

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

COPY

CITY OF GARDEN CITY, KANSAS;)
FINNEY COUNTY, KANSAS;)
MARK J. DINKEL;)
GARY E. FULLER; and)
CECIL O'BRATE,)

Plaintiffs,)

v.)

CIVIL CASE NO. 09-1258-JTM

W. CRAIG FUGATE, IN HIS CAPACITY)
AS ADMINISTRATOR OF THE)
FEDERAL EMERGENCY)
MANAGEMENT AGENCY, AN)
AGENCY OF THE UNITED STATES)
GOVERNMENT)

Defendant.)

**MEMORANDUM OF LAW AND POINTS OF AUTHORITY IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND
MOTION FOR PRELIMINARY INJUNCTION**

Now comes, W. Craig Fugate and the Federal Emergency Management Agency ("FEMA"), by and through their undersigned attorneys, and respectfully submit this Memorandum of Law and Points of Authority in Support of its Motion to Dismiss Plaintiffs' Complaint and Motion for Preliminary Injunction pursuant to Federal Rules of Civil Procedure (Fed. R. Civ. P.) 12(b)(1) and 12(b)(6).

I. INTRODUCTION

In their Complaint, Plaintiffs challenge FEMA's authority to make revisions to Flood Insurance Rate Maps (FIRMs) that determined portions of Plaintiffs' community lie in a Special Flood Hazard Area. Specifically, Plaintiffs allege that they were denied due process to challenge FEMA's mapping determination.

On August 27, 2009, Plaintiffs filed the above captioned Complaint and sought a Preliminary Injunction against FEMA to prevent it from implementing the revised FIRM and Flood Insurance Study (FIS) report for Finney County which was finalized on March 25, 2009, and scheduled to take effect on September 25, 2009. On September 16, 2009, FEMA advised Plaintiffs that it would rescind the revised FIRM and FIS report for Finney County and initiate a 90-day appeal period during which aggrieved parties may appeal the proposed flood elevations. Despite FEMA's actions, Plaintiffs refuse to dismiss their Complaint even though there is no longer a case or controversy.

II. STATUTORY PURPOSE AND SCHEME

Historically, floods have been one of the most destructive national hazards facing the people of the United States. The federal government initially addressed the problem by funding flood-control projects. However, after billions of federal dollars were spent in flood-control projects, the personal hardships and economic distress from flood continued to increase – largely as a result of unwise use of the nation's flood plains. S. REP. NO. 93-583 (1973)¹, *reprinted in* 1973 U.S.C.C.A.N. 3217, 3218-3219. In 1968, Congress responded by promulgating the National Flood Insurance Act (NFIA), 42 U.S.C. §§ 4001-4129. The two principal objectives of the Act were to provide relief from the destruction caused by floods by making flood insurance available at reasonable premium rates and to require local jurisdictions to enact land use and control measures designed to guide the rational use of the flood plain as a condition for the availability of federally-subsidized flood insurance. *Id.* at 3219. Despite this effort, the annual loss of property and the disastrous personal losses suffered by victims of recurring flood

¹ S. REP. NO. 93-583, dated November 29, 1973, came out of the Senate Committee on Banking, Housing and Urban Affairs and was to accompany H.R. 8449. *See* 1973 U.S.C.C.A.N. 3317.

disasters throughout the nation continued. *Id.* at 3220. Congress acted again to strengthen the NFIA by promulgating the Flood Disaster Protection Act of 1973, P.L. 93-234. Recognizing the national need for a reliable and comprehensive flood insurance program, and aware that mandatory flood insurance coverage must be applied with adequate safeguards and land use restrictions to minimize future losses of life and property, Congress, through the Flood Disaster Protection Act of 1973, amended the NFIA to include greater coverage and to further promote and mandate sound land use control. *Id.* at 3218. The NFIA is designed to “encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses,” and to “guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards.” *Id.*; 42 U.S.C. § 4001(e).

The National Flood Insurance Program (NFIP), a federally-subsidized program promulgated pursuant to the NFIA, is a **voluntary**, community-based program designed to provide, as a matter of national policy, a reasonable method of sharing the risk of flood losses through a program of flood insurance that complements and encourages preventative and protective measures. *See* 42 U.S.C. § 4001(a).

To meet the objective that studies be conducted to assess the flood risk within each flood-prone community, the Act authorizes FEMA to study, investigate, and publish information for all floodplain areas that have special flood hazards and to establish flood-risk zones in all such areas. *See* 42 U.S.C. § 4101. The Mitigation Directorate (formerly Federal Insurance Administration), an administration within FEMA, is charged with the responsibility for making flood elevation determinations for purposes of land use control in communities identified as flood-prone. *Reardon v. Krimm*, 541 F. Supp. 187 (D. Kan. 1982). The Act provides for

consultation with the affected community during the flood hazard study process and provides a carefully deliberated process for appeal by affected communities and owners or lessees of real property within the community who believe that their property rights may be adversely impacted by the proposed base flood elevation determinations. The Act also allows for limited judicial review of a denial of an appeal. *See* 44 C.F.R. § 67.12. The Act provides for appeals of preliminary maps rather than final determinations in order to avoid delays that may thwart the purpose of the NFIP.

III. BACKGROUND FACTS

FEMA administers the NFIP and is authorized by Section 1360 of the NFIA, to establish and update flood-risk zone data in floodplain areas. In identifying flood-prone areas, FEMA is authorized to consult with, and receive information from, and enter into agreements or other arrangements with the head of any State, regional or local agency in order to identify these floodplain areas. *See* 42 U.S.C. § 4101.

FEMA conducted a study of Garden City (the “City”) and Finney County (the “County”) as part of FEMA’s Map Modernization (MapMod) Program. Plaintiffs’ Memorandum in Support of Motion for Preliminary Injunction (hereinafter Plaintiffs’ Motion) at p. 10, para. 22.

On September 23, 2008, FEMA provided the City and the County with a preliminary Digital Flood Insurance Rate Map (DFIRM) and preliminary FIS report for the entire geographic area of Finney County, Kansas including both incorporated and unincorporated areas.² *See* Plaintiffs’ Motion at p. 14, para. 38, citing Plaintiffs’ Exhibits N and O. The proposed DFIRM and FIS report designated certain areas of the City and County as Special Flood Hazard Areas. Plaintiffs’ Motion at p. 5, para. 8; p. 14, para. 38; *see also* Plaintiffs’ Exhibits N and O. The

² As the name indicates, a DFIRM is a digital FIRM. DFIRM and FIRM will be used interchangeably in FEMA’s memorandum.

FEMA-designated Special Flood Hazard Areas that Plaintiffs take issue with involve two man-made drainage ditches. Plaintiffs' Motion at p. 6, paras. 11 and 12; *see also* Plaintiffs' Exhibit N. Plaintiffs took exception to FEMA's designation of the two ditches as Special Flood Hazard Areas because City and County planners, in reliance of 1978, 1980, and 1997 FEMA maps, directed growth towards these areas based on confidence that the area "did not meet the criteria for a Special Flood Hazard Area under the NFIA." Plaintiffs' Motion at pp. 5-6, para. 9.

FEMA, in its September 23, 2008 letter, provided the affected communities 30 days "to identify changes or corrections to non-technical information presented on the DFIRM or in the FIS report..." Plaintiffs' Motion at p. 14, para 38; *see also* Plaintiffs' Exhibits N and O. FEMA would then assess and incorporate, as appropriate, any comments or changes before the DFIRM and FIS become effective. Plaintiffs' Exhibits N and O. FEMA did not provide Garden City or Finney County with a 90-day appeal period because there were no changes to the Base Flood Elevations (BFEs). Plaintiffs' Motion at p. 15, para. 47; *see also* Plaintiffs' Exhibit R.

On October 20, 2008, the City submitted additional technical data (*i.e.*, contour data) and letters from affected citizens for consideration to revise the preliminary FIRM for the City and County. Plaintiffs' Motion at p. 15, para. 45; *see also* Plaintiffs' Exhibit Q. The letters "protest[ed] the designation of the Ditches as Special Flood Hazard Areas." Plaintiffs' Motion at p. 16, para. 53; *see also* Plaintiffs' Motion at Exhibit Q.

Although FEMA advised the communities in its September 23, 2008 letter, that it would only consider comments and corrections on non-technical information, FEMA advised Finney County that it had treated its submission as a protest; that it would consider "some of the changes requested by the City and the City of Holcomb which had been submitted in October and November," and that it would revise the preliminary maps accordingly. Plaintiffs' Motion at pp.

16-17, para. 54; *see also* Plaintiffs' Motion at Exhibit U. Specifically, FEMA revised incorrect corporate limits for the City of Holcomb and incorrect floodplain boundaries along the Arkansas River, Arkansas River Tributary 1 and Arkansas River Tributary 2. Plaintiffs' Exhibit U.

On January 29, 2009, FEMA advised the City and County that "some of the changes requested by the County had been made" and enclosed additional map panels which "included some of the changes requested by the City and County." Plaintiffs' Motion at p. 17, paras. 56 and 57; *see also* Plaintiffs' Exhibits V and W.

By letters dated March 25, 2009, FEMA advised the City and County that it had addressed all comments received on the Preliminary copies of the DFIRM and FIS report and that the DFIRM and FIS report for the community would become effective on September 25, 2009. Plaintiffs' Exhibits Y and Z.

Dissatisfied with the outcome of FEMA's mapping determination, the City and County requested that FEMA restart the FIS process using allegedly proper procedures and more detailed and accurate data because FEMA and the Kansas Division of Water Resources (DWR) did not properly coordinate the FIS and FIRM with the local community. Plaintiffs' Motion at p. 21, para. 73. FEMA denied the request to restart the FIS.

On August 27, 2009, Plaintiffs filed their Complaint along with a request for a Preliminary Injunction to stop the revised FIRM from going into effect on September 25, 2009. *See* Plaintiffs' Complaint and Plaintiffs' Motion. Plaintiffs claim that they were denied due process by not being able to appeal FEMA's mapping determination and requested the revised FIRM be set aside. Plaintiffs' Complaint at pp. 5, 8, 9, 10.

On August 31, 2009, a conference call was conducted between FEMA counsel, Plaintiffs' counsel and the Assistant United States Attorney assigned to this case. *See*

Government Exhibit A at p. 2, David Traster letter dated September 8, 2009. FEMA counsel advised Plaintiffs that FEMA intended to rescind its March 25, 2009, Letter of Final Determination (LFD) and restart the 6-month notice period pursuant to 44 C.F.R. § 59.24 because of an administrative oversight in failing to timely issue the required 90-day notice to the community prior to the effective date of the new map. *Id.* On September 3, 2009, FEMA counsel further advised Plaintiffs that FEMA decided to not only rescind the LFD but to also provide a 90-day appeal period after appropriate publication pursuant to 42 U.S.C. § 4104. *Id.*

Despite FEMA's efforts to resolve the lawsuit and provide Plaintiffs with remedies sought in their complaint (*i.e.*, provision of due process and appeal rights), Plaintiffs, on September 8, 2009, sent a letter to FEMA counsel stating that FEMA did not properly conduct the FIS report and resulting DFIRM and that FEMA's errors cannot be remedied by a 90-day appeal process. *Id.* at p. 1.

On September 16, 2009, FEMA issued letters to the City and County officially rescinding the revised DFIRM and FIS report. *See* Government Exhibit B, FEMA's Letters dated September 15 and 16, 2009. As FEMA counsel indicated to Plaintiffs, FEMA rescinded the revised DFIRM and FIS report because of an administrative oversight in failing to timely issue the required 90-day notice to the community prior to the effective date of the new map. *Id.* Further, FEMA informed Plaintiffs they would be permitted to file an appeal under 44 C.F.R. § 67.6, and if they are dissatisfied with the determination and they meet the appeal criteria set forth in the regulation, they will have the right to appeal to this Court under 44 C.F.R. § 67.12. *Id.* Although FEMA rescinded its revised DFIRM and FIS report, it advised the City and County that "all engineering data and flood hazard information upon which the determination was made currently remains valid, and remains as it appears on the preliminary DFIRM." *See* Government

Exhibit B. It further advised the City and County that any aggrieved party may appeal FEMA's proposed flood elevations during the 90-day statutory appeal period. *Id.* At this time, however, the original FIRM is in effect for Finney County, meaning that the area around the two ditches at issue has not been designated as Special Flood Hazard Areas.

On October 1, 2009, FEMA counsel asked Plaintiffs to voluntarily dismiss the pending Complaint because it is moot and Plaintiffs have failed to exhaust their administrative remedies to challenge a FEMA mapping determination that has yet to occur. *See* Government Exhibit C, FEMA letter dated October 1, 2009. On October 6, 2009, FEMA counsel sent Plaintiffs an email asking them again to voluntarily dismiss their lawsuit. *See* Government Exhibit D, FEMA email dated October 6, 2009. On that same day, Plaintiffs responded that they were unwilling to dismiss this lawsuit. *See* Government Exhibit E, Plaintiffs' email dated October 6, 2009.

IV. ARGUMENT

A. Standard of Review

1. Fed. R. Civ. P. 12(b)(1)

It is well established that federal courts are courts of limited jurisdiction, as they possess only the power authorized by the Constitution and by statute. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Accordingly, a court may properly dismiss an action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) when the court lacks the statutory authority or constitutional power to adjudicate the case. *See e.g., Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

“When a party challenges the allegations supporting subject-matter jurisdiction, ‘the court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts.’” *Davis ex rel Davis v. U.S.*, 343 F.3d 1282, 1296 (10th Cir. 2003)(quoting *Holt v. U.S.*, 46 F.3d 1000, 1003 (10th Cir. 1995). “In such instances, a court’s reference to evidence outside the pleadings does not convert the motion [to dismiss] to a Rule 56 motion [for summary judgment].” *Id.*

2. Rule 12(b)(6)

On a Rule 12(b)(6) motion, the Court must accept as true the plaintiffs’ allegations and may not dismiss the complaint for failure to state a claim, unless it appears beyond doubt that the plaintiffs cannot prove any set of facts in support of his claim which would entitle them to relief. *See Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005). When a Court determines whether to dismiss an action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted, it must accept the factual allegations in the Complaint as true. *See id.* A 12(b)(6) motion can succeed when it appears, beyond doubt, that the plaintiff cannot prove a set of facts that will support his claim and entitle him to relief. *Id.*

B. There is no Case or Controversy for this Court to Consider

Article III of the United States Constitution sets forth the jurisdiction of federal courts, allowing Federal Courts to only consider actual cases or controversies. *Kansas Judicial Review v. Stout*, 562 F.3d 1240, 1245-1246 (10th Cir. 2009)(citing U.S. Const. art. III, § 2, cl. 1). Accordingly, a plaintiff must possess a personal interest in the outcome of a case at all stages of the proceedings. *Id.* (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)) (“[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” (quotation omitted)). If, during the pendency of the case, circumstances

change such that a plaintiff's legally cognizable interest in a case is extinguished, the case is moot, and dismissal may be required. *See Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182-83 (10th Cir. 2000). A party claiming there is no longer a live case or controversy bears the burden of demonstrating mootness. *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 891 (10th Cir. 2008). In deciding whether a case is moot, "[t]he crucial question is whether granting a present determination of the issues offered . . . will have some effect in the real world." *Davidson*, 236 F.3d at 1182 (quotation omitted). When it becomes impossible for a court to grant effective relief, a live controversy ceases to exist, and the case becomes moot. *United States v. Hahn*, 359 F.3d 1315, 1323 (10th Cir. 2004).

At this time, FEMA has rescinded the revised DFIRM and FIS report that generated this lawsuit. *See* Exhibit B. The DFIRM and FIS report that was in effect prior to the proposed revision continues to be the controlling map for flood insurance rates and the two drainage ditches at issue are not designated as Special Flood Hazard Areas. Although FEMA stated in its September 16, 2009, letters to the City and County that the engineering data and flood hazard information that FEMA relied upon in its March 25, 2009, final determination remain valid, the proposed DFIRM and FIS report still have no impact on Plaintiffs' lawsuit as FEMA has yet to make a final determination. *Id.* Accordingly, there is no relief this Court can possibly grant to Plaintiffs because FEMA has not taken any action to finalize the revised FIRM and FIS report.

FEMA agreed to initiate an appeal period before any revision to the FIRM becomes effective. If Plaintiffs can provide sufficient scientific and technical data to demonstrate that FEMA's proposed FIRM and FIS report are in error, then the revision may never be made effective. On the other hand, if Plaintiffs or any aggrieved party, defined as a proper party by the

NFIA, 42 U.S.C. § 4104, are still dissatisfied with FEMA's determination regarding the proposed FIRM and FIS report, they can appeal FEMA's determination and assert its right to judicial review set forth in 42 U.S.C. § 4104(g). In the end, Plaintiffs, or any aggrieved party would have the opportunity afforded by FEMA's appeal process at 42 U.S.C. § 4104 or 44 C.F.R. Part 67 to protect its interests should FEMA change the current flood map.

C. Plaintiffs Failed to Exhaust Their Administrative Remedies

FEMA provides an administrative process to challenge any change to a flood elevation. *Great Rivers Habitat Alliance, et. al v. FEMA*, 2009 WL 2208483, *4 (E.D. Mo. 2009). If an aggrieved party properly appeals to FEMA and they are still dissatisfied, they are permitted to appeal the final determination to the United States District Court. *Id.* at *5; 42 U.S.C. § 4104(g). If an appellant fails to comply with the statutory appeal requirements, the District Court lacks subject matter jurisdiction. *Id.* "Exhaustion of the administrative review process is a prerequisite to judicial review." *Id.*, citing *Normandy Pointe Assocs. v. FEMA*, 105 F.Supp.2d 822, 827-828 (S.D. Ohio 2000).

As previously stated, FEMA rescinded the revised DFIRM and FIS report and granted Plaintiffs the right to file an appeal under 44 C.F.R. § 67.5 and § 67.6. Plaintiffs have not exhausted this administrative remedy because the appeal period has not even started. If and when Plaintiffs exhaust their administrative remedy, they would then have the right to file suit within 60 days after they receive FEMA's final determination under 42 U.S.C. § 4104(g) and 44 C.F.R. § 67.12.

V. CONCLUSION

For all the foregoing reasons, this Court should dismiss Plaintiffs' Complaint and Motion for a Preliminary Injunction against Defendants FEMA and its Administrator pursuant to Fed.

R. Civ. P. 12(b)(1) and 12(b)(6) and authorities, because this case is moot and Plaintiffs have failed to exhaust their administrative remedies.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that on October 26th, 2009, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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I further certify that I mailed the forgoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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September 8, 2009

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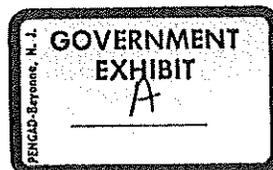
Dear Ramoncito and Darren,

We appreciate FEMA's efforts to address some of the concerns raised by the City and County in the Complaint, in our Memorandum in Support of Motion for Preliminary Injunction, and in previous letters and personal communications. However, in spite of our numerous objections, FEMA continues to assert that the Map Modernization Program was properly implemented. We have now obtained legible copies of the maps that were the subject of the initial scoping meeting. These maps provide direct evidence of a significant violation of the National Flood Insurance Act and of FEMA's regulations promulgated thereunder. This violation cannot be remedied by a 90-day appeal process.¹ We therefore renew our request that FEMA immediately rescind the March 25, 2009 LFD and begin the Map Modernization program over.

On July 17, 2009 the City and County wrote to FEMA requesting that the mapping procedure be restarted and requesting a response no later than August 21, 2009. Exhibit FF.² On August 12, 2009, City and County officials were told that a decision had been made and a response to the letter had been prepared, but FEMA did not disclose the decision or send the letter at that time. On August 25, 2009 the City and County received letters dated August 24, 2009 that continued to deny any relief. Exhibits HH & II. This left the City and County with no other option than to file suit. The Complaint and other pleadings were filed in Federal District

¹ By limiting the discussion in this letter to one procedural violation, the Plaintiffs do not waive any other argument or concern.

² In order to avoid confusion, this letter will refer to the Exhibits to the Memorandum in Support. Additional Exhibits will continue the lettering scheme used in that document beginning with Exhibit MM.



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Court on August 27, 2009. An expedited hearing on our Motion for a Preliminary Injunction was set for September 3, 2009.

On Monday, August 31, 2009, in a telephone conversation with the two of you and Robin Moore in the U.S. Attorney's office, you explained that because FEMA had discovered that the 90-day notice letters required by 44 C.F.R. § 59.24 were late, FEMA was required to rescind the March 25, 2009 Letters of Final Determination and reissue them. This would restart the 6-month notice period required by 44 C.F.R. § 59.24. The 90-day notice letters were due on or before June 27, 2009. They were actually dated June 29, 2009. Exhibits MM, NN, & OO. There were no postmarks or any other indication of the date of mailing on any of the envelopes.

The 90-day notice letters were not received until July 20, 2009 and we responded with a letter dated July 22, 2009 pointing out that the 90-day notice letters were not timely. Exhibit PP. Because of this procedural defect, FEMA's process was flawed requiring it to rescind the LFD and restart the 6-month notice period by issuing a revised LFD.

While not discussed in our conversation on August 31, 2009, there is an additional problem with the 90-day notice letters. As pointed out in our July 22, 2009 letter, there were three letters received in Garden City on July 20, 2009. Two were addressed to Pete Olson, as "Chairman, Board of Commissioners"³ and the third was addressed to the Honorable James Jarnagin, Mayor, City of Holcomb. Exhibits MM, NN, & OO. The City of Garden City did not receive a 90-day notice letter.

In our conversation, it was agreed that FEMA would write a letter to Judge Marten informing him that it was rescinding its LFD. Upon receipt of FEMA's letter, the Plaintiffs would, in turn, write a letter to Judge Marten telling him that no hearing was needed. This was accomplished and the Court entered an Order canceling the hearing on the Plaintiffs' Motion for a Preliminary Injunction that had been scheduled for September 3, 2009. Exhibits QQ, RR, & SS.

On September 1, 2009, Mr. deBorja sent an e-mail reassuring us that FEMA is going to rescind the LFD as stated in FEMA's letter to Judge Marten. Exhibit TT.

On September 3, 2009, Mr. deBorja called me stating that he had "good news." He said that "after extensive internal discussion" FEMA has decided to rescind the LFD as promised and instead of immediately reissuing a new LFD, it is going to provide a 90-day appeal period, including publishing notice in the Federal Register as provided in 42 U.S.C. § 4104. He said that FEMA has not changed its interpretation of the statute but is making a "special exception" in this case. Mr. deBorja volunteered no explanation for FEMA's change of course.

³ Mr. Olson is the County Administrator, not the Chairman of the Board of Commissioners.

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We have raised both substantive and procedural objections to the process FEMA used in this case. The Statement of Facts section of the Memorandum in Support details FEMA's failure to provide notice of the areas to be studied at the commencement of the process. As more fully discussed below, this failure violates 42 U.S.C. § 4107 and 44 C.F.R. Part 66 and is fatal to FEMA's attempts to implement the FIS and the FIRM. A more detailed discussion of the relevant facts will demonstrate that this is the only appropriate course of action.

On March 6, 2007, FEMA conducted a "scoping" meeting in Garden City to discuss its upcoming study as part of FEMA's Map Modernization Program. The City and County each received letters from DWR dated September 28, 2007 and February 25, 2008 that enclosed the minutes of the March 6, 2007 meeting and 8.5" x 11" copies of several maps, all of which were completely illegible. Exhibits K & UU. The contents of the two letters are identical.

In letters from FEMA dated August 24, 2009, FEMA characterized the scoping meeting as a "countywide" meeting. Exhibits HH & II. However, there were only 13⁴ participants in the meeting and only 8 were local, representing the City, the County, and the City of Holcomb. Exhibit K.⁵ The August 24, 2009 letters also state:

The participants, including Finney County and Garden City officials, were asked to review the currently effective FIRM and highlight the areas with existing or historical flooding issues that had not been previously mapped within the SFHA. The Garden City drainage ditches were identified at that meeting as areas subject to flooding but not shown as high-risk areas on the FIRM.

Exhibits HH & II. In addition, the Flood Insurance Study states that the scope and methods for FEMA's study were agreed to by the City and County. Exhibit D.

Legible copies of the maps that were marked at the scoping meeting clearly demonstrate that FEMA's assertions that the Ditches were identified and that there was agreement regarding the scope of the study, are unfounded.

The maps that came with the September 28, 2007 and February 25, 2008 letter were completely illegible. No one looking at these maps would be able to tell whether either Ditch 1 or Ditch 2 had been "identified at that meeting as areas subject to flooding." There was, however, a reference in the minutes to a ditch near the intersection of Highways 50 and 83. We presume that, based on this reference, FEMA assumed that the Ditches had been discussed.

⁴ The Memorandum in Support incorrectly reports that there were only 11 participants. Only 11 people signed the attendance sheet but the minutes indicate that Bob Franke and Rhonda Montgomery were also in attendance.

⁵ The minutes reflect the following individuals attended the March 7, 2007 scoping meeting: Robin Pena, City of Holcomb; Steve Nixon, City of Holcomb; Harold Williams, City of Garden City; Kaleb Kentner, City of Garden City; Chris Newell, AMEC; John Ellerman, Finney County; Dennis Lawlor, AMEC; Vernon Cress, Finney County; Andrew Meade, Garden City/ Finney County; Tom Morey, Kansas Department of Agriculture; Steve Cottrell, Garden City; Bob Franke, FEMA; and Rhonda Montgomery, Kansas Department of Agriculture.

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The February 25, 2008 letters state, in part:

At the Finney County scoping meeting, officials from Finney County and incorporated communities provided information regarding flooding problems and concerns, flood study priorities, and areas of high growth and development. Officials also identified external flood studies and/or any digital data which could be used on the modernized flood insurance rate maps.

Areas of concern to the county and/or incorporated communities were documented in the scoping report as unmet needs.

The enclosed report includes the minutes from the scoping meeting, agenda, sign in sheet and the needs for the community. This includes *all of the flood hazards which will be studied* under the map modernization process as well as unmet needs, which have been documented by both KDA/DWR and FEMA Region VII.

Exhibits K & UU (emphasis added). The minutes state:

Following the PowerPoint presentation, Mr. Lawlor directed the meeting participants to study printed maps showing the current effective extents of the FIRMs and the proposed effective extents for the new DFIRM. *The participants marked on the maps the areas which they had knowledge of existing historical flooding issues, new areas of development and areas currently listed as being in the floodway that should not be.*

Id. (emphasis added).

However, as we pointed out in the Memorandum in Support, there was no discussion at the March 6, 2007 meeting about flood risks or mapping Special Flood Hazard Areas in or around the two Ditches or of adding the Ditches to the study and there was no notice that FEMA, DWR, or AMEC intended to add the Ditches until April 10, 2008. Memorandum in Support, Statement of Facts, ¶¶ 29-36.

Newly acquired and legible copies of the maps that were discussed at the scoping meeting are attached. Exhibit VV. Careful review of these maps shows that "AE" zones are marked in red, "A" zone areas are marked in bold, green or black lines, and "One Square Mile" waterways are shown in yellow. The maps clearly show the Arkansas River from south of Holcomb to the confluence of Ditch 2 as Zone AE. They also designate Ditch 2 as "One Square Mile." If FEMA explained what "One Square Mile" meant, Ditch 2 could have been discussed although the participants have said it was not.

The bottom line is that there was no hint of the designation of Ditch 1 as an area of concern by anyone and no evidence that the Ditch 1 area was discussed at the scoping meeting at all. In fact, the evidence clearly demonstrates that it was not discussed.

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The NFIA specifically directs FEMA to consult with local officials regarding any and all flood activities associated with the identification of flood-prone areas. 42 U.S.C. § 4107. In carrying out its responsibilities regarding “notification to and identification of flood-prone areas” FEMA is required to “establish procedures assuring adequate consultation with the appropriate elected officials of general purpose local governments.” *Id.* Under this section, FEMA must fully inform local officials “*at the commencement of any ... investigation*” of the following information:

- The nature and purpose of the study*
- The areas involved*
- The manner in which the study is to be undertaken*
- The general principles to be applied, and*
- The use to be made of the data obtained.*

Id.; see also, 44 C.F.R. § 66.5(e) (emphasis added).

To fulfill its obligation under the statute, FEMA has promulgated 44 C.F.R. Part 66. FEMA specifically states that the purpose of Part 66 is “to comply with section ... 42 U.S.C. 4107... by establishing procedures ... so that adequate consultation with the community officials shall be assured.” 44 C.F.R. § 66.1(a).⁶

Under this regulation, FEMA is “Specifically” required to request that communities “submit pertinent data concerning flood hazards, flooding experience, plans to avoid potential hazards, estimate of historical and prospective economic impact on the community, and such other appropriate data.” 44 C.F.R. § 66.1(c)(1). FEMA did none of this.

Moreover, FEMA failed to carry out its responsibilities for consultation and coordination set forth in § 66.5 and in 42 U.S.C. 4107 as required by 44 C.F.R. § 66.1(c)(4). Section 66.5 requires that FEMA provide information so that “Local dissemination of the intent and nature of the investigation” can be encouraged, giving interested parties an opportunity to bring relevant data to the attention of the community and to FEMA. 44 C.F.R. § 66.5(b).

FEMA is also required to encourage submission of information concerning the study from the community. 44 C.F.R. § 66.5(c). This did not occur, and in fact, the City and County were specifically told that they could submit data but it may not be considered. Memorandum in Support, Statement of Facts, ¶ 42.

⁶ While 44 CFR § 66.1(a) appears to limit the application of Part 66 to “flood elevation determinations of Zones A1-30, AE, AH, AO and V1-30, and VE” and subsection (b) states that the procedures in this part apply when “base flood elevations are to be determined or modified,” FEMA must acknowledge that these procedures apply to Zone A studies as well since to take a contrary position would put FEMA in direct violation of 42 U.S.C. 4107 which requires FEMA to establish notification procedures for ALL of its studies and investigations. Moreover, it is clear that this was a FIS that fits squarely within the coverage of Part 66 because it designates portions of the Arkansas River as Zone AE.

Page 6

The regulations go on to require:

(e) Before the commencement of an initial Flood Insurance Study, ... *local officials shall be informed* of (1) The date when the study will commence, (2) *the nature and purpose of the study*, (3) *areas involved*, (4) the manner in which the study shall be undertaken, (5) the *general principles to be applied*, and (6) the intended use of the data obtained. *The community shall be informed in writing if any of the six preceding items are or will be changed after this initial meeting and during the course of the ongoing study.*

(f) *The community shall be informed in writing of any intended modification to the community's final flood elevation determinations or the development of new elevations in additional areas of the community as a result of a new study or restudy.* Such information to the community will include the data set forth in paragraph (e) of this section.

44 C.F.R. § 66.5(e) & (f) (emphasis added).

The facts set out above clearly demonstrate that the City and County were not informed *at the commencement* of the study that either of the Ditches were to be added to the flood maps and there is no credible argument that the City and County were told that Ditch 1 would be added.

FEMA did not "specifically" request that the City and County "submit pertinent data concerning flood hazards, flooding experience, plans to avoid potential hazards, estimate of historical and prospective economic impact on the community, and such other appropriate data."

FEMA failed to tell the City and County that the two Ditches were to be included in the study so that "Local dissemination of the intent" to add either or both of them could be given to interested parties thus affording them an opportunity to bring relevant data to FEMA's attention.

If the decision to add the Ditches occurred sometime after the scoping meeting, FEMA failed to inform the City and County in writing that the areas being studied had changed as required by the statute and by 44 C.F.R. § 66.5(e).

FEMA also failed to inform the City and County of the development of new elevations in additional areas of the community as required by 44 C.F.R. § 66.5(f).

The City and County do not contend that FEMA wholly failed to inform the City and County of any of the information that was needed. Instead, we contend, and the record clearly establishes, that FEMA failed to provide the City and the County with the data it needed,

- (1) To fully understand what was going to occur,
- (2) To prepare for the dramatic changes that adding the Ditches would cause,
- (3) To inform its citizens of the economic impact in a timely manner, and
- (4) To allow the City and County to gather information needed to challenge FEMA's inclusion of the Ditches.

Page 7

The failure to provide this vital information not only violates both the letter and the spirit of 42 U.S.C. § 4107 and 44 C.F.R. Part 66, but it also creates substantial prejudice because of the significant economic impact the FIS and the FIRM would have on the community. FEMA clearly understands this prejudice and has a policy that protects communities from this harm by requiring that detailed, rather than approximate methods, be used in developing areas. Memorandum in Support, Statement of Facts, ¶¶ 17-19.

For the reasons set out in the Compliant, in the Memorandum in Support, and in this letter, FEMA is required to set aside the FIS and the FIRM and start the process over in our community.

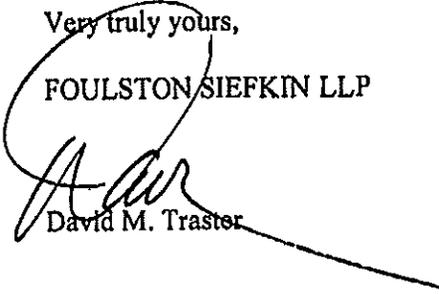
We would like to offer an alternative suggestion that advances both FEMA's goals and ours. We have no objection to the portions of the FIS and the FIRM that deal with the Arkansas River corridor through Finney County. In fact, we support FEMA's efforts to refine the flood hazard areas associated with the River. It is the addition of the two Ditches that is problematic on multiple levels.

Assuming that we could work out the details, our alternative suggestion is that FEMA revise the FIS and the FIRM by deleting the newly designated Zone A Special Flood Hazard Areas associated with the two Ditches. FEMA could issue a new LFD fairly quickly and the City and County would adopt the 60.3(d) ordinances in due course. We would even consider an accelerated adoption of the ordinances so that the protections would be in place for those areas more quickly. This approach would allow FEMA to map Finney County and capture the benefit of the FIS for the River, with a detailed study of the Ditches to be conducted at an appropriate time in the future.

We would appreciate your careful consideration of the concerns set out here.

Very truly yours,

FOULSTON SIEFKIN LLP


David M. Traster

cc: Peter Olson
Matt Allen
Randall D. Grisell
Robin Moore



Federal Emergency Management Agency

Washington, D.C. 20472

September 15, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Larry C. Jones
Chairman, Finney County Board
of Commissioners
311 North Ninth Street
Post Office Box M
Garden City, Kansas 67846

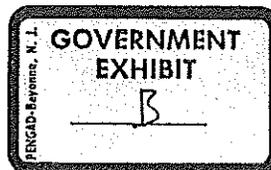
Community: Finney County, Kansas
(Unincorporated Areas)
Community No.: 200099

Dear Mr. Jones:

This letter serves as a formal notification that the final determination for Finney County, Kansas, unincorporated areas, set out in the enclosed March 25, 2009 letter, has been rescinded. The decision was made because of administrative delays in the issuance of the 90-day notice prior to the effective date of the Digital Flood Insurance Rate Map (DFIRM) and Flood Insurance Study (FIS).

As you may be aware, the study of the flood hazards by the Kansas Department of Agriculture was incorporated into the preliminary, countywide DFIRM and FIS report, which were issued on September 23, 2008. Although the March 25, 2009, final determination is hereby rescinded, all engineering data and flood hazard information upon which the determination was made currently remains valid, and remains as it appears on the preliminary DFIRM. However, profiles with flood elevations will be issued under a separate cover to the Chief Executive Officer of the community for newly identified flood hazards and a 90-day appeal period will be initiated. The backup hydraulic models for these newly identified flood hazards can be made available upon request.

The 90-day appeal period is the statutory period, beginning on the date of second publication of the proposed flood elevations in the local newspaper, during which community officials and appropriate aggrieved parties may appeal the flood elevations. An appeal is a formal objection to proposed flood elevations, submitted by a community or appropriate aggrieved party during the 90-day appeal period. Appeals must be based on data that show the proposed flood elevations are scientifically or technically incorrect. A new final determination will be made, and a new Notice of Final Determination will be issued once the appeal period has expired and any appeals submitted during that 90-day appeal period have been resolved.



Larry C. Jones

September 15, 2009

Page 2

If you have any questions regarding this matter, please contact Melissa Janssen, Risk Analysis Branch Chief, FEMA Region VII Office by telephone at (816) 283-7012.

Sincerely,


for Edward L. Connor
Acting Federal Insurance Administrator
National Flood Insurance Program

Enclosure

cc: Mr. Peter Olson, County Administrator, Finney County
Mr. David Traster, Foulston Siefkin LLP
Community Map Repository



Federal Emergency Management Agency
Washington, D.C. 20472

September 16, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Nancy J. Harness
Mayor, City of Garden City
301 North Eighth Street
Post Office Box 499
Garden City, Kansas 67846

Community: City of Garden City,
Finney County, Kansas
Community No.: 205186

Dear Mayor Harness:

This letter serves as a formal notification that the final determination for Finney County, Kansas, and incorporated areas, including the City of Garden City, set out in the enclosed March 25, 2009 letter, has been rescinded.¹ The decision was made because of administrative delays in the issuance of the 90-day notice prior to the effective date of the Digital Flood Insurance Rate Map (DFIRM) and Flood Insurance Study (FIS).

As you may be aware, the study of the flood hazards by the Kansas Department of Agriculture was incorporated into the preliminary, countywide DFIRM and FIS report, which were issued on September 23, 2008. Although the March 25, 2009, final determination is hereby rescinded, all engineering data and flood hazard information upon which the determination was made currently remains valid, and remains as it appears on the preliminary DFIRM. However, profiles with flood elevations for newly identified flood hazards will be issued under a separate cover to the Chief Executive Officer of the community, and a 90-day appeal period will be initiated. The backup hydraulic models for these newly identified flood hazards can be made available upon request.

The 90-day appeal period is the statutory period, beginning on the date of second publication of the proposed flood elevations in the local newspaper, during which community officials and appropriate aggrieved parties may appeal the flood elevations. An appeal is a formal objection to proposed flood elevations, submitted by a community or appropriate aggrieved party during the 90-day appeal period. Appeals must be based on data that show the proposed flood elevations are scientifically or technically incorrect. A new final determination will be made, and a new Notice of Final Determination will be issued once the appeal period has expired and any appeals submitted during that 90-day appeal period have been resolved.

¹ Please be advised that this letter supersedes FEMA's letter of September 15, 2009.

Mayor Nancy J. Harness

Page 2

If you have any questions regarding this matter, please contact Melissa Janssen, Risk Analysis Branch Chief, FEMA Region VII Office by telephone at (816) 283-7012.

Sincerely,



Ar Edward L. Connor
Acting Federal Insurance Administrator
National Flood Insurance Program

Enclosure

cc: Matthew C. Allen, City Manager, City of Garden City
Mr. David Traster, Foulston Siefkin LLP
Community Map Repository



Federal Emergency Management Agency
Washington, D.C. 20472

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

IN REPLY REFER TO:
19P-N

March 25, 2009

The Honorable David Crase
Mayor, City of Garden City
301 North 8th Street
P.O. Box 499
Garden City, Kansas 67846

Community: City of Garden City, Kansas
Community No.: 205186
Map Panels Affected: See FIRM Index

Dear Mayor Crase:

This is to formally notify you of the final flood hazard determination for your community in compliance with Title 44, Chapter I, Part 67, Code of Federal Regulations. On September 3, 1997, the Department of Homeland Security's Federal Emergency Management Agency (FEMA) issued a Flood Insurance Rate Map (FIRM) that identified the Special Flood Hazard Areas (SFHAs) the areas subject to inundation by the base (1-percent-annual-chance) flood in the City of Garden City, Finney County, Kansas. Recently, FEMA completed a re-evaluation of flood hazards in your community. On September 23, 2008, FEMA provided you with Preliminary copies of the Flood Insurance Study (FIS) report and FIRM that identify existing flood hazards in your community.

FEMA has addressed all comments received on the Preliminary copies of the FIS report and FIRM. Accordingly, the FIS report and FIRM for your community will become effective on September 25, 2009. Before the effective date, FEMA will send you final printed copies of the FIS report and FIRM.

Because the FIS for your community has been completed, certain additional requirements must be met under Section 1361 of the National Flood Insurance Act of 1968, as amended, within 6 months from the date of this letter. Prior to September 25, 2009, your community is required, as a condition of continued eligibility in the National Flood Insurance Program (NFIP), to adopt or show evidence of adoption of floodplain management regulations that meet the standards of Paragraph 60.3(d) of the enclosed NFIP regulations (44 CFR 59, etc.). These standards are the minimum requirements and do not supersede any State or local requirements of a more stringent nature.

It must be emphasized that all the standards specified in Paragraph 60.3(d) of the NFIP regulations must be enacted in a legally enforceable document. This includes adoption of the current effective FIS report and FIRM to which the regulations apply and the other modifications made by this map revision. Some of the standards should already have been enacted by your community in order to establish eligibility in the NFIP. Any additional requirements can be met by taking one of the following actions:

1. Amending existing regulations to incorporate any additional requirements of Paragraph 60.3(d);
 2. Adopting all the standards of Paragraph 60.3(d) into one new, comprehensive set of regulations;
- or

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3. Showing evidence that regulations have previously been adopted that meet or exceed the minimum requirements of Paragraph 60.3(d).

Communities that fail to enact the necessary floodplain management regulations will be suspended from participation in the NFIP and subject to the prohibitions contained in Section 202(a) of the Flood Disaster Protection Act of 1973 as amended.

In addition to your community using the FIS report and FIRM to manage development in the floodplain, FEMA will use the FIS report to establish appropriate flood insurance rates. On the effective date of the revised FIRM, actuarial rates for flood insurance will be charged for all new structures and substantial improvements to existing structures located in the identified SFHAs. These rates may be higher if structures are not built in compliance with the floodplain management standards of the NFIP. The actuarial flood insurance rates increase as the lowest elevations (including basement) of new structures decrease in relation to the Base Flood Elevations established for your community. This is an important consideration for new construction because building at a higher elevation can greatly reduce the cost of flood insurance.

To assist your community in maintaining the FIRM, we have enclosed a Summary of Map Actions to document previous Letter of Map Change (LOMC) actions (i.e., Letters of Map Amendment, Letters of Map Revision) that will be superseded when the revised FIRM panels referenced above become effective. Information on LOMCs is presented in the following four categories: (1) LOMCs for which results have been included on the revised FIRM panels; (2) LOMCs for which results could not be shown on the revised FIRM panels because of scale limitations or because the LOMC issued had determined that the lots or structures involved were outside the SFHA as shown on the FIRM; (3) LOMCs for which results have not been included on the revised FIRM panels because the flood hazard information on which the original determinations were based is being superseded by new flood hazard information; and (4) LOMCs issued for multiple lots or structures where the determination for one or more of the lots or structures cannot be revalidated through an administrative process like the LOMCs in Category 2 above. LOMCs in Category 2 will be revalidated through a single letter that reaffirms the validity of a previously issued LOMC; the letter will be sent to your community shortly before the effective date of the revised FIRM and will become effective 1 day after the revised FIRM becomes effective. For the LOMCs listed in Category 4, we will review the data previously submitted for the LOMA or LOMR request and issue a new determination for the affected properties after the revised FIRM becomes effective.

The FIRM and FIS report for your community have been prepared in our countywide format, which means that flood hazard information for all jurisdictions within Finney County has been combined into one FIRM and FIS report. When the FIRM and FIS report are printed and distributed, your community will receive only those panels that present flood hazard information for your community. We will provide complete sets of the FIRM panels to county officials, where they will be available for review by your community.

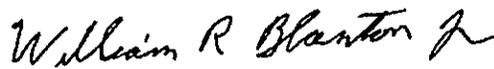
The FIRM panels have been computer-generated. Once the FIRM and FIS report are printed and distributed, the digital files containing the flood hazard data for the entire county can be provided to your community for use in a computer mapping system. These files can be used in conjunction with other thematic data for floodplain management purposes, insurance purchase and rating requirements, and many other planning applications. Copies of the digital files or paper copies of the FIRM panels may be obtained by calling our Map Service Center, toll free, at 1-800-358-9616. In addition, your community

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may be eligible for additional credits under our Community Rating System if you implement your activities using digital mapping files.

If your community is encountering difficulties in enacting the necessary floodplain management measures, we urge you to call the Director, Federal Insurance and Mitigation Division of FEMA in Kansas City, Missouri, at (816) 283-7002 for assistance. If you have any questions concerning mapping issues in general or the enclosed Summary of Map Actions, please call our Map Assistance Center, toll free, at 1-877-FEMA MAP (1-877-336-2627). Additional information and resources your community may find helpful regarding the NFIP and floodplain management, such as *The National Flood Insurance Program Code of Federal Regulations*, *Answers to Questions About the National Flood Insurance Program*, *Frequently Asked Questions Regarding the Effects that Revised Flood Hazards have on Existing Structure*, *Use of Flood Insurance Study (FIS) Data as Available Data*, and *National Flood Insurance Program Elevation Certificate and Instructions*, can be found on our website at <http://www.floodmaps.fema.gov/lfd>. Paper copies of these documents may also be obtained by calling our Map Assistance Center.

Sincerely,



William R. Blanton Jr., CFM, Chief
Engineering Management Branch
Mitigation Directorate

Enclosure:

Final Summary of Map Actions

cc: Community Map Repository
City Administration Center
301 N. 8th Street
Garden City, Kansas 67846

Mr. Kaleb Kentner
Floodplain Administrator
301 North 8th Street
Garden City, KS 67846

U.S. Department of Homeland Security
500 C Street, SW
Washington, DC 20472



FEMA

October 1, 2009

VIA FIRST CLASS MAIL AND E-MAIL

Foulston & Siefkin, LLP
Attn: David Traster, Esq.
Bank of America Tower, Suite 1400
534 South Kansas Avenue
Topeka, Kansas 66603-3436

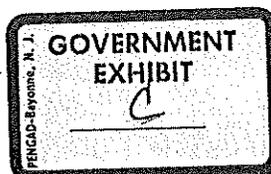
Mr. Traster:

This letter is in response to your letter of September 8, 2009. FEMA appreciates your concerns and the issues you have presented. As you are aware on September 16, 2009, the Letters of Final Determination for Garden City, Holcomb County and Finney County were rescinded. At this time, the prior Flood Insurance Rate Maps remain in effect.

The pending lawsuit was filed in response to your clients' concern that they were not afforded due process because they were not provided with a proper appeal. FEMA rescinded the map revisions due to administrative delays and will afford your clients full appellate rights as part of the process described in the rescission letters. Your clients will have the ability to appeal their concerns to FEMA with the protections provided by 42 U.S.C. § 4104. Once the appeal process commences any lawsuit is either moot or premature. Further, your clients have failed to exhaust the administrative remedies available to them under the appeal process.

FEMA is not required to commence the flood hazard identification process without regard to the procedural activities that were conducted appropriately, and does not intend to do so. The flood mapping process and flood insurance studies are conducted to map flood risks based on the available scientific and technical information. If your client can establish FEMA's map revision was in error, the maps will be modified in accordance with that scientific data.

We respectfully request that you dismiss your case with prejudice. If your client is unhappy with the results of their appeal, they will have the opportunity to file a new lawsuit to establish FEMA's decision was arbitrary and capricious under 42 U.S.C. § 4104.



www.fema.gov

Thank you again for your cooperation.

Sincerely,

Darren S. Wall
Ramoncito DeBorja
Trial Attorneys
Federal Emergency Management Agency
U.S. Department of Homeland Security
409 3rd Street, SW, Suite 206
Washington, D.C. 20472-3800

DeBorja, Ramoncito

From: Wall, Darren [darren.wall@dhs.gov]
Sent: Tuesday, October 06, 2009 8:21 AM
To: Traster, David; DeBorja, Ramoncito
Cc: Moore, Robin (USAKS)
Subject: RE: City of Garden KS, et al. v. W. Craig Fugate (USDC, D. KS 09-1258)

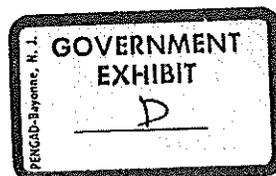
Mr. Traster:

On October 1, 2009, we provided you with a response to your letter. As you are aware, there is no matter in controversy at this time. We respectfully request that you withdraw your complaint. Our answer is due on October 23 and we would like to know your intentions. If you do not intend to dismiss your complaint, we will be left with no choice, but to file a Motion to Dismiss.

I appreciate your attention to this matter.

Sincerely,
DARREN S. WALL
Trial Attorney
Office of Chief Counsel
Federal Emergency Management Agency
Phone: 202-646-4611
Fax: 202-212-4949

This communication was prepared by the Department of Homeland Security, Office of the Chief Counsel and may contain confidential and/or sensitive attorney client privileged, attorney work-product and/or U.S. Government information, and is not for release, review, retransmission, dissemination or use by anyone other than the intended recipient. Please consult the Office of the Chief Counsel before disclosing any information contained herein.



10/16/2009

DeBorja, Ramoncito

From: Traster, David [dtraster@foulston.com]
Sent: Tuesday, October 06, 2009 3:31 PM
To: 'Wall, Darren'; DeBorja, Ramoncito
Cc: Moore, Robin (USAKS); 'Matt Allen'; polson@FinneyCounty.org; 'Randy Grisell'; Kaleb Kentner; 'Tim Hamilton'; 'Steve Cottrell'; Ballinger, Pam
Subject: RE: City of Garden KS, et al. v. W. Craig Fugate (USDC, D. KS 09-1258)

Mr. Wall,

Thank you for your October 1, 2009 letter and for your e-mail sent this morning. I have been thinking about how to respond and planned to write to you today about these matters anyway, so today's e-mail was timely.

As I said in my September 23, 2009 e-mail, I have been thinking about whether our case is moot and a substantive response to my September 8, 2009 letter is important for my analysis. I had been hopeful that I would be able to determine how to proceed once I had your views on the procedural problems created at the original scoping meeting. Unfortunately, your October 1, 2009 "response" did not address either the facts or the legal issues raised in my September 8, 2009 letter.

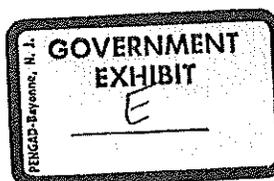
I was particularly confused by the first sentence in the third paragraph of your letter. I do not understand what you meant by: "FEMA is not required to commence the flood hazard identification process without regard to the procedural activities that were conducted appropriately, and does not intend to do so."

While your letter fails to address the substance of the issues raised, I do read it to mean that FEMA is planning to proceed with its announced intention to establish a 90-day appeal period after which it will issue a new LFD. And, FEMA is not willing to begin the process over, nor will it consider our suggestion that a new LFD be issued for the Arkansas River corridor leaving the ditches for another day. I also take your letter to mean that FEMA remains unwilling to meet with representatives of the City and County to discuss these matters.

The failure to provide a substantive response leaves us with a disagreement about whether there is a live controversy and we do not currently plan to dismiss the lawsuit.

Dave

David M. Traster
Foulston Siefkin LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, Kansas 67206-4466



10/16/2009

Phone: 316-291-9725
Cell: 316-210-8338
Fax: 866-347-3138
E-mail: dtraster@foulston.com
Web Site: www.foulston.com
Secretary: Pam Ballinger (316-291-9746)

From: Wall, Darren [mailto:darren.wall@dhs.gov]
Sent: Tuesday, October 06, 2009 7:21 AM
To: Traster, David; DeBorja, Ramoncito
Cc: Moore, Robin (USAKS)
Subject: RE: City of Garden KS, et al. v. W. Craig Fugate (USDC, D. KS 09-1258)

Mr. Traster:

On October 1, 2009, we provided you with a response to your letter. As you are aware, there is no matter in controversy at this time. We respectfully request that you withdraw your complaint. Our answer is due on October 23 and we would like to know your intentions. If you do not intend to dismiss your complaint, we will be left with no choice, but to file a Motion to Dismiss.

I appreciate your attention to this matter.

Sincerely,
DARREN S. WALL
Trial Attorney
Office of Chief Counsel
Federal Emergency Management Agency
Phone: 202-646-4611
Fax: 202-212-4949

This communication was prepared by the Department of Homeland Security, Office of the Chief Counsel and may contain confidential and/or sensitive attorney client privileged, attorney work-product and/or U.S. Government information, and is not for release, review, retransmission, dissemination or use by anyone other than the intended recipient. Please consult the Office of the Chief Counsel before disclosing any information contained herein.

Ballinger, Pam

From: KSD_CMECF@ksd.uscourts.gov
Sent: Monday, October 26, 2009 10:47 AM
To: KSD_CMECF_Security@ksd.uscourts.gov
Subject: Activity in Case 6:09-cv-01258-JTM-DWB City of Garden City, Kansas et al v. Federal Emergency Management Agency Memorandum in Support of Motion

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of Kansas

Notice of Electronic Filing

The following transaction was entered by Moore, Robin on 10/26/2009 at 10:46 AM CDT and filed on 10/26/2009

Case Name: City of Garden City, Kansas et al v. Federal Emergency Management Agency
Case Number: 6:09-cv-01258-JTM-DWB
Filer: Federal Emergency Management Agency
Document Number: 8

Docket Text:

MEMORANDUM IN SUPPORT of [7] MOTION to Dismiss *Plaintiffs' Complaint and Motion for Preliminary Injunction* by Defendant Federal Emergency Management Agency (Attachments: # (1) Exhibits A thru E)(Moore, Robin)

6:09-cv-01258-JTM-DWB Notice has been electronically mailed to:

David M. Traster dtraster@foulston.com, pballinger@foulston.com

Randall D. Grisell randyg@gcnet.com

Robin Barkett Moore robin.moore@usdoj.gov, debra.austin2@usdoj.gov, usaks.ecf@usdoj.gov

6:09-cv-01258-JTM-DWB Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description:Main Document
Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1028492125 [Date=10/26/2009] [FileNumber=1898046-0] [8f661945f0f8704908ab35e22537460136e774cf3743a8a2f9ff07776cf5c784b57c5fd82d0f0ca3cddb9ba34b4557ac83dadaf1ada4b717dbf1b520592f2cab]]

Document description: Exhibits A thru E

Original filename:n/a

Electronic document Stamp:

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