

## The Long, Hot Summer: Active Duty Support to Wildland Fire Fighting Operations

Captain Matt D. Montazzoli\*

*The U.S. military has been a key partner in wildland firefighting for decades and we greatly appreciate their willingness to provide us with Soldiers to serve as firefighters.<sup>1</sup>*

*[W]e do have to know in what odd places to look for missing parts of a story about a wildfire and of course have to know a story and a wildfire when we see one.<sup>2</sup>*

You are a newly minted operational law attorney assigned to Fort Wildland in the mountain west. You are ensconced behind your desk, enjoying a post-physical training (PT) cup of coffee in the early hours of a typical Monday. Your boss is on leave, the Deputy is on temporary duty, and the staff judge advocate (SJA) is on convalescent leave after a particularly brutal sports PT session the week prior. You sip your coffee and look out the window, noting the faint haze of smoke that hangs in the air. In fact, that morning you had to rummage around in your car trunk for your snow scraper to clear a thin layer of accumulated ash from your windshield before beginning your commute. Acknowledging that your day will cease to be yours once the rest of the office arrives for duty, you turn your attention to the pile of work your boss generously left on your desk and begin reviewing a fragmentary order when your phone rings. The local chief of police introduces himself and says in a hurried voice,

A lightning strike caused a fire on state forest land between town and the post. The fire department is on scene, and they're reporting a flame front that is wind driven, moving fast through dried scrub brush. Once it burns past Rocky Road, it will hit a grove of beetle-killed ponderosa pine, crown, and run all the way into town if we don't hook it. Our folks can't get it under control with the resources we have, but there is an engineer unit on your post that could scrape a dozer line between Rocky Road and the reservoir to stop the fire from getting to that beetle-kill. The Mayor asked me to call you. Can your commander help?

The goal of this article is to equip a Judge Advocate to perform on the staff of an active duty unit that has been assigned to support wildland fire fighting (WFF) operations. Wildland fire or wildfire is defined as any non-structure fire

that occurs in the wildland.<sup>3</sup> Wildland is “[a]n area in which development is essentially non-existent, except for roads, railroads, powerlines, and similar transportation facilities. Structures, if any, are widely scattered.”<sup>4</sup> The terms wildland fire and wildfire are used interchangeably throughout this article. Wildfire suppression or WFF is “[a]n appropriate management response to wildfire . . . that results in curtailment of fire spread and eliminates all identified threats from the particular fire.”<sup>5</sup> The article will discuss the history of military involvement in wildland fire suppression, including deliberate mobilization of active duty troops for WFF and Immediate Response Authority (IRA); the landscape of modern wildfire suppression, including a very brief overview of tactics and civilian suppression resources; and a review of legal issues likely to arise during support of WFF operations. The legal issues surrounding WFF operations are not especially knotty or novel, but the context can be confusing. As with most situations, a judge advocate with a solid working knowledge of wildland fire terms, tactics, and capabilities will be in a position to provide a commander with well-reasoned, useful legal advice across a broad range of disciplines.

### I. Historical Role of the Military in Wildfire Suppression

Wildfire has long been an important part of the ecology of the American west. Lightning-caused wildfires served as natural agents of renewal, clearing out deadfall and maintaining the health of forests. Native Americans and early settlers utilized fire as a resource management tool, executing controlled burns in the service of hunting and agriculture.<sup>6</sup> For most of the nineteenth century, the federal government's interest in land management was limited to ensuring that natural resources were “wisely used for the benefit of the

\* Judge Advocate, U.S. Army. Trial Counsel, 21st Theater Sustainment Command, Panzer Kaserne, Germany. J.D., 2014, University of Colorado School of Law. Member of the bar of Colorado. The author wishes to thank Mr. Robert Gonzales, U.S. Army North; Mr. Steven O'Brien, Defense Coordinating Element Region X; and CPT David Pigott, Colorado Army National Guard.

<sup>1</sup> Press Release, Aitor Bibaburu, U.S. Nat'l Interagency Fire Ctr., NIFC Mobilizes Active Duty Military Personnel to Help with Wildfire Suppression (Aug. 17, 2015) (on file with author) [hereinafter NIFC Mobilizes Active Duty].

<sup>2</sup> NORMAN MACLEAN, *YOUNG MEN AND FIRE* 37 (1992).

