

**Management Alert -
FEMA Should Recover
\$6.2 Million in Public
Assistance Funds for
Disaster Repairs That Are
Not the Legal
Responsibility of
Richland County, North
Dakota**





DHS OIG HIGHLIGHTS

Management Alert - FEMA Should Recover \$6.2 Million in Public Assistance Funds for Disaster Repairs That Are Not the Legal Responsibility of Richland County, North Dakota

October 30, 2017

Why We Did This Report

During an on-going audit of \$7.0 million of FEMA Public Assistance funds awarded to Richland County, North Dakota, we discovered an eligibility issue that requires immediate attention. We determined the County does not have legal responsibility for disaster-related repairs on township roadway projects.

What We Recommend

We recommended FEMA determine whether a legal basis exists for the County to act as the subgrantee for townships; if not, to disallow the costs; and require future written agreements.

For Further Information:

Contact our Office of Public Affairs at (202) 254-4100, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

Richland County, North Dakota does not have legal responsibility for the disaster-related repairs on township roadway projects. Rather, the repairs are the legal responsibility of individual organized townships. In the four disasters we reviewed, funding for 283 projects totaling \$6.2 million is ineligible because the County does not have the legal responsibility for repairs to township roadways. Legal responsibility is one of the cornerstones of overall Public Assistance funding eligibility.

FEMA Response

FEMA officials agreed with our three recommendations. Appendix B includes FEMA's written response in its entirety.



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Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

OCT 30 2017

MEMORANDUM FOR: Nancy J. Dragani
Acting Regional Administrator, Region VIII
Federal Emergency Management Agency

FROM: John E. McCoy II *JEM II*
Acting Assistant Inspector General for Audits

SUBJECT: *Management Alert - FEMA Should Recover \$6.2 Million in Public Assistance Funds for Disaster Repairs That Are Not the Legal Responsibility of Richland County, North Dakota
FEMA Disaster Numbers 1829-DR-ND, 1907-DR-ND, 1981-DR-ND, and 4118-DR-ND*

We are currently auditing \$7.0 million of Federal Emergency Management Agency (FEMA) Public Assistance (PA) funds awarded to Richland County, North Dakota (County). The North Dakota Department of Emergency Services (NDDDES), a FEMA grantee, awarded these funds to the County for disaster recovery work related to severe storms and flooding that occurred from 2009 to 2013. FEMA provided PA funding to the County for 309 projects for the 4 disasters (see table 1). This management advisory report informs you of an eligibility issue that requires your immediate attention. At the conclusion of our audit, we plan to issue our complete audit report including any additional findings and recommendations.

Table 1: Richland County Disasters

Disasters and Year of Occurrence	County Project Count	Awarded for County Facilities	Township Project Count	Identified as Awarded for Township Facilities	Total Project Count	Total Award
1829-DR-ND (2009)	18	\$584,572	127	\$2,099,262	145	\$2,683,834
1907-DR-ND (2010)	1	84,867	70	1,850,060	71	1,934,927
1981-DR-ND (2011)	6	121,169	80	1,994,640	86	2,115,809
4118-DR-ND (2013)	1	12,445	6	207,931	7	220,376
Total Cost	26	\$803,053	283	\$6,151,893	309	\$6,954,946

Source: FEMA data and Office of Inspector General (OIG) analysis.



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Background

North Dakota experienced nine major federally declared disasters from 2009 to 2013. The County is located in the declared area for four of these nine disasters. North Dakota divides its counties into townships. The townships are either “organized” or “unorganized.” There are approximately 1,360 “organized” townships in North Dakota.

In North Dakota, the “organized” townships, not the counties, have the legal responsibility for road construction and maintenance of roadways within the townships. Unorganized townships have relinquished these rights, responsibilities, and duties to the county in which they are located.

The County contains a total of 36 townships. All of the County’s townships are organized and the townships, not the County, are legally responsible for repairs to their township roadways. FEMA determined that the County was the eligible applicant for disaster-related damages to roadways within the County. Our concern about the legal responsibility is the reason for this management advisory report.

