




## OFFICE OF THE CITY ATTORNEY

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### CLAIMS MEMORANDUM #DC-2021-027

**TO:** Mayor and Council

**FROM:** Kelea Fisher, Deputy City Attorney 

**DATE:** October 19, 2021

**MEETING:** October 26, 2021

**RE:** Damage claim of Mujtaba Ghulam-Ali  
24229 State Highway 49  
Lawton, OK 73507

Submitted in the amount of \$13,400.00 on August 2, 2021

**RECOMMENDATION:** Denial

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**BASIS OF CLAIM:** Mujtaba Ghulam-Ali, has filed a claim on behalf of John R. McKee Trust<sup>1</sup>, 805 NW 63<sup>rd</sup> Street, Oklahoma City, Oklahoma. Mr. Ghulam-Ali alleges on June 27, 2021 at approximately 1:30 a.m., the property located at 24229 State Highway 49, Lawton, Oklahoma 73507, flooded due to the City of Lawton opening the dam gates. Mr. Ghulam-Ali further alleges that a large amount of water flooded the property and did not have "time to drain properly." The claim is in the amount of \$13,400.00 which represents alleged damages to a fence in the amount of \$6,000.00 and \$7,400.00 for damages to the sheetrock, frame, LED lights, and for dehumidifiers. Claimant submitted an undated invoice from an unknown source, which is purportedly evidence that fencing, topsoil, and concrete were sold to Miyagi Farms, L.L.C. in the amount of \$6,000.00.

**DATE OF DAMAGE:** June 27, 2021

**FACTS:** According to the National Oceanic and Atmospheric Administration (NOAA) records, on June 27, 2021, the area in question (Highway 49 near I-44 in Comanche County) received between 8-10 inches of rain overnight. Radar also recorded in excess of 10 inches of rain in the close proximity of 24229 State Highway 49 (within a quarter of mile). According to the U.S. Department of Commerce, this amount of rainfall was a 500-year storm event. The overnight rain on June 26<sup>th</sup> to early morning June 27<sup>th</sup> caused the bridge to wash out that is located approximately 1/8 of a mile north of Highway 49 on Madische Road, which is approximately a half mile from 24229 State Highway 49. Flooding also occurred all along the creeks east and west of Interstate I-44, which caused flooding to the Dollar General Store and Liberty National Bank.

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<sup>1</sup> It should be noted that Mr. Ghulam-Ali alleges that his company, Miyagi Farms, LLC, leases the property in question from John R. McKee Trust. However, at the time this memorandum was finalized Mr. Ghulam-Ali had failed to provide a copy of said lease after it was requested. This claim is being recommended for denial, however, even if the claim was not being recommended for denial, at this time, the City Attorney's Office is unable to substantiate that Claimant would legally be entitled to any damages related to this property.

Even further west on Highway 49 near Wichita Mountain Estates, Ketch Creek overflowed and exceeded the creek banks, which rarely occurs. Rain was measured in that location exceeding 10 inches in a 12-hour period. According to Rusty Whisenhunt, Director of Public Utilities, the dam operation did not cause flooding at the property located at 24229 State Highway 49. Mr. Whisenhunt further states in order for this property to flood from the gate operation at Lake Ellsworth dam, the water would have had to travel uphill. The flood gates on Lake Lawtonka would not have had any effect on that area either. The dam gates were opened and operated at proper increments based on lake levels. Records also indicate that the heavy rains that fell were south of the watershed to Lake Ellsworth. According to Comanche County Emergency Management Director, Michael Merrit, the excessive rain fall caused water rescues in Comanche County and road-graders were out the following days repairing washed out areas of roads in the county.

**LEGAL BASIS FOR DENIAL OF CLAIM:** Pursuant to Title 51, Oklahoma Statutes, §151 et seq., municipalities are held accountable in the same manner as private entities or individuals for negligent acts or omissions that result in harm to others. However, negligence is never presumed, and the burden of proving negligence and that it was the proximate cause of the harm complained of, is on the complaining party. Oklahoma Ry. Co. v. Ivery, 204 P.2d 978 (Okla. 1949).

It is well established that an individual or entity is not liable for a loss or claim resulting from an “Act of God.” Mulkey v. Meridian Oil, Inc., 143 F.R.D. 257 (W.D. Okla. 1992). As defined by the Courts, an “Act of God” is some unavoidable accident which results exclusively from nature’s cause, such as lightning, violent wind and flood. Studebaker v. Cohen, 747 P.2d 274 (Okla. 1987). An unavoidable accident is one which occurs without negligence on the part of either party to a claim. OUJI 2d 10.9. It is one not caused by the fault of any persons, but if the accident could have been prevented by means suggested by common prudence, it is not deemed unavoidable. Video Independent Theatres, Inc. v. Cooper, 421 P.2d 833 (Okla. 1966).

The Oklahoma Governmental Tort Claims Act provides that the state or a political subdivision **shall not be liable** if a loss or claim results from:

8. Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the state or a political subdivision;
5. Any claim based on performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees.

This office recommends full denial of this claim because in this instance:

1. On June 27, 2021, flooding occurred in many areas within Comanche County and the City of Lawton. It was not the negligence of the City that caused Claimant’s damage rather, it was an unavoidable “Act of God” for which the City cannot be held liable.
2. The City employee operating the flood gates was not negligent in operating the dam gates. The employee followed gate operation policy and opened gates accordingly.

  
KATELYN FISHER  
DEPUTY CITY ATTORNEY