<sup>3</sup> NAT'L WILDFIRE COORD. GRP., PMS 205: GLOSSARY OF WILDLAND FIRE TERMINOLOGY 182 (2008).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> JOHN W. POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES 17 (2d ed. 1879) (“In the main these fires are set by Indians . . . they systematically set fire to forests for the purpose of driving the game.”).

home builder first of all.”<sup>7</sup> The role of the United States Forest Service in wildland fire management was incidental, insofar as timber that was immolated would be unavailable for productive economic use.<sup>8</sup> Unlike the majority of the Forest Service’s regulatory mission, WFF was universally popular with the residents of western states, to the extent that internal Forest Service publications asserted that “[p]robably the greatest single benefit derived by the community and the nation from forest reserves is insurance against the destruction of property, timber resources, and water supply by fire.”<sup>9</sup>

Acute federal interest in wildland fire suppression can be traced to the fire season of 1910. Known as the “Big Burn,” a series of contemporaneous wildfires consumed three million acres in Idaho, Montana, and Washington state, scorching frontier towns, and killing eighty-five people, many of them firefighters.<sup>10</sup> This incident also represents an early example of active duty military support for WFF, as several companies of Buffalo Soldiers from the 25th Infantry Regiment were hastily dispatched by President Taft to battle the blazes.<sup>11</sup> In the aftermath of the big burn, the Chief of the Forest Service advocated for establishing military outposts in national forests during fire season, and federal cavalry routinely deployed to Yosemite National Park during the summer months for wildfire patrols.<sup>12</sup>

Throughout the twentieth century, federal policy demanded immediate suppression of all wildfires on public lands, regardless of cause.<sup>13</sup> In the 1930s, crews from the Civilian Conservation Corps (CCC) were employed in wildfire suppression, greatly expanding the ability of federal officials to mass men and material to extinguish fires.<sup>14</sup> The Army provided officers and non-commissioned officers as

cadre to CCC crews, and after World War II, the paramilitarization of the fire service took off in earnest. The smokejumpers, elite firefighters who arrive at wildfires via parachute drop, jumped from military surplus C-47 ‘flying boxcar’ aircraft of the type that had scattered paratroopers over Normandy, while surplus jeeps and ‘deuce and a half’ trucks were not an uncommon sight on the fire line.<sup>15</sup> The modern incident command system (ICS), which mirrors a military staff, evolved to provide management of massive wildfire suppression operations in California in the 1970s and has become the standard framework for domestic emergency response.<sup>16</sup>

The military continues to play a key role in WFF, especially the reserve component. The National Guard and Air National Guard, acting in State Active Duty (SAD) status, are intimately involved in wildfire suppression in western states; some National Guard units undergo extensive wildland fire training and have capabilities and equipment that is on par with that of civilian wildland fire fighting agencies.<sup>17</sup> National Guard resources can also directly support civilian responders; during Colorado’s 2012 High Park wildfire, an Army National Guard armory was converted into a base camp and incident command post for several hundred civilian firefighters.<sup>18</sup> Individual state laws and authorities vary, but typically Guard forces on SAD status can be employed for WFF pursuant to the Governor’s declaration of a state of emergency for affected counties and his or her issuance of an executive order directing SAD forces to provide support of civil authorities.<sup>19</sup> State Active Duty forces will typically organize as a joint task force (JTF).<sup>20</sup> Although SAD forces can be used to fight wildfires on the ground, they will primarily assist in traffic control, evacuation, and aerial fire suppression missions.<sup>21</sup> Aerial fire suppression missions can

<sup>7</sup> Letter from Gifford Pinchot, first Chief of the U.S. Forest Service, quoted in CHARLES F. WILKERSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 128 (1993).

<sup>8</sup> POWELL, *supra* note 6, at 15-17.

The evidence that the growth of timber, if protected from fires, might be extended to the limits here given is abundant . . . . [I]f the fires are prevented, the renewal by annual growth will more than replace that taken by man . . . . [O]nce protected from fires, the forests will increase in extent and value.

*Id.*

<sup>9</sup> U.S. DEP’T OF AGRIC., *THE USE OF THE NATIONAL FOREST RESERVES: REGULATIONS AND INSTRUCTIONS* 63 (1905).

<sup>10</sup> See TIMOTHY EGAN, *THE BIG BURN TEDDY ROOSEVELT AND THE FIRE THAT SAVED AMERICA* (2009).

<sup>11</sup> STEPHEN J. PYNE, *FIRE IN AMERICA: A CULTURAL HISTORY OF WILDLAND AND RURAL FIRE* 244 (1982).

<sup>12</sup> *Buffalo Soldiers*, U.S. NAT’L PARK SERV., <http://www.nps.gov/yose/learn/historyculture/buffalo-soldiers.htm> (last visited June 7, 2016).

<sup>13</sup> Rebecca K. Smith, *War on Wildfire: The U.S. Forest Service’s Wildland Fire Suppression Policy and Its Legal, Scientific, and Political Context*, 15 U. BALT. J. ENVTL. L. 25, 25 (2007).

<sup>14</sup> Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 ENVTL. L. 301, 306 (2006).

<sup>15</sup> Ker Than, *The Military Roots of Fighting Modern Wildfires*, NATL. GEO., (Aug. 28, 2013), <http://news.nationalgeographic.com/news/2013/08/130828-military--wildfire-fighting-technologies-rim-fire-yosemite>.

<sup>16</sup> U.S. FED. EMER. MGMT. AGENCY, INCIDENT COMMAND SYSTEM TRAINING (May 2008), <https://training.fema.gov/emiweb/is/icsresource/assets/reviewmaterials.pdf>.

