



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 4, 2023

CBCA 7450-FEMA

In the Matter of LARIMER COUNTY, COLORADO

Lori R. Hodges, Director of Office of Emergency Management, Larimer County, Colorado, Johnstown, CO, appearing for Applicant; and Wendy Huff Ellard and Erin Greten, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Jackson, MS, counsel for Applicant.

Michael Haney, State Public Assistance Officer, Division of Homeland Security and Emergency Management, Colorado Department of Public Safety, Centennial, CO; and Danielle Lewis, Ingrid C. Barrier, and Jennifer H. Hunt, State of Colorado Department of Law, Office of the Attorney General, Colorado Division of Homeland Security and Emergency Management, Denver, CO, appearing for Grantee.

Christiana Cooley, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **RUSSELL**, **GOODMAN**, and **O'ROURKE**.

RUSSELL, Board Judge, writing for the panel.

The applicant, Larimer County, Colorado (the County), seeks arbitration of the Federal Emergency Management Agency's (FEMA's) denial of the County's request for public assistance (PA) funding for private property debris removal (PPDR) on twenty-four roads.

The panel decides this matter under its authority set forth in 42 U.S.C. § 5189a(d) (2018). For the foregoing reasons, we conclude that, under the Stafford Act, the County's

first appeal request was timely and, additionally, that the County has established entitlement to PA funding for its PPDR activities.

Background

The Cameron Peak Fire burned in Colorado from September 6 to November 5, 2020. The fire caused significant damage, leaving hazardous dead or dying trees on private rights of way and properties in the County. As a result of the fire, the President declared a major disaster in Colorado (FEMA-DR-4581-CO).

Larimer County hired an arborist to assess all trees along public and private roadways in the County. Request for Arbitration in the Matter of Larimer County, Colorado, Exhibit 9. The arborist expressly limited his review to only those trees that were directly impacted by the fire with the objective of saving as many as possible. *Id.* Using specified criteria, including the distance of a tree from the roadway, the arborist identified trees that were most at risk of falling and, thus, posing a public safety hazard. *Id.* Hazardous trees were identified based on structural weakness due to burn severity, soil instability, weakened root systems, wind impacts, and the proximity of the trees to roadways traveled by the public. *Id.*

On June 3, 2021, Larimer County submitted its initial request for PA funding for PPDR and, on June 8, 2021, provided additional justification to support its request. On August 21, 2021, FEMA partially approved the County's request for PPDR concluding that only four of the twenty-eight private roads included in the County's request met FEMA's criteria of having hazardous trees along the roadways, the removal of which was in the public interest. FEMA concluded that the removal of hazardous trees along the other private road segments in the County's request did not serve the public interests because the roads were restricted by locks or gates, offered only informal access to public roads, or did not offer through-travel to public roads. County Exhibit 2.3.

On September 8, 2021, the County provided additional information to support its request for PA funding on roads in two areas with gates. County Exhibit 3. The County explained that the Monument Gulch gate is owned by the United States Forest Service (USFS), and, therefore, this gate should not be used as a basis for denial. *Id.* Additionally, the County noted that the presence of a gate does not necessarily preclude PPDR funding when it can be shown that debris removal is in the public interest. *Id.* The County provided a map showing that Monument Gulch neighborhoods lead to USFS roads and another public road that are used frequently by USFS personnel and emergency services personnel for emergency rescues of members of the public that access public national lands. *Id.* The County also challenged FEMA's denial of funds for the Crystal Mountain area, arguing that public roads are accessible from this area and that, like the Monument Gulch area, USFS and emergency services personnel use Crystal Mountain for emergency services. *Id.*

On November 8, 2021, FEMA issued a determination memorandum denying the County's PA request, asserting that the debris removal was not in the public's interest. FEMA concluded that, contrary to the County's assertion, the twenty-four roads at issue do not provide public access to USFS roads or trailways, nor do the roads offer through-travel to other public roads. County Exhibit 2.1. FEMA also noted that certain areas had private property or private road signs. *Id.*

