



State of New Mexico

Michelle Lujan Grisham
Governor

January 13, 2023

Comments on the Interim Final Rule (IFR) Outlining Procedures for Implementation of the Hermit's Peak/Calf Canyon Fire Assistance Act (division G of P.L. 117-180)

Angela Gladwell
Director, Claims Office
120 South Federal Place
Santa Fe, NM 87501

Dear Ms. Gladwell,

Thank you for your work to quickly launch the Federal Emergency Management Agency (FEMA) Claims Office to manage the Hermit's Peak/Calf Canyon (HPCC) Fire Assistance Act (FAA). The urgent and long-term needs of those affected by these fires cannot be overstated, and the State of New Mexico stands ready to support FEMA in delivering timely and holistic assistance to impacted communities.

The State of New Mexico is committed to the full recovery of communities impacted by the HPCC Fire. This includes regular direct support to individuals, efforts to channel resources to local governments and non-profit organizations, and regular communication and coordination with all stakeholders so that all possible resources are identified and deployed to these communities. It is critical – and in alignment with FEMA's mission to foster a recovery that is locally executed, State managed, and federally supported – that the State be given a defined role within the Final Rule. This includes robust data sharing, case management coordination, and coordination of requests for support through Public Assistance or other state-managed processes. Continuous collaboration between the Claims Office and the State will be critical to ensuring a fair and efficient process for impacted individuals and communities.

The Hermit's Peak/Calf Canyon Fire Assistance Act is intended to make individuals and communities whole after catastrophic losses from these federally-caused wildfires, and it is the State of New Mexico's priority that that intent be fully realized.

In alignment with this vision, the State is respectfully submitting the following comments, recommendations, and requests regarding the program's design. The New Mexico Department of Agriculture and Energy, Minerals, and Natural Resources Department will also be submitting comments to provide further feedback in their areas of expertise.

Current Regulations	State Comments
<p>The Interim Final Rule states that, “The Act requires claims must be submitted no later than two years after publication of this interim final rule or November 14, 2024.”</p>	<p>The full effects of the fire will not be known for years – if not decades – after this period elapses. It is important that the process be expanded to account for the long-term health and environmental effects that may entitle claimants to further compensation.</p>
<p>Regarding Section 296.21(c)(1), the Interim Final Rule states, “FEMA will provide compensatory damages for the damage or destruction of a property and its contents, including the reasonable cost of reconstruction of a structure comparable in design, construction materials, size, and improvements. FEMA will calculate these costs using post fire construction costs in the locality that a damaged or destroyed structure existed before the Fire.”</p>	<p>The Claims Office should not value reimbursement based on the current market value, but rather the cost to rebuild and construct at a reasonable point in the future. This includes acknowledging, accounting for, and accurately reimbursing the rapidly increasing market values of land, construction, and all other costs due to macro-economic conditions as well as regional and local realities as a direct result of the fire and subsequent monsoon season.</p> <p>To accomplish this, the reasonable cost for reconstruction must go beyond the initial costs assessed in the post-fire environment, especially since many households are not able to rebuild in the immediate post-fire period. Claimants may have to wait months – or years – to rebuild safely on what are currently hazardous areas which may not permit construction, especially in a continuously flood-prone environment. The construction costs for rebuilding in these conditions must account for changes in inflation extending well beyond the immediate post-fire market value of rebuilding materials and services.</p>