<sup>17</sup> Penny Horton, *North Dakota National Guard Members Complete Wildland Firefighting Training*, NATIONAL GUARD (May 9, 2012), <http://www.nationalguard.mil/News/ArticleView/tabid/5563/Article/575808/north-dakota-national-guard-members-complete-wildland-firefighting-training.aspx>.

<sup>18</sup> HEADQUARTERS, COLO. ARMY NAT’L GUARD, FRAGMENTARY ORDER 12-13, HIGH PARK WILDFIRE, TO OPORD 11-03 FY12 COARNG SENTINEL para. 1 (Jun. 9, 2012) (on file with author).

<sup>19</sup> Colorado National Guard, Joint Forces Headquarters Tabletop Exercise: Wildfire, at slide 12 (Jun. 6, 2009) (unpublished PowerPoint presentation) (on file with author) [hereinafter Wildfire TTX].

<sup>20</sup> *Id.* at slide 21.

<sup>21</sup> Colorado National Guard, Wildfire Staff Mission Analysis, at slide 9 (Feb. 4, 2015) (unpublished PowerPoint presentation) (on file with author).

use National Guard lift aviation, and the Air National Guard also maintains the capability to convert C-130s to perform retardant drops using the Modular Airborne Fire Fighting Systems (MAFFS).<sup>22</sup> Although the contributions of the reserve component are significant, employing National Guard forces on SAD or in Title 32 status does not present the same legal or logistical issues as the employment of active duty forces, and this article is primarily focused on the issues surrounding active duty support of WFF operations.

## II. Modern Jurisdictional Framework

The responsibility for WFF rests with a diverse, diffuse, and often confusing confederacy of agencies. There is significant and continuing tension between wildland fire suppression agencies regarding wildfires that spread across jurisdictional boundaries.<sup>23</sup> The geographic location of a wildfire ignition typically determines which agency has initial responsibility for suppression.<sup>24</sup> A fire on private land is initially the responsibility of the landowner.<sup>25</sup> Although a private landowner's responsibility is usually limited to promptly reporting the blaze to authorities, some states require the landowner to "take all practicable means to suppress any fire on his property," lest he be financially liable for later government suppression efforts.<sup>26</sup>

When a fire starts on public land that is not managed by the federal government, a patchwork of state laws control; if the ignition happens within the limits of a municipality, the local fire department has the authority (although not always the wildland-specific training or equipment) to extinguish the blaze.<sup>27</sup> Unincorporated areas implicate the jurisdiction of local, often volunteer, rural fire protection districts, while some states appoint the elected county sheriff as the official fire warden.<sup>28</sup> The state government will often step in when local or county forces are unable to bring a fire under control. Several western states have their own dedicated WFF agencies, but the majority assigns the function to departments

of forestry or natural resources management.<sup>29</sup> A fire that breaks out on federal public land is, in some ways, the cleanest possible scenario, as federal land management agencies will be the first responders and federal authorities will manage the incident response from start to finish.

At the federal level, the main players are the Department of Agriculture (USDA)'s United States Forest Service (USFS), the Department of the Interior (DOI)'s National Parks Service (NPS), and the DOI's Bureau of Land Management (BLM). The Forest Service is the oldest federal land management agency, and can trace its origins (and wildfire suppression mission) back to the Organic Act of 1897.<sup>30</sup> Although responsible for only thirty percent of federally owned lands, it has by far the largest role in wildland fire management, at least as measured by millions of dollars spent.<sup>31</sup> The National Parks Service benefits from being charged with responsibility for the most beautiful and most high profile public lands in the country, including landmarks such as the Grand Canyon National Park, Gettysburg National Military Park, and Yellowstone National Park.<sup>32</sup> Many Americans have spent time on USFS or NPS managed lands for recreation, and positive images of Smokey Bear and campaign hat clad rangers are fairly commonplace.<sup>33</sup> By contrast, BLM lands tend to be less visited and less well known.<sup>34</sup> The Bureau of Land Management manages over 260 million acres of public land, including one out of every five acres west of the Mississippi river.<sup>35</sup> The Bureau of Land Management's holdings are sometimes regarded as leftovers from the USFS and NPS reserves, causing a perception that BLM's wilderness holdings are composed of "land that only God and the BLM could love."<sup>36</sup>

Although there is occasional infighting and jurisdictional squabbling between "green" (USDA) and "brown" (DOI) fire suppression agencies, in practice federal WFF displays an enviable degree of interagency cooperation. The National Interagency Fire Center (NIFC), the federal clearinghouse for all things wildland fire, includes representatives from the

<sup>22</sup> *Modular Airborne Firefighting Systems (MAFFS)*, U.S. FOREST SERV., <http://www.fs.fed.us/fire/aviation/airplanes/maffs.HTML> (last visited June 7, 2016).

<sup>23</sup> DONALD K. ARTLEY, *WILDLAND FIRE PROTECTION AND RESPONSE IN THE UNITED STATES: THE RESPONSIBILITIES, AUTHORITIES, AND ROLES OF THE FEDERAL, STATE, LOCAL, AND TRIBAL GOVERNMENT* 6 (2009) [hereinafter *WILDLAND FIRE PROTECTION AND RESPONSE*].