On January 7, 2022, the County submitted its appeal to the recipient, the Colorado Division of Homeland Security and Emergency Management (DHSEM). Although the County's appeal to DHSEM was timely submitted under FEMA's regulations, FEMA nevertheless denied the County's appeal as untimely because DHSEM submitted the County's appeal to FEMA on March 9, 2022, one day late. According to FEMA, this date was outside the 120-calendar-day time frame required by FEMA's regulations for recipients to submit first appeals on an applicant's behalf to FEMA. 44 CFR 206.206 (2021). FEMA thus concluded that its first appeal decision became the final agency determination. *Id.* 206.206(a), (b)(1)(ii)(A).

In this arbitration, FEMA moves to dismiss the arbitration as untimely or, alternatively, asks the panel to uphold its determination that PPDR was not in the public interest. If the panel decides in favor of the County on the PPDR issue, FEMA asks that the panel return this matter to FEMA to determine the reasonable costs incurred by the County for the debris removal.

The County asks the panel to issue a decision in its favor on both the timeliness issue and on the merits. As for the former, the County asks that the panel find its first appeal timely or, alternatively, toll the limitations period. Regarding the merits, in its request for arbitration and at the hearing, the County argued that debris removal measures on the privately owned roads were necessary to allow safe access for the public including emergency services personnel.

The County produced documents providing details on the roads for which it seeks PA funding, including the number of hazardous trees along each roadway and the number of structures accessible by the roads. The County argues that roads, like those at issue in this arbitration, are not safe when there are a significant number of hazardous trees, any one of which could fall and injure or kill a person. The County supported its argument with testimony and affidavits, including from the Larimer County sheriff who also serves as the County's fire warden and lead public safety official. County Exhibit 15. The sheriff is responsible for coordinating all search and rescue operations in the County and led the County's response to 778 wildfires. *Id.* He explained that the Cameron Peak Fire was the largest and most destructive. *Id.* The panel found his testimony persuasive on the need for the County to clear the hazardous trees on the roads at issue for the safety of the public,

including emergency services personnel. *Id.* His testimony was also consistent with and buttressed by testimony provided by a captain with the sheriff's office and the Director of Larimer County's Emergency Management, both of whom, like the sheriff, have familiarity with the roads, the terrain within the County, and the way that the public uses the roads and trails in the County.

The County also identified 1286 forest sites near the Cameron Peak Fire area and, through testimony, noted the public's tendency to explore the wilderness from any access point even those identified as private roads or roads with warning signs posted. The County explained that the gates at issue in this arbitration are not the same as those in what is generally thought of as a "gated community." In the areas at issue in this arbitration, there are no guard posts or points accessible only by key entry. Instead, the gates are typically wood or metal posts on either side of the roadway with a gate that can be latched; however, the County noted, the gates are frequently left open. And even if the gates are locked, the public typically just walks around them to access the private road and forest land beyond them. *See, e.g.*, County Exhibits 15 and 16.

Discussion

I. The County's Appeal was Timely

Under the Stafford Act, "[a]ny decision regarding eligibility for, from, or amount of assistance . . . may be appealed within 60 days after the date on which the applicant for such assistance is notified of the award or denial of award of such assistance." 42 U.S.C. § 5189a(a). FEMA has promulgated regulations under the statute, and those regulations state:

The applicant may make a first appeal through the recipient within 60 calendar days from the date of the FEMA determination that is the subject of the appeal and the recipient must electronically forward to the Regional Administrator the applicant's first appeal with a recommendation within 120 calendar days from the date of the FEMA determination that is the subject of the appeal. If the applicant or the recipient do not meet their respective 60-calendar day and 120-calendar day deadlines, FEMA will deny the appeal.

44 CFR 206.206(b)(ii)(A). Instead of pursuing a second appeal, an applicant may request arbitration from the Board under section 423 of the Stafford Act (as amended by section 1219 of the Disaster Recovery Reform Act of 2018). 42 U.S.C. § 5189a(d); *see also* 44 CFR 206.206(b)(3)(i)(C), (b)(3)(ii).