Results

The County does not have legal responsibility for the disaster-related repairs on township roadway projects. Therefore, the County is not eligible to receive \$6,151,893 in Federal funding identified as township projects because it is not legally responsible for the repairs to the damaged facilities (roadways). Rather, the repairs are the legal responsibility of individual “organized” townships. The *Robert T. Stafford Disaster Relief and Emergency Assistance Act* is the legal authority that provides for PA grants to state and local governments for the repair, reconstruction, or replacement of public facilities.¹ To receive a PA grant, the applicant must meet the eligibility requirements set forth in FEMA’s implementing regulations (44 Code of Federal Regulations (CFR) 206.223). Those regulations require that the proposed work —

- (1) be required as the result of the emergency or major disaster event;
- (2) be located within the designated area of a major disaster or emergency declaration, except that sheltering and evacuation activities may be located outside the designated area; and
- (3) be the legal responsibility of an eligible applicant.

¹ 42 United States Code § 5121 *et seq*



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FEMA policy further states that an eligible applicant must be legally responsible for the repair of the damaged facility and if an eligible applicant did not have legal responsibility, the facility is ineligible for assistance.² In addition, the current FEMA *Public Assistance Program and Policy Guide* (April 2017) states that “an eligible public facility is one that a ... local government owns or has legal responsibility for maintaining, including any ... non-Federal-aid street, road, or highway.” Therefore, legal responsibility is one of the cornerstones of overall PA funding eligibility.

There is some urgency for FEMA to address the issue of legal responsibility because FEMA Region VIII is reviewing and closing the County’s projects and there is a current presidentially-declared disaster for North Dakota. The legal responsibility issue also raises the question of eligibility of disaster-related work in ongoing and future disasters in North Dakota. Therefore, FEMA should not obligate Federal funding to the County unless the repairs are the legal responsibility of the County.

The County is not eligible for Federal funding for the \$6,151,893 of disaster-related repairs on 283 projects that are the legal responsibility of the townships even though the County has been requesting and receiving Federal funds from NDDES as subgrantee. The townships completed repairs to roadways either with County resources (labor, equipment, and materials) or with third-party contractors the townships hired. The townships awarded the contracts and submitted paid invoices to the County for reimbursement. For township projects performed using County resources, the County tracked its own costs and then submitted disaster-related costs to NDDES for reimbursement.

County officials said the townships had responsibility for road repairs and that the County has no legal responsibility for road maintenance and repairs. County officials also said that most townships do not have the capability to manage Federal grants; therefore, the County acts on the townships’ behalf as subgrantee for PA grants. County officials said there is no written agreement documenting this arrangement and that, historically, this was how the County and townships handled federally declared disasters. Further, County officials asserted that because they have no authority over townships, they cannot require the townships to follow Federal grant regulations and requirements.

In essence, for projects that are the legal responsibility of the townships, the County is merely acting as a “pass-through” entity, reimbursing townships for costs the townships expended for repairs. NDDES has a FEMA-State agreement and is the FEMA grantee, responsible for passing Federal funds through to eligible applicants. Because the County is not a FEMA grantee and does not

² FEMA, *Public Assistance Guide* (FEMA 322, June 2007, p. 23)



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have legal responsibility for the disaster-related repairs in the townships, the \$6.2 million of funding the County received is ineligible.

FEMA Region VIII officials said that there was a verbal agreement made long ago between FEMA and NDDES that the counties would be the subgrantee rather than the townships. FEMA stated that the counties acted as the subgrantee because townships lack the capability to manage Federal funds. FEMA also said that managing the potential 55 subgrantees (counties) versus about 1,000 subgrantees (townships) makes this practice more efficient. However, improved efficiency should not justify bypassing one of the basic eligibility requirements of legal responsibility.

Conclusion

In the four disasters we reviewed, funding for 283 projects totaling \$6,151,893 is ineligible because the County does not have the legal responsibility for repairs to the damaged facilities. Therefore, FEMA should disallow \$6,151,893 in grant funding as ineligible for disasters 1829, 1907, 1981, and 4118, unless there is a legal basis for allowing an entity without the legal responsibility to repair the roads to be the subgrantee. Further, FEMA should not provide future disaster funding to the County on projects it does not have legal responsibility for repairs.

Recommendations

We recommend that the Regional Administrator, FEMA Region VIII:

Recommendation 1: Determine whether there is a legal basis for allowing the County to act as the subgrantee for townships even though the County is not legally responsible for the repair of township roads.