<sup>24</sup> *Id.* at 10.

<sup>25</sup> *Id.*

<sup>26</sup> W. VA. CODE § 20-3-11 (2015).

<sup>27</sup> *Wildland Fire Protection and Response*, *supra* note 23, at 23.

<sup>28</sup> Colo. Rev. Stat. § 30-10-512 (2014).

<sup>29</sup> *Wildland Fire Protection and Response*, *supra* note 23, at 19-20.

<sup>30</sup> Sundry Civil Appropriations Act of 1897 (Forest Service Organic Administration Act of 1897) 16 U.S.C. §§ 473-478, 479-482, 551 (amended 1905, 1911, 1925, 1962, 1964, 1968, 1976).

<sup>31</sup> U.S. DEP'T OF AGRIC., FISCAL YEAR 2015 BUDGET OVERVIEW 33 (2015). Wildfire suppression costs have grown from 13% of USFS's budget in 2004 to consume 47% of the budget as of 2014. *Id.*

<sup>32</sup> *About Us*, U.S. NAT'L PARK SERV., <http://www.nps.gov/aboutus/> (last visited June 7, 2016).

<sup>33</sup> The National Park system experienced 281.3 million visits in 2010. See THOMAS H. STEVENS, ET AL., *Declining National Park Visitation, An Economic Analysis*, 26 JOUR. LEISURE RES. (NO. 2) 153, 160 (2014).

<sup>34</sup> U.S. BUR. OF LAND MGMT., PUBLIC LAND STATISTICS 2013, 187 (July 2014), [http://www.blm.gov/public\\_land\\_statistics/pls13/pls2013.pdf](http://www.blm.gov/public_land_statistics/pls13/pls2013.pdf) (estimated 68 million visitors to Bureau of Land Management (BLM) lands in 2013).

<sup>35</sup> *The Bureau of Land Management*, U.S. BUR. OF LAND MGMT., [http://www.blm.gov/style/medialib/blm/wo/Communications\\_Directorate/general\\_publications/general.Par.75750.File.dat/TextBLMbro.pdf](http://www.blm.gov/style/medialib/blm/wo/Communications_Directorate/general_publications/general.Par.75750.File.dat/TextBLMbro.pdf) (last visited June 7, 2016).

<sup>36</sup> Charles F. Wilkinson, Professor of Law, University of Colorado, Lecture during Foundations of Natural Resources Law and Policy (Fall 2013) (on file with author).

Forest Service, BLM, NPS, National Weather Service, Bureau of Indian Affairs, Fish and Wildlife Service, and the Federal Emergency Management Agency.<sup>37</sup> Unlike the military concept of unity of command, “[d]ecisions are made using the interagency cooperation concept because the NIFC has no single director or manager.”<sup>38</sup> Although the Department of Defense (DoD) is not a standing member of the NIFC, the DoD will send a liaison officer as necessary.<sup>39</sup> In recent years, the DoD assigns a mobilized reservist serving as an emergency liaison preparedness officer (ELPO) to serve as a full-time liaison to the NIFC during the fire season.<sup>40</sup>

Wildland fire fighting operations can be broken into two stages: Initial attack (IA) and extended attack. Initial attack represents “actions taken by the first resources to arrive at a wildfire.”<sup>41</sup> Initial attack forces can range from a single fire engine to several crews supported by aircraft, depending on the situation, and activities can include sizing up of the fire, patrolling, monitoring, holding actions, or suppression.<sup>42</sup> Barring an exceptionally active fire season or a fire that starts on a military installation, active duty military units are unlikely to engage in IA.<sup>43</sup> The vast majority of wildfires are contained during initial attack, but those that require additional resources are referred to as extended attack incidents.

An extended attack incident represents all suppression efforts from the end of IA until a fire is officially extinguished.<sup>44</sup> The massive *megafires* that dominate cable news during the summer are typically extended attack incidents.<sup>45</sup> Extended attack incidents are analogous to a military campaign, with a sprawling, forward operating base-like fire camp springing up to provide a headquarters complete with sleeping tents, dining facilities, laundry, and logistical support.<sup>46</sup> Wildfire units that are available for nationwide dispatch by the NIFC are part of the National Ready Reserve, colloquially known as being on the board.<sup>47</sup>

Units from local fire engines to federal Hot Shot crews can put themselves on the board if fire activity in their home district does not require their presence.<sup>48</sup> Military units are never on the board, but may be activated by the NIFC for deliberate support of WFF using specific procedures described later in this article.