<p>There is no specific qualification of what “value” is being evaluated under the current Interim Final Rule, both as it relates to “pre-fire value” and general “value” of real property and other losses.</p>	<p>Losses should be calculated based on replacement and/or intrinsic value – not fair market value. Assessment of these values should account for the generational investment in the land and forest that was destroyed, as well as the loss that will be incurred while regrowth takes place. For example, a tree that was 5 years old at the time of the fire should be evaluated at the value it would have in 20-30 years when it would have been harvested. It also should be considered that the same tree may take years to be rooted in the same area.</p>
<p>Compensation may be provided for mental health, but not for other physical health effects. Section 296.21(e)(3) states, "FEMA may reimburse an individual claimant for reasonable out of pocket expenses incurred for treatment of a mental health condition rendered by a licensed mental health professional, which condition resulted from the Hermit’s Peak/Calf Canyon Fire. FEMA will not reimburse for treatment rendered after April 6, 2024."</p>	<p>Compensation should also be provided for the long-term physical health effects associated with the fire (e.g., breathing polluted air, contamination of water sources and soils), and should not be limited to treatment as of 2024.</p>
<p>Regarding section 296.21(e)(3), the Interim Final Rule clarifies that "Consistent with the Cerro Grande Fire Assistance process, paragraph (e)(3) states that FEMA may reimburse claimants for reasonable out of pocket treatment costs for mental health conditions resulting from the Fire. FEMA is offering reimbursement for treatment received between April 6, 2022, and April 6, 2024. Damages for mental health conditions are not recoverable under New Mexico law, except in a very limited class of cases. While FEMA will reimburse claimants for these expenses, given the limitation of New Mexico law FEMA will not entertain subrogation claims for mental health treatment unless those expenses could be recovered in a tort action under New Mexico law."</p>	<p>The trauma and distress of the impacted community cannot be understated and should be treated as both a priority and compensable damage. Beyond paying for mental health services, non-economic losses should be considered, and the Claims Office should review other precedents for non-economic losses and develop a process to provide payment commensurate with these losses. For example, damages for emotional distress and mental anguish have been treated as recoverable and payable by PG&E, which was found culpable for the October 2017 North California Fires. FEMA should make all efforts to minimize the cost burden put on the claimant, including a more flexible approach to ensure that claimants receive the maximum amount to which they are entitled, without inappropriate offset.</p>

<p>Section 296.21(c)(2) states, “Compensation for the replacement of destroyed trees and other landscaping will not exceed 25 percent of the pre-fire value of the structure and lot.”</p> <p>This is further clarified, “In paragraph (c)(2), FEMA is limiting compensation for trees and other landscaping to 25 percent of the pre-fire value of the structure and lot. This approach is generally consistent with the approach taken in the Cerro Grande Fire Assistance process. Under New Mexico tort law, damages are awarded for destroyed or damaged trees based on the value of the trees destroyed or the difference in value of the real estate with and without the trees. This 25 percent limitation does not apply to business losses for timber, crops, and other natural resources under section 296.21(d).”</p>	<p>Compensation for the Replacement Cost of destroyed trees and landscaping should not be limited to 25% (or any other percentage) of the pre-fire value of the structure and lot. The HPCC FAA was intended to restore claimant’s actual losses, which cannot be achieved without a full reimbursement of those losses. The trees that were lost in the Cerro Grande Fire were largely used for cosmetic and aesthetic landscaping. Conversely, claimants’ livelihoods were dependent on the trees that were lost in the HPCC Fire. Injured persons should therefore be fully compensated for 100% of the trees that they lost.</p>
<p>Regarding Section 296.21(e)(5), the Interim Final Rule states, “Section 104(d)(4)(c)(vii) of the Act grants FEMA the authority to compensate claimants for reasonable efforts to reduce an increased risk to their property from wildfires, floods, or other natural disasters. Consistent with the Act and with the Cerro Grande Fire Assistance process, paragraph (e)(5) provides that FEMA will reimburse claimants for reasonable efforts to reduce risk back to levels prevailing before the Fire. Such measures may include, for example, risk reduction projects that reduce an increased risk from flooding, mudslides, and landslides in and around burn scars in an amount not to exceed 25 percent of the higher of compensation from all sources, (i.e., the Act, insurance, and FEMA assistance under the Stafford Act), for damage to the structure and lot, or the pre-fire value of the structure and lot.”</p>	<p>FEMA, consistent with standard program delivery as well as their strategic goals, should prioritize and facilitate hazard mitigation opportunities throughout program implementation. As such, mitigation costs should not be capped at a low percentage (25%) which would limit mitigation opportunities. Instead, FEMA should consider reimbursing mitigation costs at up to 100%.</p>