Recommendation 2: Disallow \$6,151,893 (\$5,228,005 Federal share) in grant funding as ineligible unless FEMA determines there is a legal basis for the County to act as the subgrantee.

Recommendation 3: If FEMA determines that the County may enter an agreement with the townships to act as subgrantee, in future disasters require that the agreement be in writing and explicitly set forth the County is legally accountable for the performance of the award and the expenditure of funds for repairs of damaged township roads.



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Discussions with Management and Audit Follow-up

We discussed the preliminary results of our management alert with FEMA and NDDES officials and included their comments in this alert, as appropriate. We also provided a draft advisory report in advance to these officials and discussed it at exit conferences held with FEMA on March 1, 2017, and July 25, 2017, and with NDDES on March 24, 2017, and July 25, 2017. We considered their comments in developing our final report and incorporated their comments as appropriate.

FEMA Region VIII officials provided a written response to a report draft on September 8, 2017, and concurred with our recommendations (see appendix B). In their response, FEMA officials stated there is a legal basis under North Dakota state law for the County to act as the subgrantee for the township road projects, and that the County is legally responsible for the projects referenced in the report. FEMA identified that the North Dakota Constitution article VII § 10 and North Dakota Century Code (NDCC) §§ 54-40.3-01 allow political subdivisions the legal authority to jointly or cooperatively administer any function that is authorized or assigned to one of them under a joint powers agreement. However, this type of agreement is contingent upon approval of the political subdivisions' governing bodies, as noted below:

54-40.3-01. Joint powers agreements – General authority.
Any county, city, township, city park district, or other political subdivision of the state, *upon approval of its respective governing body, may* enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them. [emphasis added]

We agree with FEMA's observation that the operation of state law cannot be ignored. The preceding citation makes clear that such agreements *may* be entered into, not that they operate automatically to convey concurrent legal responsibility. We found no evidence, nor did any North Dakota, FEMA, or County official indicate that either the townships' or County's governing bodies approved joint powers agreements for any of the disasters under review. To the contrary, officials told us that the practice in place was based on decades-old tradition rather than a formal statutory-compliant process. While such an agreement may not be required to be in writing, documentation of the *approval* to enter into such an agreement would likely be required of the County's governing body. County officials were not able to provide us with evidence of such approval.



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In addition, FEMA likened the County-township relationship in North Dakota to that of providing disaster funding to states as the applicant for debris removal and emergency protective measures conducted on behalf of their political subdivisions. While FEMA's example points out the importance of recognizing legal authority under state law, it does not truly reflect the economic ramifications of the County-township relationship in North Dakota. In FEMA's example, the state, as the applicant, incurs the costs for the debris removal or emergency protective measures and bears the financial risk if FEMA determines noncompliance has occurred. In North Dakota, the County did not incur the costs for repair of township roads; townships performed all procurements and incurred the disaster-related costs. Therefore, the County is not accountable for the performance of the award and has no incentive to ensure proper expenditure of grant funds. Should costs be questioned and funding denied, the County, as the applicant, does not bear the loss of monies expended; the township does. This key difference emphasizes the need for any such agreement between County and township to be very explicit on the individual parties' responsibilities and duties under the PA grant.

FEMA has asked that recommendations 1 and 2 be resolved and closed. We agree that the NDCC provides the vehicle through a joint powers agreement to convey legal responsibility to Richland County for township disaster-related repairs. However, the statutorily-mandated approval process was not carried out in the four subject disasters. Because this shortcoming cannot be rectified at this point, we will resolve and close recommendations 1 and 2. We encourage, however, that FEMA and NDDDES focus on all North Dakota counties' full compliance of the joint powers agreement in future disasters.

In addition, FEMA provided documentation of their action directing the state to memorialize in writing any future joint powers agreements for the purpose of the County applying for PA funds and managing projects on behalf of townships. We consider recommendation 3 resolved and closed.

Therefore, based on FEMA's actions, we consider recommendations 1, 2, and 3 to be resolved and closed and require no further action from FEMA.

Major contributors to this report are Paige Hamrick, Director; John Polledo, Audit Manager; Patti Smith, Auditor-in-Charge; Rebecca Hetzler, Senior Auditor; and Nigel Gardner, Independent Reference Reviewer.