### III. Modern Wildfire Suppression Resources

Wildfire suppression units are referred to as resources. Resources can be broadly segregated into hand crews, engines, overhead, and aviation. Engines consist of the fire trucks of popular imagination; they are generally four wheel drive vehicles modified to transport and deploy water onto a fire. Engines are classified into seven different types based on the amount of water they can carry and the rate at which they can pump that water through their hoses.<sup>49</sup> Engines typically employed for wildfire suppression range from a Type VI (“six pack”) engine that resembles a pickup truck outfitted with a water tank and hoses that can pump thirty gallons per minute with a crew of two, all the way to a Type I engine, the main battle tanks of the wildfire suppression army with a crew of four and the ability to pump over a thousand gallons in a minute.<sup>50</sup> Wildland fire fighting agencies also employ water tenders, large tanker trucks that haul water from reservoirs to the fireline to replenish engine supplies.<sup>51</sup> Additionally, wildland fire fighting organizations make use of bulldozers and tractor plows, capable of building firelines quickly and cheaply over certain terrain.<sup>52</sup>

Within the WFF community, *overhead* is the term for supervisory and planning resources.<sup>53</sup> Most resources provide their own overhead in the form of a crew superintendent or an engine boss organic to that resource. Every fire, regardless of complexity, must have an incident commander (IC).<sup>54</sup> While the first qualified overhead to

<sup>37</sup> *Mission and History*, NAT’L INTERAGENCY FIRE CTR., [http://www.nifc.gov/aboutNIFC/about\\_mission.html](http://www.nifc.gov/aboutNIFC/about_mission.html) (last visited June 7, 2016).

<sup>38</sup> *Id.*

<sup>39</sup> *Military Support in Wildland Fire Suppression*, NAT’L INTERAGENCY FIRE CTR., [http://www.nifc.gov/fireInfo/fireInfo\\_military.html](http://www.nifc.gov/fireInfo/fireInfo_military.html) (last visited June 7, 2016).

<sup>40</sup> E-mail from Mr. Robert Gonzales, U.S. Army North, to author, (Mar. 15, 2016) (on file with author).

<sup>41</sup> NAT’L WILDFIRE COORD. GRP., PMS 210: WILDLAND FIRE INCIDENT MANAGEMENT FIELD GUIDE 17 (2013).

<sup>42</sup> U.S. NAT’L INTERAGENCY FIRE CTR., 2016 NATIONAL INTERAGENCY STANDARDS FOR FIRE AND AVIATION OPERATIONS GUIDE 7 (2016) [hereinafter REDBOOK].

<sup>43</sup> NAT’L INTERAGENCY FIRE CTR., NFES 2175: MILITARY USE HANDBOOK ch. 30-1 (2006) [hereinafter MILITARY USE HANDBOOK] (“Initially the military will in most cases be assigned mop-up activities. Within a few shifts they may . . . be reassigned to hotline fire activities.”)

<sup>44</sup> REDBOOK, *supra* note 42, at 7.

<sup>45</sup> Kyle Dickman, *Age of the Megafire: We’re Making Wildfires Worse and We Don’t Know How to Fight Them*, SALON.COM (Jul. 12, 2015), [http://www.salon.com/2015/07/12/age\\_of\\_the\\_megafire\\_were\\_making\\_wildfires\\_worse\\_and\\_we\\_dont\\_know\\_how\\_to\\_fight\\_them/](http://www.salon.com/2015/07/12/age_of_the_megafire_were_making_wildfires_worse_and_we_dont_know_how_to_fight_them/).

<sup>46</sup> Jessica Garrison, *Los Angeles Fire Camp Like a Little City*, LOS ANGELES TIME (Sept. 5, 2009), <http://articles.latimes.com/2009/sep/05/local/me-fire-command5>.

<sup>47</sup> REDBOOK, *supra* note 42, at 342-43.

<sup>48</sup> NAT’L DISPATCH EFFICIENCY WORKING GRP., INTERAGENCY STANDARDS FOR THE ROSS OPERATIONS GUIDE 6 (2015).

<sup>49</sup> REDBOOK, *supra* note 42, at 271.

<sup>50</sup> See U.S. FOREST SERV., WILDLAND FIRE ENGINE GUIDE (2000).

<sup>51</sup> REDBOOK, *supra* note 42, at 272.

<sup>52</sup> *Id.* at 273.

<sup>53</sup> U.S. NAT’L INTERAGENCY FIRE CTR., 2015 NATIONAL INTERAGENCY MOBILIZATION GUIDE 54 (2015) [hereinafter MOBILIZATION GUIDE].

<sup>54</sup> REDBOOK, *supra* note 42, at 208.

arrive on an initial attack will initially act as the IC for that fire, more complex extended attack fires require additional mission command resources in the form of an incident management team (IMT).<sup>55</sup> Incident management teams are divided into types based on their level of training and the complexity of incidents that each team is capable of managing, from Type 5, a purely local ad-hoc team capable of managing very simple incidents, all the way to a Type 1 team that fulfills all of the functions associated with a military general staff, from logistics to public affairs, and is capable of managing a very complex incident or series of incidents.<sup>56</sup> Type 1 and Type 2 teams are certified by the federal government; there are currently sixteen Type 1 IMTs in the United States.<sup>57</sup>

