

Congress of the United States

Washington, DC 20515

January 4, 2023

The Honorable Deanne Criswell
Administrator
Federal Emergency Management Agency
500 C Street S.W.
Washington, D.C. 20472

Angela Gladwell
Director, Hermit's Peak Claims Office
Federal Emergency Management Agency
500 C Street S.W.
Washington, DC 20472

Dear Administrator Criswell and Director Gladwell,

We write to comment on the FEMA Interim Final Rule (IFR) on the Hermit's Peak/Calf Canyon Fire Assistance Act (division G of Public Law 117–180)(“the Act”) published in the Federal Register on November 14, 2022. We appreciate your diligent and flexible response to the Hermit's Peak/Calf Canyon Fire to meet the needs of the impacted community. In order to best serve this community, we do, however, recommend changes to aspects of the IFR to ensure those impacted can complete the claims process and receive the compensation as authorized by the Act.

The first set of requests detail the top concerns our offices and the community have with the current IFR. We note that changes to these sections are critical to the overall performance of the Office of Hermit's Peak/Calf Canyon Fire Claims (“Claims Office”). They are:

1. With regard to the “Injured Persons” definition and section 296.14, Subpart C that addresses the compensation available under the Act, the IFR states, “FEMA may only compensate claimants for damages that resulted from the Fire.” The areas impacted by the fires and surrounding communities faced significant flooding in the aftermath of the fires that was directly caused by the fire, and it was congressional intent that the Act cover the subsequent flooding. We recommend that the IFR include in the definition of “Hermit's Peak/Calf Canyon Fire” a subsection (4) to read: flooding, mudflow, mold, and debris flow resulting from the two fires referenced above in subsections (1) to (3). We recommend you specifically reference flooding, mudflow, mold, and debris flow as a cause of injury and as a damage that can be compensated. We are also concerned that it may be difficult for claimants to prove that the flooding that caused damage to their property resulted from the Hermit's Peak/Calf Canyon fire. FEMA should develop a simple process or map to assess whether flooding in particular areas is the result of the fire and remove the burden from the claimant.
2. Section 296.21(c)(2) of the IFR regarding reforestation and revegetation states, “[c]ompensation for the replacement of destroyed trees and other landscaping will not exceed 25 percent of the pre-fire value of the structure and lot.” In certain instances, this could serve as a cap on recovery. Capping compensation for reforestation at 25 percent of the award does not take into account the degree of damage or the effort required to remediate the damage. It is important that adequate resources are devoted to restoring the environment and the livelihoods of those affected. The 25 percent cap also requires FEMA to inspect property and prove whether a tree was used for landscaping, business, or subsistence and calculating entire

property value on lands where it otherwise might not be necessary. This directly contradicts section 296.5 which states “The Act is intended to provide... a simple, expedited process to seek compensation.” We recommend that the IFR eliminate any restrictions on the valuation of trees and other landscaping, both as a standalone valuation and as it relates to total value.

Similarly, Section 296.21(e)(5) of the IFR states that “FEMA will reimburse claimants for the costs incurred to implement reasonable measures necessary to reduce risks from natural hazards heightened by the Hermit’s Peak/Calf Canyon Fire to the level of risk prevailing before the Hermit’s Peak/Calf Canyon Fire... Compensation under this section may not exceed 25 percent of the higher of payments from all sources (i.e., the Act, insurance proceeds, FEMA assistance under the Stafford Act) for damage to the structure and lot, or the pre-fire value of the structure and lot.” Given the devastation caused by the fire and the likely need for long-term mitigation, we recommend lifting the 25 percent limit and allowing individuals to receive the compensation needed to fully recover after this disastrous fire. The impacted communities are located in mountainous terrain that is prone to wildfires and flooding, as evidenced by the events of this year. We strongly believe that any compensation to help mitigate future events benefits not only the community, but the federal response.

These and other sections duplicate regulations from the Cerro Grande fire. While we recognize the value of building on the Cerro Grande regulations for the Act, it is important that the final regulations for this Act, reflect that unlike the Cerro Grande fire, the Hermit’s Peak/Calf Canyon Fire destroyed significant forested private lands, communities, acequias, ranches and farms. Individuals and businesses relied on the forests not just for subsistence, but also for their annual income for themselves and others in the community. We’d recommend removing repeated references to the Cerro Grande Fire Assistance Act and the Cerro Grande Assistance process in the supplemental information and instead focus on the unique damages of a fire that destroyed the many watersheds, villages, businesses, ranches and forests over 534 square miles.

