

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Electronically filed on: July 26, 2022

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| _____ |) | |
| PENDARIES VILLAGE COMMUNITY |) | |
| ASSOCIATION, INC. and PENDARIES |) | |
| VILLAGE MUTUAL DOMESTIC WATER |) | |
| CONSUMERS ASSOCIATION |) | |
| |) | |
| Plaintiffs, |) | No. <u>22-814 L</u> |
| v. |) | |
| |) | |
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMPLAINT FOR JUST COMPENSATION

Plaintiffs, the Pendaries Village Community Association, Inc., and the Pendaries Village Mutual Domestic Water Consumers Association, bring this action against the United States for taking their properties without just compensation. On April 6, 2022, the United States Forest Service initiated a prescribed burn in the Las Dispensas area of the Santa Fe National Forest at a time and under circumstances in which the direct, natural, and foreseeable consequence of the Government’s action was that the prescribed burn would become an uncontrollable wildfire that burned, damaged, and destroyed Plaintiffs’ properties. This wildfire, known as the Hermits Peak and Calf’s Creek Wildfire, became the most destructive wildfire in New Mexico’s history—and it is still wreaking havoc in the Santa Fe National Forest area of northern New Mexico. The Pendaries Village Community Association, Inc., where Plaintiffs’ buildings, infrastructure, golf course, and other properties are located, lay in direct line of sight of the April 6, 2022 controlled

burn, and the taking of Plaintiffs' property was the inevitable result of the Government's actions on that day.

PARTIES

1. Pendaries Village Community Association, Inc. (Pendaries Village) is a nonprofit corporation registered in the state of New Mexico. The Association operates a homeowners association that had a golf course, resort lodge, golf shop, restaurant, bar, and snack bar. There are almost 300 homes on the property with part-time and full-time residents.

2. Pendaries Village Mutual Domestic Water Consumers Association is a nonprofit corporation registered in the state of New Mexico. The Pendaries Village Mutual Domestic Water Consumers Association maintains and operates a water system to supply and distribute water to its users, who are located in Pendaries Village.

3. Defendant, the United States of America, is a republic formed under the Constitution of the United States, exercising the powers granted by the people of the United States subject to prescribed limitations, including the requirements of the Fifth Amendment that private property not be taken for public use without just compensation.

JURISDICTION

4. This Court has jurisdiction over these claims under 28 U.S.C. § 1491 (the Tucker Act) as a "claim against the United States founded either upon the Constitution,

or any Act of Congress or any regulation of any executive department or upon any express or implied contract with the United States.”¹

STATEMENT OF FACTS

The Pendaries Village community

5. Pendaries Village is a planned community of homes situated in the Santa Fe National Forest north of Hermit’s Peak in northern New Mexico.

6. A mountain community and golf resort, prior to the Hermit’s Peak wildfire Pendaries Village boasted almost 300 homes, a beautiful 18-hole golf course, a resort lodge with cabin rooms, a fully stocked fishing pond, disc golf courses, and beautiful views and locations for hiking, biking, and stargazing. The golf course hosted several Professional Golfers’ Association of America events, including the Sun Country Senior Section Championship that was scheduled for the summer of 2022. The homes, resort, and golf course provided mountain views, secluded woodland settings, and fields of wildflowers. In addition, the community and resort offered access to hiking trails in the Santa Fe National Forest. Visitors and residents enjoyed outdoor concerts, art shows, farmer’s markets, and other community and holiday events every year.

Gallinas Watershed and Santa Fe National Forest

7. Established in 1915, the Santa Fe National Forest in northern New Mexico covers 1,558,452 acres, including all or portions of Rio Arriba, San Miguel, Sandoval, Santa Fe, Mora, and Los Alamos counties.

¹ 28 U.S.C. § 1491.