Aviation resources consist of fixed wing and rotary wing assets from private contractors and government agencies. Rotary wing resources can be used for anything from aerial reconnaissance to “bucket drops” of water onto fires.<sup>58</sup> Rotary wing lift resources are also utilized for logistics and to insert “helitack” crews: Rappel-capable teams of firefighters similar to Air Assault units in the Army.<sup>59</sup> Lift helicopters are regularly utilized for medical evacuation, and can be employed to evacuate civilians threatened by wildfire.<sup>60</sup> The most common fixed wing air assets consist of air tankers known as “slurry bombers,” specially modified airplanes that drop water or a flame-extinguishing chemical liquid called slurry onto or in the path of wildfires.<sup>61</sup> A common example of military support to wildfire suppression efforts is the Modular Airborne Fire Fighting System (MAFFS), a

modification that converts C-130 Hercules cargo aircraft into massive slurry bombers.<sup>62</sup>

The infantrymen in the war on wildfire are organized into hand crews. Hand crews are categorized as Type 1 crews, which are national-level resources, and Type 2 crews, which are local or regional resources with a lower level of training and readiness.<sup>63</sup> Type 1 crews include Smokejumpers, airborne firefighters with base throughout the western United States and Alaska.<sup>64</sup> “Hot Shot” crews, composed of experienced firefighters with extensive training, are also Type 1 assets.<sup>65</sup> A Type 1 crew is always available for deployment from one fire to another for the entire fire season.<sup>66</sup> Type 2 crews have varying levels of training and readiness; some Type 2 crews are dedicated to wildfire suppression, but many are primarily utilized for trail maintenance or fuel reduction crews that are cross-trained in firefighting.<sup>67</sup> Many states train and organize prisoners into Type 2 wildfire crews; these “con crews” are organized with the same personnel and equipment as a regular crew, with the addition of a pair of shotgun-toting correctional officers.<sup>68</sup> In some fire seasons, con crews make up nearly half of wildfire hand crews in California.<sup>69</sup>

Typical hand crews are composed of eighteen to twenty people, broken up into three squads with a superintendent (supe) and foreman for overhead.<sup>70</sup> The supe and foreman (often called the crew boss) fill roles analogous to a lieutenant and a platoon sergeant, with the superintendent primarily responsible for tactics and communication with higher

<sup>55</sup> *Id.* at 209.

<sup>56</sup> *Id.* at 209-12.

<sup>57</sup> *Incident Management Team Professional Development and Training*, U.S. FIRE ADMIN., <https://www.usfa.fema.gov/training/imt/> (last visited June 7, 2016).

<sup>58</sup> Jennifer Hlad, *Pendleton Choppers Practice Fighting Wildfires Amid Drought*, STARS AND STRIPES (May 1, 2015), <http://www.stripes.com/news/us/pendleton-choppers-practice-fighting-wildfires-amid-drought-1.343552>. Judge Advocates should be aware that the purchase of wildland fire fighting (WFF) specific equipment, such as the ‘bambi buckets’ described in the article, for defense support of civil authorities (DCSA) with Operations and Maintenance, Army funds is not proper. See BLACK FOREST FIRE AAR, *infra* note 90, at 3. The items may be procured for a necessary expense, such as WFF on the installation, and then employed for DCSA, but should not be expressly acquired for DCSA purposes.

<sup>59</sup> Redbook, *supra* note 42, at 301.

<sup>60</sup> *Id.* at 304; BILL GABBERT, *Fire in Jasper National Park Requires Evacuation of Park Visitors by Helicopter*, WILDFIRE TODAY (Jul. 10, 2015), <http://wildfiretoday.com/2015/07/10/fire-in-jasper-national-park-requires-evacuation-of-park-visitors-by-helicopter>.

<sup>61</sup> TOM BAUER, *Forest Service Unveils Strategy for Replacing Old Slurry Bombers*, THE MISSOULIAN (Feb. 11, 2012), [http://missoulian.com/news/state-and-regional/forest-service-unveils-strategy-for-replacing-old-slurry-bombers/article\\_d17624c8-54b1-11e1-8215-0019bb2963f4.html](http://missoulian.com/news/state-and-regional/forest-service-unveils-strategy-for-replacing-old-slurry-bombers/article_d17624c8-54b1-11e1-8215-0019bb2963f4.html); see also Anna Huckabee, *Slurry Bomber Lefthand Canyon Fire*, YOUTUBE (Mar. 11, 2011),

<https://www.youtube.com/watch?v=XQtPHOYtOIo> (video of slurry bomber in action).

<sup>62</sup> *Modular Airborne Firefighting Systems (MAFFS)*, *supra* note 22.

<sup>63</sup> REDBOOK, *supra* note 42, at 51-53.

<sup>64</sup> Smokejumpers also provide U.S. Army Special Operations Command (USASOC) elements with training and technology development for rough terrain parachuting. See INTERAGENCY MEMORANDUM OF AGREEMENT BETWEEN USDA-FOREST SERVICE, USDOJ-BLM, AND USASOC (1992).

<sup>65</sup> REDBOOK, *supra* note 42, at 260.

<sup>66</sup> *Id.* at 261.