3. Section 296.30(a) outlines the burden of proof for establishing all elements of injury, in particular how this correlates to property ownership. While we understand that providing proof of ownership is necessary and important for good governance of the funds provided in the Act, we are concerned that this requirement may be overly burdensome and difficult for some affected individuals to meet. For that reason, we encourage the Claims Office to be flexible in determining what documentation is required. Requiring claimants to provide detailed proof of ownership such as title, deeds, or tax records could be difficult or even impossible for some people who have lost their homes and documents to the fires. Rural areas often lack reliable access to public records. In some cases, these documents may have been destroyed in the fire or simply never existed due to informal arrangements between family members or other individuals without formal legal records.
4. Section 296.21 addresses paragraph (c)(4) of the Act on compensation for Subsistence Resource losses. Many rural and Tribal communities rely on the subsistence resources that have been destroyed by wildfires - like fish, game, and timber - to sustain their livelihoods and make a living. We believe that compensating these communities for their losses, including income loss associated with these resources, would help them to recover, and also help them to support themselves and their families. Furthermore, it would contribute to ensuring that the affected communities can continue to participate in their traditional ways of life.

Compensation for subsistence resource losses after a wildfire is important for the preservation of the culture and for the future of rural communities. We recommend that the regulations acknowledge that these subsistence resources can also be the primary source of revenue and income for impacted individuals and businesses. For example, Christmas trees harvested for sale provide a significant amount of revenue to the impacted communities. Our constituents are concerned that these will not be included in full valuation. We request that FEMA use the same guidelines in section 296.21 paragraph (c)(4) for reimbursing subsistence resource losses that are used for income, regardless of whether they are considered property, financial or business losses.

5. Regarding the definition of “Good Cause,” we request that FEMA add the following language to the end of the current definition: “or any circumstance where the administrator determines that good cause would further the mission of the Claims Office to pay compensatory damages for injuries suffered from the Hermit’s Peak/Calf Canyon Fire.” We request that FEMA exercise maximum flexibility when it comes to determining good cause and be sensitive to the unique challenges of the affected claimants.

Additionally, we want to outline additional changes that we believe will allow the Claims Office to have further success.

Section 296.4 Definitions

We are grateful to FEMA for its commitment to include Claims Navigators as part of the Claims Office. We request that you include a definition of Claims Navigator in the final regulation. Navigators should have access to the administrative record of the claimant and work with the claimant throughout the administrative claims process. Navigators should work with claimants on gathering required documentation, including working with appraisers and other pertinent FEMA and non-FEMA officials. In addition, they should provide updates to claimants regarding the progress of their claim. Claims Navigators should be knowledgeable of the Hermit’s Peak/Calf Canyon claims process as well as allowable damages and documentation requirements to answer claimant questions.

Furthermore, as FEMA holds job fairs and begins to hire officials for the Office, we believe hiring members of the local community will serve a mutual benefit for FEMA and those impacted by the fires. To increase this trust in the process, it is especially important that the Claims Navigators, Claims Reviewers, and Authorized Officials are New Mexican. Additionally, FEMA cannot let the language barrier be an impediment to individuals seeking to submit a claim. There we encourage you to hire officials who are bilingual and that all materials are available in English and Spanish.

Regarding the definition of “Authorized Official’s Determination,” we request that FEMA clarify that it will send determinations by both mail and electronically.

Regarding the definition of “Injured Person,” we request that immediately after “school district,” FEMA include “acequia, land grant.”

296.10 Filing a claim under the Hermit's Peak/Calf Canyon Fire Assistance Act

It is our understanding that FEMA is not currently allowing claimants to file a Notice of Loss in person. This directly contradicts section 296.10(e) of the IFR. FEMA should ensure that claimants may file notice of loss by mail, electronically, or in person.

296.12 Election of remedies

Section 296.12(a) provides that an injured person “who accepts an award under this Act” waives their right to pursue claims through the Federal Tort Claims Act or a civil action authorized by any other provision of law. It is unclear as to whether this applies to a partial payment or the final award. We recommend FEMA clarify that this provision only applies to final awards and when the claimant has signed a Release and Certification Form.