Please call me with any questions at (202) 254-4100, or your staff may contact Paul Wood, Acting Deputy Assistant Inspector General at (202) 254-4100 or Paige Hamrick, Director, Central Regional Office - North, at (214) 436-5200.



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Appendix A

Objective, Scope, and Methodology

We are currently auditing FEMA Public Assistance grant funds awarded to Richland County, North Dakota (County), Public Assistance Identification Number 077-99077-00. Our full audit will include a review of costs claimed from disasters 1829, 1907, 1981, and 4118. Our audit objective will be to determine whether the County accounted for and expended FEMA grant funds according to Federal regulations and FEMA guidelines.

Our review covers the period of March 13, 2009, through November 14, 2016, the cutoff date of the management advisory report. We reviewed the funding and location of damaged facilities for 309 projects in the four disasters totaling \$7.0 million to determine the legal responsible entity for the damaged facilities.

To complete our management advisory report, we interviewed FEMA, NDDDES, and County officials; reviewed applicable Federal regulations and FEMA guidelines; reviewed North Dakota statutory codes; and performed other procedures considered necessary to accomplish our objective. We did not perform a detailed assessment of the County's internal controls over its grant activities because it was not necessary to accomplish our audit objective. We, however, as part of this management advisory, did a limited review of the eligibility of projects for township roadway repairs. We conducted fieldwork at FEMA, NDDDES, and County offices.

We are conducting the full performance audit pursuant to the *Inspector General Act of 1978*, as amended, and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based upon our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based upon our audit objective. We are conducting this audit by applying the statutes, regulations, and FEMA policies and guidelines in effect at the time of the disaster.



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Appendix B
Management Comments


U.S. Department of Homeland Security
Region VIII
Denver Federal Center, Building 710
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FEMA

September 8, 2017

MEMORANDUM FOR: Paige Hamrick, Director
Office of Inspector General Central Region Office – North
Office of Inspector General
Office of Emergency Management Oversight

FROM: Nancy J. Dragani 
Acting Regional Administrator, Region VIII
Federal Emergency Management Agency (FEMA)

SUBJECT: OIG Report titled: “FEMA Should Recover \$6.2 Million in
FEMA Public Assistance Funds for Disaster Repairs That Are
Not the Legal Responsibility of Richland County, North
Dakota”
FEMA Disaster Numbers 1829-DR-ND, 1907-DR-ND, 1981-
DR-ND, and 4118-DR-ND”
Audit Report Number OIG-16-055

Thank you for the opportunity to review and comment on this Draft Report. The Federal Emergency Management Agency (FEMA) appreciates the work of the Office of the Inspector General (OIG) in planning and conducting its review and issuing this Report.

FEMA also appreciates that the OIG recognized the initiative by the State of North Dakota to provide assistance to Richland County and townships during the disaster and the resulting response and recovery periods.

FEMA has considered the recommendations in the Draft Report regarding all eligible projects performed within township boundaries and determined that there is legal basis for the County to represent the townships under a joint powers agreement.

FEMA engaged with the State of North Dakota and the State has agreed to memorialize in writing any future joint powers agreements for the purposes of the County applying for Public Assistance (PA) and managing projects on behalf of townships.

The Draft Report contains three recommendations with which FEMA concurs. Please see the attached for our detailed response to the recommendations.

Again, thank you for the opportunity to review and comment on this Draft Report. Please feel free to contact Tom Bush, at (303) 235-4860, with any questions or concerns.

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Appendix B (continued)

Technical comments were previously provided under a separate cover. We look forward to working with you in the future.

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Appendix B (continued)

**Attachment: DHS Management Response to Recommendations
Contained in OIG-16-055 Draft Report**

Recommendation 1:

Determine whether there is a legal basis for allowing the County to act as the subgrantee for townships even though the County is not legally responsible for the repair of township roads.

Response: Concur. FEMA agrees that determining the County's legal responsibility to perform the work is a legal requirement under the regulations. To that end, FEMA considered the arrangement between the County and township under which it completed work in disasters 1829, 1907, 1981, and 4118. FEMA has determined that the County is legally responsible for performing the work on the projects referenced in the Report, as there is a legal basis under state law for the arrangement.

The arrangement between the County and its townships does not violate federal laws, executive orders, regulations, or FEMA policies on PA eligibility or grants management. The State of North Dakota's laws allow latitude and deference to local political subdivisions to determine the most advantageous and efficient arrangement for repairs or reconstruction of their road network. In particular, political subdivisions have the legal authority to jointly or cooperatively administer any function that is authorized or assigned to one of them under a joint powers agreement. N.D. Const. art. VII, § 10; N.D.C.C. §§ 54-40.3-01. Through mutual agreement, a political subdivision may transfer to the county in which it is located any of its powers or functions as provided in law. N.D. Const. art. VII, § 10. Assuming that township roads are the responsibility of the township, there is a legal basis for the county to act on behalf of the townships for the purpose of receiving federal grant funds.

Here, the entities were recovering from a federally declared disaster that exceeded their capabilities. As the smallest political subdivision, townships are least likely to have capacity to apply for and manage federal grant programs, particularly during the recovery phase of a disaster. The townships therefore leveraged the capacity of Richland County staff to apply for federal aid and manage the PA grant as allowed under a joint powers agreement.

The operation of state law cannot be ignored, especially where two political subdivisions, and otherwise eligible applicants under 44 C.F.R. 206.222, are involved. FEMA has recognized concurrent legal responsibility in other instances. Specifically, FEMA has provided funding to states as the applicant for debris removal and emergency protective measures conducted on behalf of their political subdivisions. In these instances, FEMA's determination regarding eligibility and reimbursement relied upon whether there was legal authority under state law to support such an arrangement, and confirmation that both political subdivisions did not seek reimbursement for the same work. Eligibility for the township road repairs should similarly focus on the validity of the arrangement under state law and ensuring FEMA did not reimburse both entities.

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Appendix B (continued)

In addition, and as explained in North Dakota Department of Emergency Services' response to the OIG dated March 23, 2017, the State constitutional and statutory provisions do not require a joint powers agreement to be in writing. An opinion from the State Attorney General confirms that, while a written agreement is recommended, verbal agreements are permissible. See Letter Opinion, 2004-L-26.

According to the Report, the County asserted it did not have authority over the townships and therefore could not require compliance with Federal grant regulations and requirements. Federal regulations provide that the Uniform Administrative requirements apply to all awards and subawards to governments. For the declared disasters that are the subject of this Report, those requirements appear at 44 C.F.R. 13.4 and 13.37. For disasters declared after December 26, 2014, the requirements are carried forward in 2 C.F.R. Part 200. Specifically, 2 C.F.R. 200.101(b) states the terms and conditions of Federal awards, which flow down to subrecipients unless a particular section of 2 C.F.R. or the terms and conditions of the Federal award specifically indicate otherwise. This means that non-Federal entities must comply with the requirements in 2 C.F.R. regardless of whether the non-Federal entity is a recipient or subrecipient of a Federal award. Another provision, 2 C.F.R. 200.300(b), states that the non-Federal entity is responsible for complying with all requirements of the Federal award. Accordingly, the State (as recipient) and County (as subrecipient) for township road repair projects, are responsible for ensuring compliance with all grant requirements.

Estimated Completion Date (ECD): FEMA requests that this recommendation be considered resolved and closed.

Recommendation 2:

Disallow \$6,151,893 (\$5,228,005 Federal share) in grant funding as ineligible unless FEMA determines there is a legal basis for the County to act as the subgrantee.

Response: Concur. FEMA has determined that there is a legal basis under state law for the County to act as the subgrantee for the township road projects, and that the County is legally responsible for the projects referenced in the Report. As such, it is not appropriate for FEMA to disallow grant funding.

ECD: FEMA requests that this recommendation be considered resolved and closed.

Recommendation 3:

If FEMA determines that the County may enter an agreement with the townships to act as subgrantee, in future disasters require that the agreement be in writing and explicitly set forth the County is legally accountable for the performance of the award and the expenditure of funds for repairs of damaged township roads.

Response: Concur. Because the County and the townships are eligible applicants for PA funding, FEMA did not previously require the agreement to be in writing. FEMA has

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Appendix B (continued)

since recommended, and the State has agreed, to memorialize in writing any future joint powers agreements for the purposes of the County applying for PA and managing projects on behalf of townships. The State has expressed to FEMA its intent to implement this practice for major disasters declared after the release of the OIG's Final Report.

ECD: FEMA requests that this recommendation be considered resolved and closed.

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Appendix C
Report Distribution

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