<sup>67</sup> See Jon Driessen, *Crew Cohesion, Wildland Fire Transition, and Fatalities*, U.S. FOREST SERVICE, <http://www.fs.fed.us/t-d/pubs/htmlpubs/htm02512809/page08.htm> (last visited Jan. 20, 2016).

<sup>68</sup> Alex Helmick, *Thousands of Inmates Serve Time Fighting the West’s Forest Fires*, NAT’L PUBLIC RADIO (Jul. 31, 2014), <http://www.npr.org/2014/07/31/336309329/thousands-of-inmates-serve-time-fighting-the-west-s-forest-fires>.

<sup>69</sup> David Schmalz, *Convicts on the Crew: Inmates in the California Conservation Camp Program Help Battle Wildfires*, COACHELLA VALLEY INDEP. (Dec. 30, 2013), <http://www.cvindependent.com/index.php/en-US/news/environment/item/950-convicts-on-the-crew-inmates-in-the-california-conservation-camp-program-help-battle-wildfires>.

<sup>70</sup> REDBOOK, *supra* note 42, at 262.

headquarters while the crew boss handles logistics and maximizes individual firefighter performance.

The non-overhead members of a hand crew carry various tools that they use to build a “fireline.” A fireline is essentially a shallow trench about two or three feet wide where the ground has been scraped down to mineral soil, creating a break in combustible materials that will contain the fire.<sup>71</sup> A fireline is usually dug as close as safety permits to the flames to minimize the amount of unburned fuel between the fireline and the fire.<sup>72</sup> Crews often build their fireline with “one foot in the black” because the fireline is so close to the actual fire that crew members can stand in the ashes of already burned material.<sup>73</sup> Often, a crew must hike for many miles with over twenty-five pounds of equipment before beginning work.<sup>74</sup>

A crew that is engaged in building a fireline is said to be the “cutting line.”<sup>75</sup> The supe moves ahead of the crew, scouting and marking where the fire line will be cut based on terrain and fuels.<sup>76</sup> The remaining members of the crew follow in a line, each crew member about a tool’s length from the next, bent over digging for up to sixteen hours a day.<sup>77</sup> Most crews are organized with a pair of “saw teams,” consisting of a “sawyer” who operates a chainsaw to remove trees and dense brush and a “swamper” who clears away debris to keep the saw operating.<sup>78</sup> Behind the saw teams come firefighters swinging a double-sided combination of a mattock and an axe known as a Pulaski, used to chop roots and scrape away fuels.<sup>79</sup> Farther down the line, crew members employ shovels and McLeods, a sort of aggressive looking rake.<sup>80</sup> Each crew member takes a few swings with his or her tool and sidesteps; the effect is of a centipede chewing as it crawls, stripping away anything that could burn to produce the fireline.<sup>81</sup> A fireline is measured in “chains” of sixty-six feet.<sup>82</sup> A Type 1 crew working in brush typically

cut six chains of line per hour, while a Type 2 crew is expected to cut four.<sup>83</sup> Active duty Soldiers mobilized to support wildfire suppression are classified as Type 2 crews.

#### IV. Immediate Response Authority

Active duty support for wildland fire suppression falls under the rubric of Defense Support of Civil Authorities (DSCA). Defense Support of Civil Authorities is defined as “support provided by U.S. federal military forces . . . in response to a request for assistance (RFA) from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events.”<sup>84</sup> Defense Support of Civil Authorities includes support to prepare, prevent, protect, respond, and recover from domestic incidents including major disasters, both natural and man-made.<sup>85</sup>

The Robert T. Stafford Disaster and Emergency Relief Act (“Stafford Act”) is the preeminent federal legislation governing DSCA.<sup>86</sup> The Stafford Act provides expanded federal authority in support of local disaster response efforts by providing equipment, facilities, supplies, and personnel as directed by the President.<sup>87</sup> Military WFF operations can be authorized as either deliberate DSCA missions under the Stafford Act or authorized under immediate response authority (IRA).

Immediate response authority allows a federal military commander to temporarily deploy and employ resources under her control to save lives, prevent human suffering, or mitigate great property damage.<sup>88</sup> Immediate response authority requires a request from civil authorities under imminently serious conditions when time does not permit

<sup>71</sup> *About Handcrews*, U.S. FOREST SERV., [http://www.fs.fed.us/fire/people/handcrews/about\\_handcrews.html](http://www.fs.fed.us/fire/people/handcrews/about_handcrews.html) (last visited June 7, 2016) [hereinafter *About Handcrews*].

<sup>72</sup> *Id.*

<sup>73</sup> *Wildland Fire: Fireline Construction*, U.S. NAT’L PARK SERV., <http://www.nps.gov/fire/wildland-fire/learning-center/fire-in-depth/fireline-construction.cfm> (last visited June 7, 2016).

<sup>74</sup> *About Handcrews*, *supra* note 71.

<sup>75</sup> Amanda Chicago Lewis, *The Prisoners Fighting California’s Wildfires*, BUZZFEED NEWS (Oct. 31, 2013), <http://www.buzzfeed.com/amandachicagolewis/the-prisoners-fighting-californias-wildfires#.fvVbR0kBR> [hereinafter *Fighting California’s Wildfires*].