8. The Santa Fe National Forest has meadows, conifer and ponderosa forests, and a dormant volcano. Four designated wilderness areas comprise more than 300,000 acres: the Pecos Wilderness, the San Pedro Parks Wilderness, the Chama River Canyon Wilderness, and the Dome Wilderness. The Santa Fe National Forest is home to three wild and scenic rivers protected under the Wild and Scenic River Act, the Rio Chama, Pecos, and East Fork of the Jemez. The Forest is also home to the only national recreation area in the Forest Service Southwestern Region. National recreation areas provide recreational opportunities for biking, hiking, camping, boating, fishing, and horseback riding in places with natural and scenic resources. There are also two Scenic and Historic Byways within the Forest, which contain roadways of unique historic, cultural, or scenic significance.

9. Within the Santa Fe National Forest lies the Gallinas Watershed, an 84-square-mile area composed of national, private, and public lands.² The National Forest System Lands comprise most of the Gallinas Watershed, with 51 out of the 84 square miles. The area contains ponderosa pine forests, mixed conifer forests, spruce-fir forests, and other aspen.³

² U.S. Forest Service, *Gallinas-Las Dispensas Prescribed Fire Declared Wildfire Review from the Santa Fe National Forest, Southwestern Region* (April 2022), available at https://sourcenm.com/wp-content/uploads/2022/06/Las-Dispensas-Review_Final_6_19_22-508.pdf (hereinafter “*Prescribed Fire Review*”); see also U.S. Forest Service, *Environmental Assessment for the Gallinas Municipal Watershed Wildland-Urban Interface Project* (May 2022), available at <https://sourcenm.com/wp-content/uploads/2022/05/gallinasEA-1.pdf> (hereinafter “*Environmental Assessment*”).

³ *Prescribed Fire Review* at 7.

10. The Gallinas Watershed contains the Gallinas Creek, which provides water to about 17,000 people in Las Vegas, New Mexico. The Gallinas Creek also feeds the Peterson, Bradner, and Storrie Lake reservoirs.

The Forest Service adopts its controlled burn policy

11. The Forest Service has had in place fire suppression measures since the mid-1920s, which have changed over time. Originally, the Forest Service's policy was to attack fires aggressively. The Forest Service's policy reflected the belief that attacking fires aggressively would limit and/or stop the spread and minimize costs. In 1926, the Forest Service adopted a goal of controlling all fires at 10 acres or fewer. The Forest Service modified this policy in 1935 by adopting the "10 a.m." policy, which required that, if a fire could not be controlled after a first attempt, full firefighting resources would be brought to bear to extinguish the fire by 10 a.m. the next day.

12. By the 1970s, as the Forest Service's fire suppression and pre-suppression costs rapidly rose, the Forest Service concluded that land management and fire protection were complementary and that fire suppression under the "10 a.m." policy was no longer feasible. Instead, the Forest Service began to focus on fire management and directed fire managers to minimize costs while ensuring that land and resource objectives were also met.

13. By focusing on effective fire suppression for much of the 20th century, the Forest Service (and other federal agencies) helped to limit the number of wildfires. Ironically, however, limiting the number of wildfires means that wildfires today are more severe. With fewer fires, heavily forested areas, such as the Santa Fe National Forest,

thrive and the trees shed excess seedlings and brush. The accumulation of excess vegetation can lead to a dangerous accumulation of fuels—leading to more severe fires.

14. As an element of its current fire management policy, the Forest Service now uses prescribed burns as a forest management tool. A prescribed burn is a fire set intentionally to maintain and restore the health of the forest and remove hazardous fuel to avoid larger fires.

The Forest Service long ago foresaw a high risk of fire in the Gallinas Watershed Area

15. As early as 2001, the Forest Service identified the Gallinas Watershed area of the Santa Fe National Forest, where Pendaries Village is located, as a community at risk for wildfires due to the Forest Service’s “management” of the Forest’s fuel load. In a 2004 Environmental Assessment, the Forest Service acknowledged the need for a program to “reduce the potential for large-scale, high-intensity crown fire initiation and spread in the Gallinas Municipal Watershed.”⁴

16. To reduce the potential for wildfire in the Gallinas Watershed Area, the Forest Service then adopted a plan to thin and prescribe burn 8,300 acres of the Watershed (the Gallinas Prescribed Fire Project Area).⁵ The Forest Service divided the Gallinas Watershed Prescribed Burn Project area into 12 prescribed fire units. One of these units, the Las Dispensas Fire Unit, consisting of 1,273 acres, is where the April 6

⁴ *Environmental Assessment*, supra note 1 at 1.

⁵ *Prescribed Fire Review*, supra note 1 at 7.

fire started as a prescribed (controlled) burn that quickly escaped the Forest Service's control.

17. The current Hermits Peak fire is not the first in this area that has escaped a purported Forest Service controlled burn. In October 2017, the very first prescribed fire the Forest Service set in the Gallinas Prescribed Fire Project Area got away from them and was declared a wildfire in January 2018. Fortunately, the Forest Service brought this fire under control without damage to private property.

18. In 2019, in reaction to the wildfire resulting from its first controlled burn, the Forest Service created the Gallinas Watershed Prescribed Fire Plan, which prescribes the conditions under which controlled burns may be set. The Burn Boss and District Ranger approved this plan on January 10, 2020, and then reviewed and reapproved it on October 22, 2021. (A Burn Boss is responsible for supervising a prescribed fire and writing prescribed fire plans, obtaining smoke clearance and weather forecasts, and obtaining all qualified personnel and equipment needed to conduct and patrol the area.)

The Forest Service starts the Las Dispensas Fire, which gets out of hand

19. In the years leading up to April 6, 2022—the day the Forest Service started the Las Dispensas prescribed burn—the area had suffered a significant decrease in annual precipitation.⁶ On the day the Forest Service lit the prescribed fire, the area's weather condition was identified as an “extreme drought.”⁷

⁶ *Id.* at 9.

⁷ *Id.* at 9.

20. In the fall and winter of 2021-2022, not only were the precipitation amounts below normal, but the snowpack was compressed and melted off much earlier.⁸ The National Integrated Drought Information System classified this as a snow drought.⁹

21. The Forest Service planned to initiate a prescribed burn in the Las Dispensas area sometime in the spring of 2022. Initially, the burn plan set a date of March 24, 2022. Wind speeds were determined to be too high that day, however, and woody fuel moistures were determined to be too wet, so the Forest Service postponed the fire.¹⁰ On March 24, 2022, the Forest Service announced that the prescribed burn would start sometime between April 1 and April 30, 2022.

22. On April 6, 2022, at approximately 11 a.m., the Burn Boss gave the go-ahead, and Forest Service personnel started the prescribed fire. By 4:30 that afternoon, the fire was declared a wildfire.

23. The Hermit's Peak Wildfire has devastated not only the area of the prescribed fire, but also areas outside of the originally prescribed burn, including the Pendaries Village community.

24. In the months after the fire, the Forest Service investigated the Hermits Peak Wildfire and reviewed the Prescribed Fire Plan for the April 6, 2022 prescribed burn. The Forest Service released its report, which identifies significant flaws in the

⁸ *Id.* at 10.

⁹ *Id.*

¹⁰ *Id.* at 14.

prescribed fire plan, the evaluation of environmental factors, and the implementation of the plan.

25. The Forest Service's report also identifies actions and conditions on April 6, 2022 that, had the burn boss properly considered by them, would have led to the conclusion that initiating the prescribed burn that day would lead directly, naturally, and foreseeably to the physical damage and destruction of Plaintiffs' properties in Pendaries Village.

26. For example, the Forest Service report states that the humidity levels were significantly below the minimum requirements for initiating a prescribed burn in this area.¹¹ Further, it found that the Burn Boss, when the humidity levels were significantly below the minimum requirements, did not request weather observations to be increased from hourly to half-hourly.¹²

27. The report also states that, under existing conditions, the burn crew should have anticipated the variable wind directions and velocities that whipped the prescribed burn into an uncontrolled wildfire.¹³

28. The report also states that the Forest Service personnel neither recognized nor mitigated the high potential for escape and did not cease ignitions or suppress the prescribed fire after clear indications of high fire intensity.¹⁴ The report also found that

¹¹ *Id.* at 37.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 30 and 39.

the Forest Service did not adequately provide suppression resources and underestimated the fire potential of the prescribed burn.¹⁵

29. The Forest Service report recognized and admitted that its actions directly, naturally, and foreseeably caused the Hermit's Peak wildfire in its statement of lessons learned in its April 2022 report. The Forest Service stated that it learned to "[be] aware[] of wind adjustment factors in complex terrain,"¹⁶ "[e]nsure weather observation devices follow calibration standards and are performed by trained individuals,"¹⁷ and recognize and acknowledge "long-term drought and climate factors versus short-term weather events...[which] could have led to more favorable outcomes."¹⁸ The findings and conclusions in its lessons learned show that its actions were directly responsible for and caused the prescribed burn growing into the Hermits Peak fire.¹⁹

Damage and Destruction of Pendaries Property

30. The Hermit's Creek/Calf Canyon wildfire swept through Pendaries Village, destroying and damaging millions of dollars' worth of Pendaries Association's property, including:

- The fire burned down and completely destroyed the Pendaries Lodge, restaurant, and offices;

¹⁵ *Id.* at 39.

¹⁶ *Id.* at 38.

¹⁷ *Id.*

¹⁸ *Id.* at 39.

¹⁹ *See generally id.* 37-40.

- The fire devastated the Pendaries Golf Course, singeing or destroying trees and landscaping, destroying the irrigation system and water storage tanks. Lacking irrigation, the Greens and fairways have died; they were also badly damaged by the Government’s firefighting vehicles that used the golf course as a staging area and access point for its fire suppression activities;
- The fire irreparably damaged the Pendaries water storage tanks and water distribution system, depriving residents of potable water;
- The fire and the Government’s firefighting vehicles damaged and destroyed many miles of Pendaries roads, many of which are now impassable and most of which require major repairs to provide access to Pendaries Village residents;
- The fire burned, damaged, and destroyed the trees on unsold lots owned by the Association, severely limiting their usability as homesites;
- In addition, the Association continues to suffer new damage to its property from the fire, including smoke, ash, and sediment, and the prospect of flooding and mudslides now and into the future.

CLAIM FOR RELIEF

Taking of Private Property Without Just Compensation

31. Plaintiffs reallege and incorporate all the preceding allegations of this Complaint, and further allege as follows.

32. The Fifth Amendment to the Constitution of the United States provides “nor shall private property be taken for public use without just compensation.” The Fifth

Amendment thus entitles the owner to just compensation when the United States takes property for public use.

33. At all material times, Plaintiffs were the owners of property rights compensable under the Fifth Amendment to the United States Constitution. The direct, natural, and foreseeable result of the Government's actions on April 6, 2022 as herein alleged was the taking of Plaintiffs' property. And the United States has not paid nor offered to pay Plaintiffs any just compensation for the property it has taken.

34. As an additional direct, natural, and foreseeable result of the Forest Service's taking of Plaintiffs' property without just compensation, Plaintiffs have had to retain the services of counsel to prosecute this action, incurring attorney's fees, expert witness fees, and costs and expenses of litigation which Plaintiffs are entitled to recover against the United States under the provisions of the Uniform Relocation Act.

RELIEF REQUESTED

Plaintiffs therefore request relief as follows:

1. A money judgment for the just compensation due Plaintiffs under the Fifth Amendment, including the fair market value of all property rights taken, together with interest from the date of taking until paid;
2. Reasonable attorneys' fees for bringing and prosecuting this action;
3. The expenses of appraisers and other expert witnesses, together with all other costs and expenses reasonably required to prosecute this action;
4. Costs of suit; and,
5. Any other or further relief as the Court may deem just.

Respectfully submitted,

s/ Roger J. Marzulla
Roger J. Marzulla
Nancie G. Marzulla
Marzulla Law, LLC
1150 Connecticut Avenue, NW
Suite 1050
Washington, DC 20036
(202) 822-6760
roger@marzulla.com
nancie@marzulla.com

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Counsel for the Plaintiffs

Of Counsel

Fred Hagans
Hagans Montgomery Hagans
3200 Travis 4th Floor
Houston, TX 77006
713-222-2700
FHagans@hagans.law