296.21 Allowable damages

With regard to section 296.21(e)(4) on individuals, charitable organizations, businesses, and other entities providing voluntary donations, our office heard those donations had a profound impact on victims that lost their homes, possessions, and livelihoods. We believe donations should remain an allowable damage until the Claims Office begins approving claims as provided for in the Act. To prevent potential abuse and misuse of donations, we suggest a date of August 21, 2023 as a cut off for reimbursement of donations. This date would mark one year post 100% containment of the fire and well past FEMA's anticipated start of payment of claims. We recommend that FEMA prioritize claims for property loss, financial loss and business loss before reimbursing claims for voluntary donations.

Section 104(d)(4)(A)(iii) of the Act explicitly included damage to physical infrastructure, including acequias—yet the IFR neglects to mention how compensatory damages may be awarded for damaged acequias. Acequias are centuries-old irrigation systems that many New Mexicans rely on for their water. Unclear guidance on how these infrastructure systems will be compensated led to significant frustration during the disaster period. We believe that outlining acequias in the IFR will alleviate friction as claimants begin to submit Notice of Loss forms.

Regarding 296.21(e)(2), individuals who already had flood insurance may have seen their premiums increase. Please explicitly include an increase in premium as an allowable financial loss.

Section 296.21(e)(3) provides that FEMA will reimburse individuals for reasonable expenses associated with mental health treatment for a condition that “resulted” from the Hermit's Peak/Calf Canyon Fire. We request that FEMA exercise flexibility in determining what constitutes a condition resulting from the fire. In addition, this should apply to conditions that the disaster worsened, not just those that it created. We applaud FEMA for specifically highlighting that mental health treatment is eligible for compensation and we also urge FEMA to clarify that physical injuries related to the fire and flooding are also compensable.

Section 296.21(f)(2) provides that compensation will not be awarded for injuries or costs that are eligible under the Public Assistance. We request that the Claims Office, in coordination with the New Mexico Department of Homeland Security and Emergency Management, assist claimants in applying for and receiving assistance under the Public Assistance program.

We request that section 296.21(f)(3) be amended to make clear that if FEMA only partially compensated people for their injuries or costs under Stafford Act programs, the Claims Office will compensate the remainder for injuries and costs using funds from the Act.

Section 296.21(c)(2) requires that the claimant attempt to sell the property in a “good-faith transaction” or establish that the real property value was permanently diminished. We are concerned that it may be difficult for claimants to prove that property value has been permanently diminished. We request “permanently” be changed to “significantly” or “long-term”. Additionally, we believe this requirement places an unfair burden on the claimant to establish the depreciation, and FEMA should establish a method to compensate for real property claims that utilizes local appraisers, insurance records, and tax assessments. Collecting and providing documentation of a property's value can be a difficult and time-consuming task, and thus removing the burden on the claimant will make the claims process more efficient, reduce the administrative burden and costs associated with claims, and help claimants more quickly receive the assistance they need to begin rebuilding their lives.

Paragraph (f): Regulations should note that if an insurance company has not paid all that FEMA anticipated, FEMA “will” award the difference at the time that the Authorized Official’s determination is made, rather than “can”.

296.30 Establishing Injuries and Damages

Section 296.30 directs FEMA to “recover overpayments where the agency made a material mistake in calculation of the damages owed to the claimant.” Allowing FEMA to recover overpayments when a material mistake is made could lead to a culture of distrust in which claimants are reluctant to seek damages due to a fear that if the agency makes a mistake, they could be held liable for repayment. This also places an undue burden on those who are already in a vulnerable state. FEMA has already faced significant skepticism from the community over its process and the creation of the Claims Office, and deepening those concerns does not benefit FEMA or the victims of these fires. Therefore, we believe it is in the best interest of FEMA to either not recover possible overpayments, or to establish a specific, short window of time after the Public Release is signed and denote a value for which it would recover.

296.31 Reimbursement of claim expenses

Section 296.31(a) provides that FEMA will reimburse claimants for the costs of appraisals or third-party opinions so long as they were requested by the Claims Office.

We recommend FEMA make available technical assistance to the claimants, including appraisers that would cover the most common losses, such as structures, homes, buildings, grazing lands, forested lands, etc.

In addition, we request that FEMA exercise discretion to provide reasonable reimbursement to claimants for the costs of appraisals or other technical assistance claimants received prior to when IFR was published. Eight months have passed since the fire began and many individuals have already begun the process of rebuilding. They should be eligible for reimbursement too.

296.35 Reopening a claim

Section 296.35 allows a claimant to reopen a claim when “the claimant closed the sale of a home and wishes to present a claim for decrease in the value of the real property.” We recommend FEMA insert “real property” in place of “home” to ensure that this clause is not limited to homes, but includes all real property such as barns.

296.41 Administrative appeal / 296.43 Judicial review

Sections 296.41 and 296.42 discuss a claimant’s right to pursue an administrative appeal and arbitration. The former notes that conferences and hearings “will generally be conducted virtually” with an option for an in-person meeting in limited circumstances. The latter similarly notes that arbitration hearings will take place virtually generally, with limited in-person hearings. We request that FEMA allow for in-person conferences and hearings as often as possible. Many claimants do not have readily available broadband and may be unable to participate in virtual meetings. To make sure they can fully participate in these hearings and conferences, it is critical that they have the option to participate in person.

We understand that the IFR is not a comprehensive document on the claims process, but we believe the IFR language includes contradictions on the process of submitting claims, filing Notice of Loss forms, and deadlines to sign Proof of Loss and determination documents. We ask that FEMA clarifies this process, including terms for the forms and steps of the process, and establishes a public document that claimants can access on the process.

Additionally, we appreciate that FEMA plans to hire adjusters, appraisers, and other personnel as needed to adjust claims in the same way that an insurance company would work with claimants to ensure claims are evaluated and paid fairly. By directly contracting these personnel, FEMA will ease the burden on already struggling claimants rather than requiring them to pay out of pocket for these services and seek reimbursement. This does not preclude individuals from hiring third party technical assistance and requesting reimbursement if preferred. To make this process even more consistent for all claimants, we encourage FEMA to outline which services claimants will need early in the process and how they can contact and make arrangements for such services. By providing this guidance early in the process, FEMA can ensure that claimants have the necessary support and resources in place to help them quickly and accurately assess the damages and repairs needed to move forward in the claim process.

Furthermore, to improve the claims process and functionality of the Claims Office, we encourage FEMA to work with Federal agencies to access data, especially maps, related to wildfires and flooding. FEMA can create a more comprehensive picture of the damage and the best course of action for relief. This data can be used to better inform decisions in regards to the types of aid and resources available. Furthermore, it can be used to create new initiatives that can help to prevent and mitigate future damage. By working with Federal agencies, FEMA will have access to more accurate and up-to-date data that can be used to improve the claims process and provide disaster relief more effectively. We recommend that this data be made available to the community and claimants in an easily accessible format.


We also would like to reiterate that the communities and areas affected by the Hermit's Peak/Calf Canyon Fire are vastly different from those impacted by the Cerro Grande Fire. These communities are more rural, have higher poverty rates, and have a high percentage of Spanish speakers. The lands burned contain a higher percentage of forested private land, ranches and grazing lands. FEMA must consider these differences as it implements final regulations, especially for payments for trees, navigators, and appraisers.

Lastly, we encourage the Hermit's Peak/Calf Canyon Office to keep in mind that legal precedent in New Mexico does not require claimants to adhere to a strict formula to calculate damages (see *Mogollon Gold & Copper v. Stout*, 14 N.M. 245, 91 P. 724 (1907)). Specifically, in *Maestas v. Medina*, 2011 N.M. App. Unpub. LEXIS 276 (2011), the Court of Appeals of New Mexico reiterated the principle that "the theory of damages is founded on the principle of making the injured party whole. In computing damages the fact finder is not held to an inflexible or precise standard; the object is to afford just and reasonable compensation for injuries sustained."

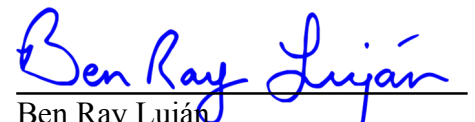
In summary, we applaud your timeliness in publishing the IFR, and the thoughtful discussion you've created with the public hearings. We appreciate your willingness to implement changes to the system used under the Cerro Grande Fire Assistance Act (P.L. 106-246) to include the development of the "claims navigator" role, and to finding a remedy to include the Las Vegas water treatment facility.

We look forward to your response.

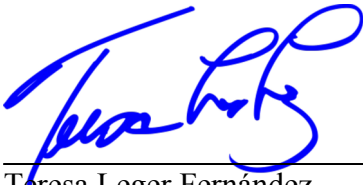
Sincerely,



Martin Heinrich
United States Senator




Ben Ray Lujan
United States Senator



Teresa Leger Fernández
Member of Congress



Melanie Stansbury
Member of Congress



Gabe Vasquez
Member of Congress