In an email dated May 8, 2022, to Colorado's Recovery Grants Section Supervisor at DHSEM, FEMA's Recovery Division Director, FEMA Region VIII, appears to recognize the challenges that both an applicant and FEMA might face in reconciling the timeliness

provisions under the Stafford Act with FEMA's regulations. The Recovery Division Director stated:

Regarding your email on the Larimer Appeal for DR 4581[,] [t]he Region and FEMA HQ are aware of the [Civilian Board of Contract Appeals' (CBCA's)], decision regarding the City of Beaumont. FEMA, however, doesn't have unilateral authority to alter or ignore the regulatory appeal timelines. Similarly the Region does not have the ability to extend the deadlines regarding timely appeals – there is no express authority to waive the requirements. The available courses of action for the applicant are outlined in the recent first appeal determination letter, dated April 20, 2022, including: second appeal through FEMA HQ or arbitration through the CBCA.

Similar to the applicant in *City of Beaumont*, CBCA 7222-FEMA, 22-1 BCA ¶ 38,018, the County, in this arbitration, challenges FEMA's denial of its first appeal as untimely. As mentioned previously, FEMA's regulations require that an applicant submit its appeal within sixty days to the recipient and then provide the recipient another sixty days to submit the applicant's appeal to FEMA. Technically, the County timely submitted its first appeal to the recipient, but then the recipient forwarded that appeal to FEMA one day late under FEMA's regulations.

The procedural facts in *City of Beaumont* are nearly identical to those in this arbitration. *City of Beaumont* involved a first appeal that FEMA deemed untimely because the recipient failed to submit the applicant's appeal to FEMA within the 120-day deadline set forth in FEMA's regulations. The *City of Beaumont* panel rejected FEMA's finding and, instead, found that the City of Beaumont's first appeal, submitted within sixty days to the recipient, was timely under the Stafford Act. The *City of Beaumont* panel explained:

[The Stafford Act] gives the right to appeal to the applicant, who perfects its appeal by filing it within sixty days after receiving notice of the funding denial. The statute does not contemplate that, once the applicant files a timely appeal within the sixty-day deadline contemplated by the statute, the appeal may retroactively be deemed untimely because FEMA's designated agent for accepting the applicant's appeal [the recipient] did not act appropriately in subsequently administering the timely-filed appeal.

22-1 BCA at 184,632. The *City of Beaumont* panel also noted:

Statutory time limits are not jurisdictional bars unless there is clear congressional intent to make them such. A court may look at the plain

language of the provision and the context of the time limit within the statute to determine if a statutory time limit is jurisdictional.

Id.

As the *City of Beaumont* panel recognized, in recent years, federal courts have begun moving away from broad categorizations of rules as jurisdictional. The Supreme Court in *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843 (2019), explained the distinction between jurisdictional and nonjurisdictional time limits:

While not demanding that Congress “incant magic words” to render a prescription jurisdictional, [*Sebilus v. Auburn Regional Medical Center*], 568 U.S. [145, 153 (2013)], . . . the Court has clarified that it would “leave the ball in Congress’ court”: “If the Legislature clearly states that a [prescription] count[s] as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue[;] [b]ut when Congress does not rank a [prescription] as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” *Arbaugh [v. Y&H Corp.]*, 546 U.S. [500, 515-16 (2006)] [] (footnote and citation omitted).

Id. at 1850.

The Supreme Court has specifically referenced so-called “claim-processing rules” that primarily promote the orderly and procedural process of litigation as not jurisdictional. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Filing deadlines are specifically referenced as one of these “claim-processing rules.” *Id.*; see *Fort Bend County, Texas*, 139 S. Ct. at 1849-50 (“The Court has characterized as nonjurisdictional an array of mandatory claim-processing rules and other preconditions to relief,” including “time prescriptions for procedural steps in judicial or agency forums.”). Here, the applicable deadline incorporated into the statute operates as a classic “claim processing rule.” The statutory language does not prescribe the time-filing requirement as jurisdictional. 42 U.S.C. 5189a; see *City of Beaumont*, 22-1 BCA ¶ 38,018, at 184,632.

