

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

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-WEB-DWB

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

**DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO  
DISMISS PLAINTIFFS' COMPLAINT AND MOTION FOR  
PRELIMINARY INJUNCTION**

Defendants, W. Craig Fugate and the Federal Emergency Management Agency ("FEMA"), respectfully submit this Reply Memorandum in Support of its Motion To Dismiss Plaintiffs' Complaint and Motion for Preliminary Injunction. In FEMA's previous Memorandum, FEMA explained that the Court should dismiss Plaintiffs' Complaint and Motion because: 1) FEMA rescinded the revised Digital Flood Insurance Rate Map (DFIRM) and Flood Insurance Study (FIS) report for Finney County and, therefore, there is no case or controversy before this Court; 2) FEMA agreed to initiate an appeal period before any prospective revision to the Flood Insurance Rate Map (FIRM) becomes effective; and 3) Plaintiffs have not exhausted their administrative remedy because the appeal period has not yet started.

In response to FEMA's Memorandum in Support of its Motion to Dismiss, Plaintiffs argue that: 1) the Court should not consider FEMA's "post-Complaint" documents because they are prejudicial; 2) this case is not moot because FEMA is still relying on the underlying FIS report and FIRM for Finney County; 3) FEMA did not follow procedures when conducting the FIS and FIRM by not properly consulting with appropriate elected officials; 4) the 90-day statutory appeal period is insufficient and the entire process should start from the beginning; and 5) Plaintiffs have exhausted their administrative remedies.

Most of the Plaintiffs' arguments were refuted in FEMA's earlier motion and will not be repeated here. Rather, this Reply focuses on the Plaintiffs' arguments concerning preclusion of any post-Complaint documents and mootness.

### **Arguments and Authorities**

#### **I. Post Complaint Documents Are Properly Before the Court**

Plaintiffs' primary argument is that the Court should not consider, for purposes of FEMA's Fed. R. Civ. P. 12(b)(6) motion, any evidence or documents submitted after they filed their Complaint. Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss ("Plaintiffs' Opposition"), Doc. 11 at pp. 6-7. Plaintiffs argue that to allow the submission of such documentation will prejudice Plaintiffs and "cause substantial harm." *Id.* at 7. Plaintiffs' are seeking to preclude the submission of documentation evidencing that FEMA did in fact provide Plaintiffs with the specific relief sought in their Complaint which is the central point of FEMA's Motion to Dismiss. As FEMA explained in its opening Memorandum, FEMA rescinded the revised DFIRM and FIS report and agreed to initiate an appeal period before any revision to the Finney County FIRM becomes effective. FEMA's Motion to Dismiss, Doc. 8 at pp. 7, 10, 11. Thus, any aggrieved party that is dissatisfied with FEMA's determination (once it

is made) regarding the proposed FIRM and FIS report has the opportunity to appeal and assert its right to judicial review set forth in 42 U.S.C. § 4104(g). *Id.*

As FEMA previously explained, a plaintiff must possess a personal interest in the outcome of a case **at all stages of the proceedings** for there to be an actual controversy. *Kansas Judicial Review v. Stout*, 562 F.3d 1240, 1245-46 (10<sup>th</sup> Cir. 2009). 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.” *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10<sup>th</sup> Cir. 2000) (quotation and citation 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 (10<sup>th</sup> Cir. 2004).

There is no live controversy in this case because FEMA provided Plaintiffs with the relief requested by rescinding the revised DFIRM and FIS report for Finney County and agreeing to initiate an appeal period before any revision to the FIRM becomes effective. Indeed, there is no effective relief that this Court can grant Plaintiffs because they have the opportunity to appeal any change FEMA makes to the Finney County FIRM. If Plaintiffs are still dissatisfied with FEMA’s determination, they can seek judicial review pursuant to 42 U.S.C. § 4104(g). Plaintiffs understand that there is no further cause of action in this case and their effort to withhold any post-Complaint documentation showing that FEMA provided them with the relief requested is simply a desperate attempt to preclude the Court from having access to all documentation relevant to the dispute, and to prevent the dismissal of their Complaint. No amount of legal maneuvering, however, can overcome the fact that this case is moot because Plaintiffs received all of the relief sought in the Complaint.

## **II. FEMA's Alleged Procedural Defects Do Not Create a Live Controversy**

Plaintiffs next claim that FEMA's failure to follow National Flood Insurance Act ("NFIA") requirements shows that there is a live controversy because it did not fully inform local officials at the commencement of the investigation regarding: 1) the nature of the study; 2) areas covered by the study; 3) manner in which the study will be undertaken; 4) general principles to be applied; and 4) use of data obtained. Plaintiffs' Opposition, Doc. 11 at p. 8. According to Plaintiffs, because the underlying FIS report and FIRM were procedurally defective, FEMA cannot be permitted to rely on it and the entire FIS and FIRM process should start from the beginning. *Id.* at pp. 9, 13.

Re-initiating the FIS and FIRM process is not a remedy available under 42 U.S.C. § 4104. Indeed, the only remedy available to Plaintiffs or any aggrieved party, if dissatisfied with FEMA's flood elevation determination, is to initiate an appeal under 42 U.S.C. § 4104 and 44 C.F.R. Part 67. Plaintiffs have the opportunity to submit "technical or scientific data . . . that tend to negate or contradict the information upon which [the] proposed determination is based." 42 U.S.C. § 4104(e). If Plaintiffs truly believe that FEMA's FIS report and FIRM for Finney County are flawed, the appeal process is their opportunity to demonstrate to FEMA that its flood elevation determination is incorrect by submitting appropriate technical or scientific data. If after the administrative appeal Plaintiffs remain dissatisfied they can seek judicial review if they are still dissatisfied with FEMA's appeal decision. Plaintiffs cannot require FEMA to re-do the entire process because of an alleged procedural defect.

Assuming, *arguendo*, that Plaintiffs could show a procedural error and demonstrate a legal basis to require FEMA to re-initiate the technical studies, the case law shows that this is not the appropriate circumstance to set aside FEMA's proceedings to date. In *Columbia Venture*

*LLC v. South Carolina Wildlife Federation*, the plaintiff argued that FEMA's failure to timely publish its proposed flood elevation determination in the Federal Register pursuant to 42 U.S.C. § 4104(a) was a procedural defect that warranted nullification of the Agency's action. *Columbia Venture LLC v. South Carolina Wildlife Federation*, 562 F.3d 290 (4<sup>th</sup> Cir. 2009). The Fourth Circuit held that the procedural defect (late Federal Register publication) was harmless error that did not prejudice plaintiff because the plaintiff was "deeply involved in the administrative process from the beginning, received actual knowledge of each development, had ample opportunity to be heard, and submitted voluminous data challenging the technical and scientific underpinnings of FEMA's conclusions." *Id.* at 294-295. In this case, Plaintiffs cannot argue that they have been prejudiced by FEMA's alleged failure in not fully informing local officials of the FIS. Indeed, Plaintiffs will have the opportunity to be heard and submit technical or scientific data to rebut the current FIS report and FIRM.

### **III. Plaintiffs' Have Still Failed to Exhaust Their Administrative Remedies**

Finally, Plaintiffs claim that they exhausted all administrative remedies available to them prior filing their Complaint. Plaintiffs' Opposition, Doc. 11 at p. 14. This claim similarly has no merit because it completely disregards FEMA's subsequent actions to rescind the Finney County FIS report and FIRM and initiate a prospective appeal period for any change FEMA makes to the base flood elevation. Plaintiffs will have an opportunity to appeal FEMA's flood elevation determination and once that appeal is decided, Plaintiffs have an opportunity to seek judicial review if they are still dissatisfied with the result. *See* 42 U.S.C. § 4104(g). Accordingly, Plaintiffs fail to show how they have exhausted their administrative remedies. Indeed, FEMA has yet to initiate the appeal period.

**Conclusion**

For the foregoing reasons as well as those set forth in FEMA's memoranda in support of its earlier motion, the Court should dismiss plaintiffs' Complaint and Motion for Preliminary Injunction because this case is moot and Plaintiffs have failed to exhaust their administrative remedies.<sup>1</sup>

Respectfully Submitted,

LANNY D. WELCH  
UNITED STATES ATTORNEY

**s/Robin B. Moore**  
ROBIN B. MOORE  
ASSISTANT UNITED STATES ATTORNEY  
Office of the United States Attorney  
1200 Epic Center, 301 North Main  
Wichita, KS 67202  
316-269-6481  
316-269-6484 (FAX)  
robin.moore@usdoj.gov  
Attorney for the Federal Defendants

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Counsel for Federal Defendant does not request oral argument as the briefs adequately present the facts and legal arguments. However, if the Court finds that oral argument would be of assistance, Federal Defendant reserves the right to participate in oral argument.

**CERTIFICATE OF MAILING**

I hereby certify that on December 24<sup>th</sup>, 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:

David M. Traster  
Foulston Siefken LLP  
1551 N. Waterman Parkway, Suite 100  
Wichita, KS 67206-4466  
Attorneys for Plaintiff

Randall D. Grisell  
Doering & Grisell, P.A.  
124 Grant  
Garden City, KS 67846  
Attorneys for Plaintiff

s/Robin B. Moore  
ROBIN B. MOORE  
Assistant U.S. Attorney

**Ballinger, Pam**

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U.S. District Court

DISTRICT OF KANSAS

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David M. Traster [dtraster@foulston.com](mailto:dtraster@foulston.com), [pballinger@foulston.com](mailto:pballinger@foulston.com)

Randall D. Grisell [randyg@genet.com](mailto:randyg@genet.com)

Robin Barkett Moore [robin.moore@usdoj.gov](mailto:robin.moore@usdoj.gov), [debra.austin2@usdoj.gov](mailto:debra.austin2@usdoj.gov), [usaks.ecfwicciv1@usdoj.gov](mailto:usaks.ecfwicciv1@usdoj.gov)

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