



# Hermit's Peak/Calf Canyon Wildfire Damages Claims Update and Negligence Refresher

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\*Not intended to constitute legal advice

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# Overview

- Hermit's Peak & Calf Canyon Wildfire Review
- Pathways to Relief
  - Hermit's Peak Fire Assistance Act
  - Federal Tort Claims Act
- Elements of Negligence
- Defenses and Immunities

# New Mexico Wildfires

- “The mission of the USDA Forest Service is to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations.”
- Prescribed fires are intended to reduce vegetation density and reduce intense wildfires.
- Two types:
  1. Pile burns
  2. Broadcast burns

## Prescribed Fire Requirements

- Interagency Prescribed Fire Planning and Implementation Procedures Guide (July 2017)
  - Updated May 2022 (post-wildfire)
- Requires that every prescribed fire have an approved “Prescribed Fire Plan”

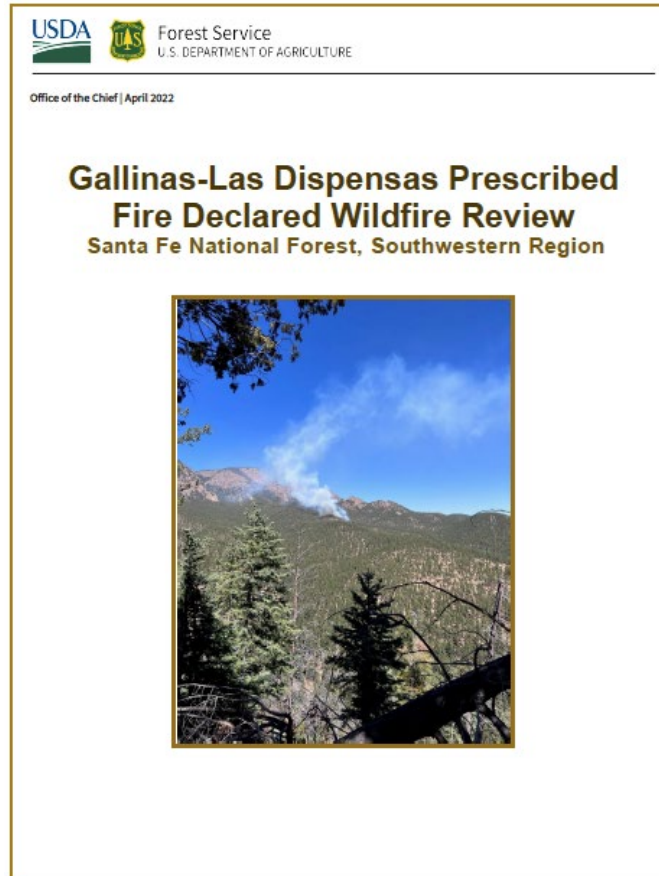
# Hermit's Peak Wildfire

- Prescribed fire to restore part of the Santa Fe National Forest and reduce risk of high-intensity wildfire
- Initially prepared in 2019 and approved in 2020
- Reviewed and re-approved in 2021
- No adjustment for drought conditions

# Calf Canyon Wildfire

- Prescribed pile burn conducted in late January 2022
- Pile burn converted into a holdover fire and remained dormant through three snow events
- Re-emerged in April 2022
- Monitored for several days
- Re-ignited 10 days after being reported
- Escaped containment lines and merged with Hermit's Peak Wildfire

# Gallinas-Las Dispensas Wildfire Review



## Key Findings:

- Fire plan in compliance with policy requirements
- Conditions were drier than recognized during planning
- Closest Remote Automated Weather Station (RAWS) was unavailable, affecting the accuracy of weather representations



## Gallinas-Las Dispensas Wildfire Review

- USFS miscalculated the complexity of this fire
- Miscalculated resources necessary to effectively contain the fire
- Although not required, USFS did not include certain modeling inputs in their planning and execution
  - Relied on empirical observations and experience instead

- Test Fire contained lighter fuels than those in the prescription location
- Weather conditions on the day of were not all within prescription parameters

## Contributing Factors:

- Government Shutdown
- COVID-19
- Mexican Spotted Owl Injunction
- Higher Tempo Operations

# Two Possible Pathways to Relief

- Federal Tort Claims Act of 1946
- Hermit's Peak Fire Assistance Act

# Federal Tort Claims Act (FTCA)

- Legal mechanism to sue the U.S. government for monetary damages
- Congressional waiver of governmental immunity
- The claim must fall within one of the FTCA's provisions
- Rejected if claim falls under an exception to FTCA
- File claim to appropriate federal agency within two years after such claim accrues

# Federal Tort Claims Act (FTCA)

- Covers claims for **injury or loss of property**, or **personal injury or death** caused by the **negligent or wrongful act or omission** of any **employee of the Government** while **acting within the scope of their office or employment**, under **circumstances** where the **United States, if a private person**, would be held **liable** to the claimant in accordance with the **law of the place** where the act or omission occurred.

28 USCS § 1346(b)(1).

# Hermit's Peak Fire Assistance Act

- Part of the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, enacted September 2022
- Appropriates **\$2.5 Billion** in compensation funds

# Hermit's Peak Fire Assistance Act

## HPFAA Provisions:

- Establishes “Office of Hermit's Peak/Calf Canyon Fire Claims” to process claims
- Submit claim by two years from publication of interim final regs in Federal Register
- FEMA determines amount to be paid within 180 days after claim is submitted
- NM state laws govern calculation of damages
- Partial payments may be made
- Arbitration; Judicial Review
- No additional attorney's fees; fees not in excess of 20% (FTCA amount)
- No appraisal costs unless appraisal requested by FEMA
- Interim final regulations published 45 days after enactment of Act



# Hermit's Peak Fire Assistance Act

Injured parties may elect to seek compensation through:

1. Submitting a claim under this Act; or
2. Filing a claim under the FTCA; or
3. Bringing an authorized civil action under any other provision of law

“The acceptance by a claimant of any payment under this Act, except an advance or partial payment . . . shall . . . be final and conclusive on the claimant, with respect to all claims arising out of or relating to the same subject matter . . . .”

# Hermit's Peak/Calf Canyon Fire Assistance Interim Final Rule

- Based on Cerro Grande Fire (2000) Assistance Act rules
- Process:
  - Notice of Loss filed by November 14, 2024
  - FEMA acknowledges receipt
  - Proof of Loss filed w/in 150 days of acknowledgement; burden on claimant to show loss
  - Claim is determined by Authorized Official within 180 days of acknowledgement
  - Release and Certification—can be partial
  - 120 days to accept or appeal
  - Appeal
  - Arbitration or Judicial Review

## Additional \$1.45B

- Consolidated Appropriations Act, 2023, § 2601 (Dec. 29, 2022). Pub. L. No: 117-328.
- “For an additional amount for ‘Hermit’s Peak/Calf Canyon Fire Assistance Account’, \$1,450,000,000, to remain available until expended, to carry out the Hermit’s Peak/Calf Canyon Fire Assistance Act”

# Negligence Claim Under FTCA

- Burden of Production
- Burden of Persuasion
- Preponderance of Evidence: More likely than not

# Elements of Negligence

- Duty
- Breach
- Causation
- Scope of Liability
- Damages

# Duty of Reasonable Care

- “The mission of the USDA Forest Service is to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations.”
- USFS must not create foreseeable risks of harm to others in fulfilling mission
- Limited duty of landowner? Native American land held in trust to benefit tribes

# Breach

- Breach of Duty of Reasonable Care
- Balancing Risk v. Untaken Precautions
- Learned Hand Formula— $B < P * L$ 
  - Burden
  - Probability of Loss before event
  - Likely Loss, not the loss suffered
- Custom

# Admission of Responsibility

- Statement of USFS Chief Randy Moore that the Hermit's Peak Fire “was a result of an escaped prescribed fire (Las Dispensas).”
- Findings from Congress: “[T]he U.S. Forest Service has assumed responsibility for the Hermit's Peak/Calf Canyon Fire; the fire resulted in the loss of Federal, State, local, Tribal, and private property.”



# Causation

- But For
- Substantial Factor
- Two fires
- Proof under each Act

# Scope of Liability

- Unforeseeable Plaintiff
- Unforeseeable Consequences
- Intervening Forces
- Exceptions to the Foresight Rule (Eggshell Plaintiff, Rescuer Rule, Medical Malpractice Complications)
- “Was it foreseeable that . . . ?”
- *Interim Final Rule states, “FEMA may only compensate claimants for damages that resulted from the Fire.”*

# Damages

- “[T]he 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 the injuries sustained.”

**Abbinett v. Fox, 1985-NMCA-017**

# Injuries Suffered

- Over 300,000 acres burned
- Over 1,000 buildings destroyed or damaged
- Loss of Life?
- Livestock, Agriculture, forestation, landscaping
- Loss of Income
- Vehicles and Other Personal Property
- Flooding
- Las Vegas Water Supply Treatment

# Federal Tort Claims Act (FTCA)

## Damages

- Property loss, personal injury, and other losses
- Emotional damages
- No punitive damages
- Attorney's fees cap (20%, 25%)
- Tax consequences

# Damages Covered Under Hermit's Peak Fire Assistance Act

EXTENT OF DAMAGES.—Any payment under this Act—

- (A) shall be limited to actual compensatory damages measured by injuries suffered; and
- (B) shall not include—
  - (i) interest before settlement or payment of a claim; or
  - (ii) punitive damages.

# Damages Under Hermit's Peak Fire Assistance Act

Allowable Damages are actual compensatory damages, which include

- Loss of Property
  - Includes decrease in value of real property; lost subsistence; reforestation or revegetation costs
- Business Loss
  - Includes business interruption losses; employee wages for work not performed; loss of business net income
- Financial Loss
  - Includes reasonable risk reduction costs up to three years after interim final regs published; flood insurance premium ~~[required to be paid by May 31, 2024]~~, if not required previously

# Damages Under Hermit's Peak Fire Assistance Act

## Allowable Damages cont'd

- Any other loss that the Administrator determines to be appropriate for inclusion as a loss of property, business loss, or financial loss
- Personal Injury
- Payments not taxable as income



# Hermit's Peak/Calf Canyon Fire Assistance Interim Final Rule

- Compensation for trees and other landscaping is limited to 25% of the pre-wildfire value of the structure and lot, not including business losses for timber, crops, other natural resources
- If not required prior to wildfire to maintain flood insurance and did not have may be reimbursed for flood insurance premiums—**[increased to 5 years]**
- Mental health treatment April 6, 2022, through 2024

# Defenses and Immunities

- Pure Comparative Fault in NM
  - (Contributory Negligence)
  - (Assumption of Risk)
- Statute of Limitations
- Governmental Immunity under FTCA

# FTCA Discretionary Function Exception

## FTCA Does NOT Apply to:

- Any claim based upon an **act** or **omission** of an employee of the Government, **exercising due care**, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a **discretionary function** or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 USCS § 2680(a)

# FTCA Berkovitz Test

*Berkovitz v. United States* established a two-prong test for determining whether the discretionary function exemption applies. 486 U.S. 531 (1988).

1. Act or omission must be discretionary in nature (involving an element of judgment or choice)
2. Even if discretionary, is conduct the type the exception is designed to shield; or is it based on considerations of public policy

## What is the USFS required to do generally?

- USFS has a duty to maintain the forests
- Monitor fires for changes in condition
- Declare wildfires

# What is the USFS required to do to conduct a prescribed fire?

- Follow the Interagency Prescribed Fire Planning and Implementation Procedures Guide
- Create a prescribed fire plan
- Plan suppression and emergency resources

# What acts are *discretionary* under NWCG Guide?

- Deciding to have a prescribed fire
- Planning when, where and how to conduct prescribed fires
- Deciding what factors to consider in planning a prescribed fire
- Ignition location and time
- Test fire location and time

## What acts are *discretionary* under the NWCG Guide?

- Deciding to over-ride prescription parameters
- Location of suppression/emergency resources
- Type of suppression/emergency resources



# Federal Tort Claims Act Application

- Does USFS conduct fall under the discretionary function exception?
- Planning considerations discretionary in nature
- Regulations for prescribed fires allow for decision making by USFS officials
- Reliance on experience and judgment

# Challenges

- Choice of Relief
- State of HPFAA Regulations—Interim Final Rule
- Confusion about HPFAA appeals process
- Statute of Limitations
- Governmental Immunity under FTCA



QUESTIONS?

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