claimants from lawsuits and not burden claimants with lawsuits with their own lawyers.

In general, the Supreme Court of New Mexico has recognized that an attorney may perfect a “charging lien,” explaining that it protects “an attorney's right to recover his fees and money expended on behalf of his client from a fund recovered by his efforts, and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his right to the same, and also to prevent or set aside assignments or settlements made in fraud of his right.” *Northern Pueblos Enters. v. Montgomery*, 1982-NMSC-057, ¶ 7, 98 N.M. 47, 49, 644 P.2d 1036, 1038 (quoting *Prichard v. Fulmer*, 22 N.M. 134, 140, 159 P. 39, 41 (1916)). Thus, the charging lien “arises from a recognition that when an attorney assists a client in procuring a judgment or a ‘fund recovered by his efforts,’ the attorney needs to be paid from that fund for the value of services rendered before the proceeds are disbursed.” *Computer One, Inc. v. Grisham & Lawless, P.A.*, 2008-NMSC-038, ¶ 13, 144 N.M. 424, 428-29, 188 P.3d 1175, 1179-80. New Mexico law allows lawyers to recover their fees by way of liens, and FEMA regulations should not seek to interfere with the lawyer and client relationship nor with the ability of the claimants’ lawyer to recover their fee.

The anti-assignment regulation would be inapplicable, if the claimants elected against proceeding under the Act and chose to proceed with FTCA claims. The FTCA contains no prohibition on assignments. FEMA should not encourage claimants to proceed under the FTCA.

6. Represented Clients

Many citizens of New Mexico are represented by counsel. To the extent a represented claimant files a Notice of Loss, their counsel should also be notified. In many instances, citizens will expect their attorneys to pursue the claim on their behalf but, absent notification of the 150-day deadline being triggered, the firms will be without notice of the need to do so.

A good example of this is in the PG&E Bankruptcy cases in California. It is extremely common for represented clients to reach out to the Fire Victim Trust directly. To help with this, the Fire Victim Trust automatically notifies the handling attorney anytime a represented client reaches out.

Similarly, the preamble to the regulations states that FEMA will only send payment to the claimant directly. This is a problem for represented clients, whose funds need to be deposited into attorney IOLTA accounts so that liens may be satisfied. For our many clients who have incurred medical expenses, etc., attorneys have an legally obligated to resolve any liens associated with these claims so our clients do not receive bills long

after they believe their case is closed. FEMA should allow payment to be made to claimants and their legal representatives for this and a myriad of other reasons.

The Office and claimants are fundamentally “opposing parties” against whom the claimants have rights to appeal, arbitrate, or even sue under the Act and regulations. It is unethical for FEMA to communicate directly with claimants represented by legal counsel under New Mexico Rule Prof. Conduct 16-402.

7. Legal Fees

The Administrator has the discretion to pay legal fees under the Act and should do so. The Act allows the award of financial losses of “any other loss that the Administrator determines to be appropriate for inclusion as financial loss.” The majority of the claimants to the Fund will be represented by legal counsel. The undersigned currently represent over 1,000 claimants. The vast majority of the significant claimants will choose to have the assistance of a lawyer. Many people will choose to hire a lawyer because they don't trust FEMA based on past experience with FEMA in this fire. Where FEMA is the reason claimants hire a lawyer, it is just for FEMA to pay that cost. More to the point, claimants using lawyers are likely to have more complete and better documented claims. FEMA should want and encourage claimants to have complete and well documented claims. If claimants pay the financial expense of a lawyer (and the majority of claimants will) the victims will not be made 100% whole unless they recover both 100% of losses and 20% for legal fees.

The Act provides the Administrator the discretion to include legal fees as an “other” financial loss and only by doing so will these victims be made whole. The Fire Victim Trust in California added legal fees to gross economic awards and it has been a tremendous benefit as around 90% of claimants hired lawyers. Congress only prevented the award of (1) punitive damages and (2) interest in the Act. Congress did not prevent the award of legal fees.

8. 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 victims 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 “other” financial loss.

Victims are not made whole if they must incur thousands of dollars for experts to prove their losses and not be able to recover these “other” financial losses. This is patently unfair for the victims. Without an expert, it is impossible for a victim to know the true value of their loss of trees, erosion damage, or cost of repair for real property. *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). 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 victims are fairly compensated. FEMA should encourage well documented claims. Therefore, we strongly urge you reconsider this exclusion.

9. 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).

The Cerro Grande Fire was almost exclusively a house loss fire and large tracts of ‘tree only’ and erosion losses were rare. Hermits Peak and Calf Canyon have the opposite type of loss profile, as the majority of losses here are “tree and erosion only’ 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.

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Filed with permission and approval of the below:

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