<p>Cost categories include loss of property, business loss, financial loss, and personal injury. Section 296.21 provides examples of indirect damage but does not define “indirect damages” specifically in the Interim Final Rule.</p>	<p>FEMA should also include reimburse for indirect damage. This includes damages resulting from mandatory evacuation, burn scar flooding, contractor damages (specifically those caused by U.S. Army Corps of Engineers), etc. FEMA should also reimburse additional travel costs associated with providing federal agencies access to private property, travel to vendor locations to purchase new equipment, and replacement of documents (deeds, passports, etc.).</p>
<p>Regarding section 296.21, the Interim Final Rule clarifies, "Paragraph (e)(2) addresses the requirement from the Act that claimants be eligible for compensation for flood insurance premiums. Consistent with the Act, claimants that were not required by law to maintain flood insurance before the Fire and did not have such insurance before the Fire may receive reimbursement <u>for the cost of reasonable flood insurance premiums for a two-year period</u> for their owned or leased real property if required to purchase flood insurance."</p>	<p>Flood insurance needs will extend far beyond the initial two-year period allowed for under the regulations. Recent history and reports from areas such as Los Alamos and Ruidoso support a 10–20-year recovery timeline before the watershed is able to reasonably protect local properties from flood hazards, if they are eventually able to do so. The duration of eligible flood insurance coverage should reflect this period.</p>
<p>Regarding section 296.21, the Interim Final Rule clarifies, "Reimbursement is available for the reasonable cost of replacing Subsistence Resources used by a claimant prior to the start of the Fire, but that are no longer available to the claimant as a result of the Fire. Claimants may receive either compensatory damages for the increased cost of obtaining subsistence resources from lands not damaged by the Fire or for the cost of procuring substitute Subsistence Resources in the cash economy."</p>	<p>There is both an immediate and long-term loss of claimants’ ability to maintain subsistence lifestyles, including for providing heat to their homes, getting food, and having access to a home at little to no cost on land that has been passed down through multiple generations. The loss of subsistence has resulted in regular and ongoing costs for rent, food, energy, etc., and should be compensated.</p>
<p>Regarding section 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.”</p>	<p>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.</p>
<p>Regarding section 296.31, the Interim Final Rule states, “Section 296.31 provides that if FEMA requests the claimant provide an appraisal or</p>	<p>Many households have already started the process of eliciting appraisals and other third-party opinions regarding the value of their property.</p>

<p>other third-party opinion, FEMA will reimburse the claimant for the reasonable cost of obtaining it. Paragraph (a) addresses the circumstances in which FEMA will reimburse a claimant for reasonable costs of third-party opinions obtained by the claimant. It provides that FEMA will do so only if the agency requests that the claimant procure the opinion.”</p>	<p>These costs – even if not requested or approved by the Claims Office – should be eligible for compensation.</p>
<p>Pursuant to Section 296.21(f), the Interim Final Rule clarifies that, “The Act allows FEMA to provide compensation only if damages have not been paid or will not be paid by insurance, a third party, or through another FEMA program.”</p>	<p>Temporary housing costs (e.g., FEMA Direct Housing) should be considered additional to HPCC funding and not a component of an individual claim.</p>
<p>Economic losses are not included under financial or business losses. Section 296.21(d) and (e) state, "(d) Business loss. Compensatory damages may be awarded for damage to tangible assets or inventory, including timber, crops, and other natural resources; business interruption losses; overhead costs; employee wages for work not performed; loss of business net income; and any other loss that the Administrator determines to be appropriate for inclusion as a business loss.</p> <p>(e) Financial loss. Compensatory damages may be awarded for increased mortgage interest costs, insurance deductibles, temporary living or relocation expenses, lost wages or personal income, emergency staffing expenses, debris removal and other cleanup costs, costs of reasonable heightened risk reduction, premiums for flood insurance, and any other loss that the Administrator determines to be appropriate for inclusion as financial loss."</p>	<p>FEMA should recognize the significant actual loss to the economies of Mora and San Miguel Counties as well as the State of New Mexico. As such, this program should allow economic redevelopment and stimulus activities including but not limited to workforce training, economic development, job creation, etc.</p>
<p>Section 296.21(b) states, “Punitive damages, statutory damages under section 30–32–4 of the New Mexico Statutes Annotated (2019), interest on claims, attorney’s fees and agents’ fees incurred in prosecuting a claim under the Act or an insurance policy, and adjusting costs incurred by an insurer or other third party with the rights of a subrogee that may be owed by a claimant as a consequence of receiving an award are not recoverable from FEMA.”</p>	<p>FEMA should make all efforts to minimize the cost burden put on the claimant, including a more flexible approach to ensure that claimants receive the maximum amount to which they are entitled, without inappropriate offset.</p>

<p>The expressed intent of FEMA is to maximize federal dollars, and section 296.21(c) states, for example, "Compensatory damages may be awarded for an uninsured or underinsured property loss, a decrease in the value of real property, damage to physical infrastructure, cost resulting from lost subsistence, cost of reforestation or revegetation <u>not covered by any other Federal program</u>, and any other loss that the Administrator determines to be appropriate for inclusion as a loss of property."</p>	<p>If HPCC Claims Office identifies other federal funding that may be available, it is the responsibility of the Claims Office to seek those funds, not the injured person. FEMA must help claimants receive other identified funding in a timely manner to ensure they do not lose out on HPCC FAA funding based on available funding that they may otherwise never receive.</p>
<p>While specific documentation requirements are not articulated under the Interim Final Rule, the Cerro Grande process required that each claim file contain proof of identity, proof of ownership or occupancy at the time of the fire, systems used to verify or estimate values, proof of vehicle title and registration, and verification of insurance, with the main goal of precluding duplication of reimbursements for losses (see GAO-03-623, pg. 14, at https://www.gao.gov/products/gao-03-623).</p>	<p>The Claims Office should develop processes which adapt to the cultural norms of the region, as many families may have difficulty documenting that they own and live on their property, even if it has been in their family for multiple generations.</p>
<p>Pursuant to section 296.30(b), the Interim Final Rule clarifies that, "Claimants who submit their Notice of Loss should submit a signed Proof of Loss to the Claims Office not later than 150 days after the initial Notice of Loss was submitted. Adherence to this deadline will leave FEMA with 30 days to determine the compensation due to the claimant and enable the agency to meet the 180-day timeframe required by Congress...FEMA will try to process claims in less than 180 days but may require the full 180-day period in many cases."</p>	<p>Pursuant to the HPCC FAA, FEMA is required to pay claims within 180 days, New Mexico recommends the 180-day clock starts as soon as a claim is filed and not be based on a FEMA-determined milestone after the claim (like receipt of FEMA required documentation). All claims shall be paid in full no later than 180 days after the claim is filed.</p>
<p>Regarding section 296.21(e)(1), the Interim Final Rule states, "Paragraph (e)(1) addresses recovery loans and provides for reimbursement of loans, including Small Business Administration (SBA) disaster loans obtained after April 6, 2022, for damages resulting from the Fire. Consistent with the Cerro Grande Fire Assistance process, FEMA will reimburse interest for the period beginning on the date the loan was taken out and ending on the date when the claimant receives a compensation award (other than partial payment). Claimants are required to use the proceeds of their compensation awards to repay the SBA disaster loans and FEMA will coordinate with the SBA to formulate procedures for assuring</p>	<p>Individuals are currently carrying the cost burden of paying interest on loans provided by SBA. To reduce this burden, the Claims Office should define a process in coordination with the Claims Office such that after an individual signs a Notice of Loss Form to indicate their interest in the program, any further payment of SBA interest will be deferred.</p>

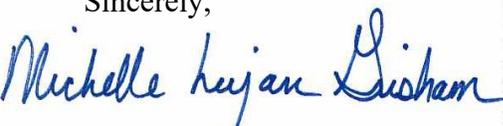
repayment contemporaneously with the compensation award receipt."	
The current burden of proof is on individuals. Section 296.30(a) states, "The burden of proving injuries and damages rests with the claimant."	Within reason, claims should be assumed reasonable and true, and the burden of proof is on the Federal government to disprove the claim.
Self-certification may be accepted in some cases, but not all. In accordance with Section 296.30(a), the Interim Final Rule clarifies, "...the Claims Office may determine that the claimant's statement alone will be sufficient to substantiate the injury or damage based on the unique circumstances presented by each case..."	Each Claimant should be allowed to "Self-Certify" their claims, under the penalty of law. FEMA can maximize and set parameters for the Proof of Loss process, such that an affidavit does not require documentation to be submitted at certain thresholds.
Section 296.21 paragraphs (c)(2) and (c)(3)(ii) states "The claimant can establish that the value of the real property was permanently diminished as a result of the Hermit's Peak/Calf Canyon Fire."	The threshold of "permanently diminished" is unclear and may be difficult to meet. Claimants should be able to show "significant," "long term," or other well-defined diminishment to property values in order to avoid any unnecessary burden on claimants.
Under section 296.14, "Assignments," the Interim Final Rule states that, "Assignment of claims and the right to receive compensation for claims under the Act is prohibited and will not be recognized by FEMA."	If a claimant passes away prior to or during the claims process, there should be a mechanism in place by which their compensation can be provided to surviving heirs.
Pursuant to section 296.30(c), the Interim Final Rule clarifies that, "Paragraph (c) requires claimants who receive compensation to sign and return a Release and Certification Form, including for partial payments under section 296.33. The Release and Certification Form must be received before the Claims Office provides payment on the claim." Regarding partial payment, as described in section 296.33, the Interim Final Rule states, "While the Claims Office's decision to provide a partial payment cannot be appealed, acceptance of a partial payment does not affect the claimant's ability to pursue an appeal, arbitration, or other options under the Act with respect to any portion of a claim for which a Release and Certification Form is not executed."	Claimant's rights to civil action or other redress of the Federal government should not be waived or limited until the Claimant agrees to a final HPCC FAA payment amount with FEMA. It also must be clear to claimants at what point(s) in the process they are waiving their right to further legal action as well as how an individual may retain their right to further legal action for different types of "subject matter."
Section 104(d)(4)(A)(iii) of the Act explicitly included damage to physical infrastructure, including acequias; however, the process for compensating acequias is not described in the Interim Final Rule.	The Interim Final Rule should include explicit processes under loss of property which describe the inclusion and compensation for damage to acequias.
Section 296.30 directs FEMA to "recover overpayments where the agency made a material	FEMA's reclamation of costs due to an administrative mistake could jeopardize local

mistake in calculation of the damages owed to the claimant.”	trust in the program and should be disallowed or limited to extremely rare and clearly defined circumstances.
The FEMA FAQs website states that, "The Hermit’s Peak/Calf Canyon Fire Claims Assistance Act states generally that compensation is not considered income or resources under Federal State or local tax laws. If you have specific questions, you should contact a tax professional for assistance."	The Claims Office is responsible for clarifying and ensuring that individuals are not taxed for the claims that they receive through the program.
Regarding the “Injured Persons” definition and section 296.14, Subpart C that addresses the compensation available under the Act, the Interim Final Rule states, “FEMA may only compensate claimants for damages that resulted from the Fire.”	This definition should be expanded to include flooding, mudflow, mold, and debris flow as a cause of injury and as a damage that can be compensated.
All claims are currently evaluated through the same review process under the Interim Final Rule.	Monetary thresholds should be established to ensure time and effort are proportionate to the claim values being made.
Per the FEMA Hermit's Peak website, Notice of Loss forms may only be submitted by email (fema-hermits-peak@fema.dhs.gov) or by mail.	Claimants should be able to file claims in person as well as via mail, email, and a web-based portal system to ensure accessibility.
No Task Forces or alignment with the Lines of Effort has yet been initiated.	<p>FEMA should integrate with existing Lines of Effort to collaborate on the unique issues, realities, and standards that have cross-cutting applications to the full recovery of the impacted area. The Lines of Effort include:</p> <ul style="list-style-type: none"> • Community Outreach • Drinking Water • Economic Recovery • Health and Social Services • Historical and Cultural Resources • Housing Recovery • Watershed Mitigation
No current structure exists for transparency to the State or local communities. Auditing is currently managed exclusively by the Department of Homeland Security Office of the Inspector General and the Comptroller General of the United States. Section 296.36 states, "Claimants are required to grant the DHS OIG and the Comptroller General of the United States access to the subject property and to records and information in their control that are relevant to their claims for purposes of audit and investigation. These records include, but are not limited to, any relevant tax records. The Act	<p>FEMA should provide full transparency of cost, budget, expenditures, etc., including administrative costs, operational costs, total payouts, total denials, etc., to not only OIG, but also the State – and by extension, local communities – without violation of the Privacy Act.</p> <p>At the individual level, information regarding their personal status and timeline to receive payment should also be easily accessible.</p>

<p>requires that the GAO, a legislative branch agency, audit claims and payments made under the Act. The DHS OIG is responsible for investigating charges of fraud and abuse and auditing FEMA's programs."</p>	
<p>Under Section 296.21, payment is generally described as being provided directly to the Claimant.</p>	<p>There is a shortage of available contractor resources, which has already increased construction costs and slowed efforts to rebuild. The State is offsetting this gap through programs (e.g., Private Property Debris Removal) which allow individuals to permit agencies to act on their behalf to address damage. While these programs are already active, additional clarification is needed to ensure that funding will be available for reimbursement. The Claims Office should support this process by allowing direct reimbursement to the State for work performed for claimants who opt-in to available programs.</p>

The State understands the difficult balance FEMA must manage to provide money to claimants as comprehensively and expeditiously as possible while still maintaining accountability, documentation, and compliance standards to limit waste, fraud, and abuse. It is my hope that our recommendations are incorporated into the Final Rule and can serve as the starting point for a strong and active partnership that ensures the timely delivery of resources that the New Mexicans impacted by these fires deserve.

Thank you for your consideration and I look forward to your response.

Sincerely,

 Michelle Lujan Grisham
 Governor