Additionally, even if the panel were to consider the 120-day, recipient-to-FEMA deadline as part of our determination on the timeliness issue, the Stafford Act’s appeal deadlines, like most others, can be equitably tolled in appropriate cases. See *Boechler, P.C. v. Commissioner of Internal Revenue*, 142 S.Ct. 1493, 1501 (2022). “[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.’” *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 255 (2016) (quoting *Holland v. Florida*, 560 U.S.

631, 649 (2010)). The second prong is meant to cover circumstances beyond the party's control. *Id.* In this arbitration, the applicant diligently pursued its rights by timely filing its appeal to DHSEM. The fact that DHSEM, under FEMA's regulations, has responsibility for timely filing the appeal to FEMA could arguably be shown as a circumstance beyond the applicant's control.

Following the panel in *City of Beaumont*, this panel decides the arbitration request based on the statutory language and the Supreme Court's decisions on filing deadlines. As stated by Judge Lester, writing separately in *City of Beaumont*:

In drafting its regulations, FEMA has essentially designated the recipient as its receiving agent for purposes of the filing of the appeal. If the recipient is late in forwarding the timely-submitted appeal to FEMA, that is not a delay that is attributable to the applicant. The statute provides the applicant the right to appeal within a sixty-day window, and the City met that deadline by delivering its appeal in the manner that FEMA has directed. Delays by FEMA or its receiving agent in forwarding or deciding the appeal should not be viewed retroactively rendering the appeal untimely.

22-1 BCA at 184,634. Thus, we find that the County's first appeal was timely, notwithstanding DHSEM's delay in forwarding the appeal to FEMA.

II. The County is Entitled to PA Funding for its PPDR Costs

Turning to the merits, the issue before the panel is whether the County has produced sufficient evidence to support award of PA funding for its PPDR costs. It is the applicant's burden to support its application for PA funding. *See Jackson County, Florida*, CBCA 7279-FEMA, 22-1 BCA ¶ 38,075, at 184,907 (citing *City of Hattiesburg, Mississippi*, CBCA 7228-FEMA, 22-1 BCA ¶ 38,029).

The Stafford Act authorizes FEMA to make PA grants for “[p]erforming on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including . . . debris removal.” 42 U.S.C. § 5170b(a)(3)(A). Pursuant to regulations implementing this statute, FEMA may only provide PA funding for debris removal that is in the “public interest.” 44 CFR 206.224(a). One situation cited in the regulation for showing debris removal to be in the public interest is “when it is necessary to . . . eliminate immediate threats to life, public health, and safety.” *Id.* 206.224(a)(1). “Eligible vegetative debris . . . include[s] tree limbs, branches, stumps, or trees that are still in place, but damaged to the extent they pose an immediate threat.” Public Assistance Program and Policy Guide (PAPPG) (June 2020) at 101.

Private property owners are generally responsible for any debris removal from their property. PAPPG at 107. In limited circumstances, FEMA may determine that PPDR is eligible for PA funding because an incident's impact is so severe and the debris on the private property is so widespread that the debris threatens public health and safety or the economic recovery of the community. *Id.* However, "[t]he debris removal must be in the public interest, not merely benefitting an individual or a limited group of individuals." *Id.*

The County's debris removal effort did not merely benefit private property owners. Instead, as summarized above, the County persuasively showed through documents (in particular, the arborist's report), hearing testimony, and affidavits that the debris on private roads and areas was widespread and posed a significant and potentially deadly hazard to the public. The County also showed that the removal of the debris was necessary to protect the public, including emergency services personnel, from this hazard. Accordingly, the panel finds that the County has met its burden of showing its entitlement to PA funding for its PPDR costs. This matter is returned to FEMA to determine the County's reasonably-incurred costs for the purpose of providing PA funding to the County for its debris removal efforts.

Decision

We find that the applicant timely submitted its first appeal to FEMA under the Stafford Act and, further, that the costs in dispute are eligible for PA funding.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge