

# THE WILDFIRE MENACE: Will the West Learn or Burn?

Senator Jon Kyl\* & Kris Kiefer\*\*

## FOREWORD

When I was asked to make this presentation, the first thing I did was to check with Kris Kiefer on Senator Flake's staff. Senator Flake and Senator McCain have been very active on pushing legislative reforms, and I wanted to know why, with so many announcements of forward progress on forest management, it still seemed that nothing on the scale required was getting done. I will today summarize much of the positive news, but also lay out an agenda of un-finished business, much of which is the object of our delegation's efforts.

While some of us have been working on forest management and ecological restoration since the 1980s, much of the interest and energy in forest health began to take shape after one of Arizona's most damaging fires, the Rodeo-Chediski in 2002. With more than 462,000 acres of ponderosa pine forests charred and hundreds of homes lost, our earlier warnings finally took on some urgency.<sup>1</sup>

Governors Hull and Napolitano established committees and councils on forest health.<sup>2</sup> Senator McCain and I pushed legislation to advance federal wildfire policy, such as the Wildfire Prevention Act of 2002 and the Southwest Forest Health and Wildfire Prevention Act, which eventually led to the creation of the Ecological Restoration Institute at NAU.<sup>3</sup> ERI has been

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1. *Historically Significant Wildland Fires*, NAT'L INTERAGENCY FIRE CTR., [https://www.nifc.gov/fireInfo/fireInfo\\_stats\\_histSigFires.html](https://www.nifc.gov/fireInfo/fireInfo_stats_histSigFires.html) (last visited Feb. 12, 2016).

2. Arizona Exec. Order No. 2001-16 Creating the Governor's Forest Health/Fire Plan Advisory Committee (Aug. 7, 2001); Arizona Exec. Order No. 2003-16 Creating the Governor's Arizona Forest Health Advisory Council (May 22, 2003).

3. The Wildfire Prevention Act of 2002, S. 2670, 107th Cong. (2002); Southwest Forest Health and Wildfire Prevention Act of 2003, S. 32, 108th Cong. (2003); *see also* Southwest Forest

a great asset, making sound contributions to the state and federal policy debates.

And, these federal policy advancements have led to some good on-the-ground results. In 2004, Arizona became home to the first long-term large-scale stewardship contract in the White Mountains.<sup>4</sup> During the 10-year term of that contract, private industry invested \$130 million in the area and mechanically treated approximately 70,000 acres.<sup>5</sup>

By all accounts the effort was a success. Evidence suggests that during the Wallow Fire in 2011, as well as the San Juan Fire in 2014, the treatments caused the fast-moving crown fires to drop to the forest floor, making them easier and safer to fight.<sup>6</sup> Perhaps most notably, the treatments in the Wildland-Urban Interface or WUI areas around Alpine and Nutrioso are credited with saving those towns.<sup>7</sup>

Likewise, you have heard that in April 2015 the Forest Service and a collaborative group of stakeholders were able to put the finishing touches on a comprehensive environmental analysis that will open the door to further treatments on approximately 586,000 acres across four of Arizona's national forests.<sup>8</sup> This effort, the Four Forest Restoration Initiative or 4FRI, is something that was important to me during my time in office, and I was happy to see the Forest Service sign the record of decision. There are, however, several problems getting 4FRI off the ground. Imagine the benefits to our state if the entire acreage could be treated within the designed time frame. This is why Senators Flake and McCain, as well as the Arizona Republic,

Health and Wildfire Prevention Act of 2004, Pub. L. No. 108-317, 118 Stat. 1204, 1204, 1207–08 (2004).

4. Jesse Abrams & Sam Burns, *Case Study of a Community Stewardship Success: The White Mountain Stewardship Contract*, ECOLOGICAL RESTORATION INSTITUTE—ISSUES IN FOREST RESTORATION 2 (2007), [http://openknowledge.nau.edu/1294/1/Abrams\\_Burns\\_2007\\_ERIWhitePaper\\_CaseStudyOfACommunity.pdf](http://openknowledge.nau.edu/1294/1/Abrams_Burns_2007_ERIWhitePaper_CaseStudyOfACommunity.pdf).

5. E-mail from Diane Vosick, Dir. of Policy & P'ships, Ecological Restoration Inst., to Kris Kiefer (Apr. 29, 2015, 10:10 AM) (on file with Kris Kiefer) ("According to the [Forest Service's] regional office, there were 70,602.90 acres treated."); *see also* Press Release, Jeff Flake, U.S. Senator-Ariz., Flake, McCain Press Forest Service to Increase Wildfire Mitigation in Arizona (Nov. 6, 2015), <http://www.flake.senate.gov/public/index.cfm/2015/11/flake-mccain-press-forest-service-to-increase-wildfire-mitigation-in-arizona>.

6. U.S. FOREST SERV., SAN JUAN FIRE FUEL TREATMENT EFFECTIVENESS REPORT (2014), [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprd3839397.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3839397.pdf).

7. Shaun McKinnon, *Forest-thinning Strategy Credited for Saving Alpine from 2011 Fire*, AZ CENT. (June 19, 2012, 11:38 PM), <http://www.azcentral.com/news/articles/2012/06/19/20120619arizona-forest-thinning-credited-saving-alpine-2011-fire.html>.

8. *See* Press Release, U.S. Forest Serv., Forest Service Issues Decision on Historic Effort to Restore Forests on Half Million Acres; More than 30 Stakeholder Groups Joined the Project (Apr. 20, 2015), <http://www.fs.usda.gov/detail/coconino/news-events/?cid=STELPRD3835399>.

recently referred to the record of decision as a call to action.<sup>9</sup> They're right. We must expect more from the project in terms of results on the ground, if 4FRI is going to stand as a forest-management model for the rest of the West.

With enactment of the Farm Bill in the 113<sup>th</sup> Congress, a number of other important forest-management tools were approved.<sup>10</sup> Section 8205 of the Farm Bill included modifications to the liability provisions in stewardship contracts, while also permanently reauthorizing the program.<sup>11</sup> Senator Flake worked hard to advance the liability reform as part of his Stewardship Contracting Reauthorization and Improvement Act, which was largely incorporated into the Farm Bill.<sup>12</sup> With this change, stewardship contracts will now include the same type of liability protections for contractors as timber contracts, making it easier and less costly for contractors to enter into stewardship arrangements.<sup>13</sup> The office of procurement finalized the change in late 2014, and it is now codified in title 48 of the Code of Federal Regulations.<sup>14</sup>

The Farm Bill also included provisions to expand “Good Neighbor Authority”<sup>15</sup> and to allow special designations of insect and disease infested forest areas.<sup>16</sup> The good-neighbor program allows state foresters to conduct cooperative restoration projects on federal forests, and the insect and disease infestation section establishes categorical exclusions on projects designated by the Secretary.<sup>17</sup> In Arizona, Governor Brewer asked the Secretary to designate 182,000 acres as being at risk of fire from disease and insect infestations under this new authority.<sup>18</sup> In May 2014, the Secretary approved

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9. Letter from John McCain & Jeff Flake, U.S. Senators-Ariz., to Tom Vilsack, Sec’y, U.S. Dep’t of Agric. (Apr. 21, 2015); Republic Editorial Board, *The Forest Service Shouldn’t Pat Itself on the Back Yet*, AZ CENT. (Apr. 22, 2015, 5:49 PM), <http://www.azcentral.com/story/opinion/editorial/2015/04/22/fri-deal-struck-last-get-thinning/26212565/>.

10. Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014) [hereinafter Farm Bill].

11. *Id.* § 8205, 128 Stat. 649, 918–21 (codified as 16 U.S.C. § 6591c (2014)).

12. *See* 16 U.S.C. § 6591c (2014).

13. *Id.*

14. 48 C.F.R. §§ 436.578, 452.236-78 (2014).

15. Farm Bill § 8206 (2014).

16. *Id.* § 8204.

17. KATIE HOOVER, CONG. RESEARCH SERV., R43431, FORESTRY PROVISIONS IN THE 2014 FARM BILL (P.L. 113-79) 4 (Mar. 21, 2014), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43431.pdf>.

18. Letter from Jan Brewer, Ariz. Governor, to Tom Vilsack, Sec’y, U.S. Dep’t of Agric. (Apr. 7, 2014); *see also* Letter from John McCain & Jeff Flake, U.S. Senators-Ariz., to Tom Vilsack, Sec’y, U.S. Dep’t of Agric. (Apr. 11, 2014).

the request, along with a total of forty-seven million acres in forty-one states and Puerto Rico.<sup>19</sup>

These accomplishments are important. They should be celebrated, but it remains to be seen how much these decisions will result in treated acres.

In March 2015, USDA Undersecretary Robert Bonnie testified before the Senate Energy and Natural Resources Committee that “[f]ifty-eight million acres of national forests are at high or very high risk of severe wildfire.”<sup>20</sup> Of those acres, 11.3 million are of the highest priority, because they are either in the WUI or part of watersheds or water sources.<sup>21</sup> To illustrate the scale of the challenge, of those fifty-eight million acres, 4FRI would mechanically treat one million acres over twenty years.<sup>22</sup> And we consider 4FRI very ambitious.

Another essential component is the need to provide a sufficient shelf-stock of timber for the industry that has developed in Arizona’s eastern forests. The saw mills, pellet plant, and biomass facility in that part of the state proved capable of partnering with the Forest Service to get the work done. However, a combination of factors—the expiration of the White Mountain Stewardship contract and the destruction of 56,000 acres of National Environmental Policy Act or NEPA-approved forest in the Wallow fire—coalesced to stress those entities by depriving them of much-needed wood. The Forest Service must find ways to make sure that those eastside companies have access to sufficient material to maintain their businesses. For, as those who have studied the Forest Service’s stewardship contracting program caution: “Once

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19. *Insect and Disease Area Designations*, U.S. FOREST SERV., <http://www.fs.fed.us/farmbill/areadesignations.shtml> (last visited Feb. 12, 2016) (“The Forest Service has designated approximately 46.7 million acres across the National Forest System that are either already experience or are at risk of experiencing insect and disease infestations.”).

20. *Improving Forest Health and Socioeconomic Opportunities on the Nation’s Forest System: Hearing Before the S. Comm. on Energy & Nat. Res.*, 114th Cong. 2 (2015) (statement of Robert Bonnie, Undersec’y, U.S. Dep’t of Agric.); see also *The Federal Government’s Role in Wildfire Management, the Impact of Fires on Communities, and Potential Improvements to be Made in Fire Operations: Hearing Before the S. Comm. on Energy & Nat. Res.*, 114th Cong. 4 (2015) (statement of Tom Tidwell, Chief, U.S. Forest Serv.) [hereinafter *The Federal Government’s Role in Wildfire Management*].

21. *The Federal Government’s Role in Wildfire Management*, *supra* note 20, at 4 (statement of Tom Tidwell, Chief, U.S. Forest Serv.) (“Out of the 58 million ‘high or very high’ risk acres, we have identified approximately 11.3 million acres for highest priority treatment. These acres are in proximity to the wildland-urban interface or are in priority watershed or water sources, are in frequent fire return regimes, and are not in roadless or wilderness areas.”).

22. *4FRI Introduction Transcripts*, U.S. FOREST SERV., <http://www.fs.usda.gov/detail/4fri/planning/?cid=stelprdb5275410> (last visited Feb. 12, 2016).

industry is gone, the expertise, workforce, and equipment needed to treat vegetation are gone too.<sup>23</sup>

So, what else can be done? Signing ceremonies and press releases are not enough; work must be actually completed on the ground. Here are two specific areas where Congress can help. First, it must resolve the fire-borrowing epidemic, which has halted important fuels reduction work in recent years.<sup>24</sup> Second, Congress must reduce regulatory barriers and create efficiencies for the completion of proactive forest treatment work.

No policy proposal has garnered more attention in the last couple of years than the ongoing effort to stop fire borrowing. For those that are unfamiliar with this practice, in seven of the last ten years, the Forest Service has run out of money for fighting wildfires before the beginning of the new fiscal year.<sup>25</sup> In order to cover the remaining wildfire costs, such as hotshot crews, incident response teams, and air tankers, the Forest Service has transferred funds from a variety of accounts into the suppression account.<sup>26</sup> That means activities from hazardous fuels reduction to recreation programs are interrupted to cover annual suppression costs. Even though much of those costs are repaid in later appropriations bills or supplemental appropriations, the damage is done because planning and work on the ground stops.

Forest Service Chief Tom Tidwell explained it this way:

Each time the agency transfers money out of accounts to pay for fire suppression there are significant and lasting impacts across the entire Forest Service. Not only do these impacts affect the ability of the Forest Service to conduct stewardship work on national forests, they also affect our partners, local governments, and Tribes.<sup>27</sup>

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23. Francisco X. Aguilar et al., *The Status of and Opportunities for Business Clustering within the Forest Products Sector in the U.S.: Appendix B*, U.S. ENDOWMENT FOR FORESTRY & COMMUNITIES 26 (2009), [http://www.usendowment.org/images/BS\\_cluster\\_App\\_B.pdf](http://www.usendowment.org/images/BS_cluster_App_B.pdf).

24. Phil Taylor, *Forest Service 'Borrowed' from Panoply of Programs Since '02*, ENV'T & ENERGY PUB. (Aug. 18, 2015), <http://www.eenews.net/stories/1060023610>.

25. Darryl Fears, *U.S. Runs Out of Funds to Battle Wildfires*, WASH. POST (Oct. 7, 2012), [https://www.washingtonpost.com/national/us-runs-out-of-funds-to-battle-wildfires/2012/10/07/d632df5c-0c0c-11e2-bd1a-b868e65d57eb\\_story.html](https://www.washingtonpost.com/national/us-runs-out-of-funds-to-battle-wildfires/2012/10/07/d632df5c-0c0c-11e2-bd1a-b868e65d57eb_story.html).

26. *Id.*

27. *Exploring Wildland Fire Management: Hearing Before the S. Comm. on Energy & Nat. Res.*, 113th Cong. 3 (2013) (statement of Tom Tidwell, Chief, U.S. Forest Serv.); *see also Wildfire Preparedness and Forest Service: Hearing on the 2015 Year Budget Before the S. Comm. on Energy & Nat. Res.*, 113th Cong. 3 (2014) (statement of Tom Tidwell, Chief, U.S. Forest Serv.) (“Each time the agency transfers money out of non-fire accounts to pay for fire suppression there are significant and lasting impacts across the entire Forest Service. When funding is transferred from other programs to support fire suppression operations, these non-fire programs are impacted because they are unable to accomplish priority work and achieve the overall mission of the agency.”).

In response, some members of Congress and the Obama Administration have sought to advance policies that would address the problem. In the 113<sup>th</sup> Congress, Senators Ron Wyden of Oregon and Mike Crapo of Idaho advanced the first such proposal premised on the idea of treating catastrophic wildfires like natural disasters.<sup>28</sup> However, their bill has faltered because of the upward pressure it would put on the budget and its lack of an explicit commitment to fuels treatment work.<sup>29</sup>

With those concerns in mind Senators McCain and Flake along with Senators Heller, Barrasso, and Enzi developed an alternative proposal.<sup>30</sup> In their bill, wildfire suppression appropriations would only qualify for a limited budget cap adjustment if a number of conditions are satisfied.<sup>31</sup> Among those conditions is the use of a better formula to estimate suppression costs; an appropriation equivalent to 100% of that better formula; a set of criteria for designating catastrophic wildfires; and a set aside of funds for proactive forest activities like thinning.<sup>32</sup> The bill also included a national forestry bill that Senator Barrasso had championed and a stewardship contracting improvement bill led by Senator Flake.<sup>33</sup>

Both the Wyden-Crapo and McCain-Flake measures have returned in the 114<sup>th</sup> Congress in substantially the same form.<sup>34</sup> As the proponents of each try to find a path forward, it is worth making a couple of observations that could indicate there is an opportunity for a deal. Most notably, following the Senate Committee on Energy and Natural Resources wildfire hearing on May 6, 2015, Senator Cantwell expressed her interest in crafting a bill that deals with fire borrowing and forest management.<sup>35</sup> This is a major development, as Senator Cantwell is the ranking member on the Energy and Natural Resources Committee and an original cosponsor of the Wyden-Crapo proposal.<sup>36</sup> The fact that she is working on a bill that will be different than the

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28. Wildfire Disaster Funding Act of 2013, S. 1875, 113th Cong. (2013).

29. See, e.g., Andrew Clevenger, *Western Lawmakers Want to Treat Megafires like Natural Disasters*, BULLETIN (Jan. 23, 2015), <http://www.bendbulletin.com/localstate/2808581-151/western-lawmakers-want-to-treat-mega-fires-like-natural>.

30. FLAME Act Amendments of 2014, S. 2593 §§ 102, 103, 113th Cong. (2014).

31. *Id.*

32. *Id.*

33. *Id.* §§ 201–206, 301.

34. Wildlife Disaster Funding Act of 2015, S. 235, 114th Cong. (2015); FLAME Act Amendments of 2015, S.508, 114th Cong. (2015).

35. Phil Taylor, *Cantwell Prepping Bill to Thin Forests, Prevent ‘Borrowing’*, ENV’T & ENERGY DAILY (May 6, 2015), <http://www.eenews.net/eedaily/2015/05/06/stories/1060018054> (“Cantwell’s bill will aim to prevent wildfire borrowing, but it will be different from a broadly supported bill proposed by Sens. Ron Wyden (D-Ore.) and Mike Crapo (R-Idaho), her office said.”).

36. U.S. SENATE COMM. ON ENERGY & NAT. RES., <http://www.energy.senate.gov/public/> (last visited Mar. 5, 2016).

Wyden–Crapo proposal may suggest that the Senate is approaching a fiscally responsible deal.

It is also worth noting that, although the 2015 Senate budget resolution already contained language related to wildfire suppression, Senators Flake, Wyden, and Crapo worked out compromise language on an amendment that could pave the way for a limited budget cap adjustment if certain conditions are satisfied.<sup>37</sup> Similarly, the Forest Service’s FY16 budget justification provides that its proposed “budget cap adjustment will only be accessible for wildland fire suppression operations if a declaration has been issued by the Secretary of Agriculture that one or more . . . conditions are met,” such as the complexity or the size of the fire has risen to a particular level—the same conditions that were included in the McCain-Flake bill and the FLAME Act.<sup>38</sup>

As a practical matter, this would mean that only those truly catastrophic fires would qualify for emergency federal funding, as opposed to small fires that might not otherwise merit adjusting budget caps for increased federal spending. To this end, Chief Tidwell recently confirmed that “[t]he Administration supports declaration criteria for accessing the cap adjustment.”<sup>39</sup>

The bottom line is that the fire-borrowing problem has proven a significant impediment to effective budgeting for Forest Service priorities, including hazardous fuels reduction. As it stands, there are signs of compromise; we need to support their efforts.

Second, I think it is important to touch upon the need for streamlining and finding efficiencies with regard to the federal approach to forest health. Last April, the Government Accountability Office or GAO published a report finding that the Forest Service is among the “most frequent producers” of

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37. Adjustment for Wildfire Suppression Funding in the Senate, S. Con. Res. 11, 114th Cong. § 3208 (2015); *see also* 161 CONG. REC. S2031 (Mar. 26, 2015) (statement of Sen. John McCain) (“I also want to commend my colleague, Senator Wyden, who offered an amendment, S.A. 434, that focuses purely on suppression funding, which I agree should be paired with the wildfire language in the budget resolution. Senator Wyden and I have talked about merging some elements of our two proposal [sic] in order to cover both suppression and prevention. Our mutual goals were advanced today when Senator Wyden modified his amendment to state that Congress may incorporate additional criteria in any proposal that enables limited wildfire adjustments for the Disaster Relief Fund.”).

38. U.S. FOREST SERV., FISCAL YEAR 2016 BUDGET JUSTIFICATION 253 (2015), <http://www.fs.fed.us/sites/default/files/media/2015/07/fy2016-budgetjustification-update-four.pdf>.

39. *See The Fiscal Year 2016 Budget Request for the U.S. Forest Service: Hearing Before the S. Comm. on Energy & Nat. Res.*, 114th Cong. 34–36 (2015) (statement of Tom Tidwell, Chief, U.S. Forest Serv.).

environmental impact statements in the federal government.<sup>40</sup> From 2008 to 2012 it produced 572 EISs, accounting for 24% of EISs across all federal agencies.<sup>41</sup> What's more, it takes the Forest Service, on average, more time to complete its environmental reviews than other agencies.<sup>42</sup> That doesn't account for the litigation challenges that serve to further delay projects.<sup>43</sup>

This process simply must be streamlined and the time and cost per acre of these environmental reviews reduced. The 4FRI record of decision is a great example of reducing per-acre costs. By completing a review on 586,000 acres for treatment and a total project area of 2.4 million acres, one million acres of mechanical treatment, the Forest Service is able to achieve efficiencies that could be a model for other collaborative efforts throughout the West.<sup>44</sup>

There have also been legislative efforts to develop categorical exclusions for certain forest treatment work, or to deem NEPA complete on wildfire projects within a certain amount of time after the environmental review is initiated. One such proposal introduced by Senator Heller in the 113<sup>th</sup> Congress and cosponsored by Senator Flake would have created categorical exclusions for projects near drinking water supplies or other utility corridors, and for projects that would protect endangered species habitat.<sup>45</sup>

After a fire has charred a landscape, streamlined NEPA procedures take on an added sense of urgency. In general, salvage logs are only viable in the market place for 18 months or so—that also happens to be the average time it takes the Forest Service to complete an environmental assessment according to GAO.<sup>46</sup> There have been instances, such as after California's Rim Fire, where the Forest Service processes NEPA documents quickly.<sup>47</sup> Finding a way to duplicate those efforts across forest landscapes would likely be a boon to continued restoration efforts.

We have also seen great collaboration among local communities. The citizens of Flagstaff collectively decided to advance a watershed protection plan for their city with the passage of a \$10 million bond.<sup>48</sup> Similarly, Salt

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40. U.S. GOV'T ACCOUNTABILITY OFFICE, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 10 (2014), <http://www.gao.gov/assets/670/662546.pdf>.

41. *Id.* at 11.

42. *Id.* at 15–16.

43. *Id.* at 21–22.

44. *4FRI Planning*, U.S. FOREST SERV., <http://www.fs.usda.gov/main/4fri/planning> (last visited Feb. 12, 2016).

45. Emergency Fuel Reduction Act of 2014, S. 2768, 113th Cong. § 3(e)(2)(A) (2014).

46. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 40, at 16.

47. See Letter from Nancy Sutley, Chair, Council on Env'tl. Quality, to Tom Tidwell, Chief, U.S. Forest Serv. (Dec. 9, 2013).

48. Flagstaff Ballot Measure 405, *Forest Health and Water Supply Protection Project* (Ariz. 2012).



River Project has initiated an effort to increase forest restoration work on two critical efforts in Arizona through the establishment of the Northern Arizona Forest Fund project.<sup>49</sup>

As shown by those local efforts, the level of interest in this conference and the bevy of congressional hearings on this issue, including the aforementioned Senate Committee on Energy and Natural Resources hearing, where Dr. Pyne, who spoke at this conference, and SRP's Bruce Hallin testified, forest and watershed health and the threat of catastrophic wildfires are key issues for policy makers and stakeholders at the state and federal level.<sup>50</sup>

Since the dark days following Rodeo-Chediski some important developments have occurred, but the need for leadership and action remains. The key is real results on the ground through commonsense improvements to how we approach forest health and wildfire suppression. The good news is that your representatives in Washington are actively engaged in trying to identify and advance proactive solutions. The bad news is 2015 was another challenging year because of a dearth of rain and snowpack. I appreciate all the participants in the symposium and writers for this publication for their interest and commitment to attacking the challenge.

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49. See *Northern Arizona Forest Fund*, NAT'L FOREST FOUND., <https://www.nationalforests.org/who-we-are/regional-offices/southernrockies/azforestfund> (last visited Feb. 12, 2016).

50. See *The Federal Government's Role in Wildfire Management*, *supra* note 20.