<sup>76</sup> Kyle Dickman, *In the Line of Wildfire*, OUTSIDE (Jun. 13, 2013), <http://www.outsideonline.com/1920071/line-wildfire> [hereinafter *In the Line*].

<sup>77</sup> *About Handcrews*, *supra* note 71.

<sup>78</sup> *In the Line*, *supra* note 76.

<sup>79</sup> The Pulaski was named in honor of Forest Service Ranger Edward Pulaski, the hero of the 1910 ‘big burn.’ See *1910 Fires: Edward Pulaski*, U.S. FOREST SERV., <http://www.fs.usda.gov/detail/r1/learning/history->

[culture/?cid=stelprdb5122876](http://www.fs.usda.gov/detail/r1/learning/history-culture/?cid=stelprdb5122876) (last visited June 7, 2016). Pulaski saved the lives of his forty-five man hand crew by leading them to take shelter inside an abandoned mineshaft to escape the fire. *Id.* He is also said to have invented the tool that carries his name.

<sup>80</sup> *Fighting California’s Wildfires*, *supra* note 75.

<sup>81</sup> *Id.*

<sup>82</sup> U.S. NAT’L WILDFIRE COORD. GRP., PMS 210: WILDLAND FIRE INCIDENT MANAGEMENT FIELD GUIDE 110 (2013).

<sup>83</sup> *Id.*

<sup>84</sup> U.S. DEP’T OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) 16 (29 Dec. 2010) (C1 21 Sept. 2012) [hereinafter DCSA].

<sup>85</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES I-2 (31 Jul. 2013).

<sup>86</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 42 U.S.C. § 5121 (1988) (amending the Disaster Relief Act of 1974, Pub. L. No. 93-288).

<sup>87</sup> 42 U.S.C. § 5170 (2015).

<sup>88</sup> DCSA, *supra* note 84, para. 4.g.

approval from higher authority.<sup>89</sup> Immediate response authority forces cannot perform law enforcement duties; the deployment must be terminated when civilian resources become available or the immediate threat has passed, usually within seventy-two hours.<sup>90</sup> All requests for support of civil authorities must be evaluated for legality, lethality, risk of harm to military forces, cost, appropriateness, and impact on military readiness.<sup>91</sup> The decision to employ IRA, and any decision to extend immediate response beyond 72 hours, should be documented in writing and ought to undergo a legal review.<sup>92</sup> Immediate response authority forces continue to answer to their chain of command, unlike forces deliberately mobilized for WFF operations.<sup>93</sup> Recent IRA mobilizations have included Soldiers, rotary wing aviation assets, wheeled vehicles, and bulldozers.<sup>94</sup>

The use of IRA is not an isolated or unlikely event, particularly for installations in the western United States. For example, assume that a wildfire caused by a lightning strike ignites on state land near a rural military installation. A local engine crew deploys to the fire to size it up and determines that based on prevailing winds and available fuels, the fire is likely to “blow up” and burn into a populated area once it hits a dense thicket of scrub brush that is a few miles away. At the current rate of spread, the fire will reach the thicket within the next hour. An hour is not enough time to cut a fireline by hand between the fire and the thicket, but a bulldozer could easily cut a fireline in the time available. An active duty engineer company on the base happens to have bulldozers available. In response to a request from the local civil authorities and considering the factors discussed above, the Commander could authorize the use of the bulldozers under IRA.<sup>95</sup>

Judge advocates advising commanders during IRA operations should remember that the Posse Comitatus Act (PCA) prohibits active duty Soldiers and Airmen from

engaging in law enforcement actions.<sup>96</sup> The standing rules for the use of force (SRUF) apply during a wildfire incident, however Soldiers are prohibited from carrying individual or issued weapons while “participating in a [wildfire suppression] operation.”<sup>97</sup> While most operations in support of wildland fire suppression are unlikely to trigger the PCA, it is important to watch for mission creep. For example, during the Waldo Canyon Fire in 2012, a civilian official attempted to employ Soldiers to perform duty at roadblocks to prevent members of the public from entering areas where wildfire suppression operations were being conducted.<sup>98</sup> While this makes intuitive sense, in that Soldiers are trained and equipped for such a mission, it runs afoul of the PCA and the request was denied.<sup>99</sup> A judge advocate should be nested with the task force command team and in close touch with the IMT during planning to make incident managers aware of the constraints on military resources.

During the Waldo Canyon Fire, Soldiers were employed to control traffic in support of an engineer company’s convoy of bulldozers from Fort Carson to the scene of the fire. The use of Soldiers to control civilian traffic off-installation represents a PCA violation, but because the Soldiers were conducting roadblocks to allow a military convoy to move unimpeded along civilian streets and highways, this activity falls under the military purpose doctrine (MPD) exception to the PCA.<sup>100</sup> The MPD allows federal troops to provide some law enforcement assistance if the primary purpose of the assistance is to further a military purpose under appropriate authority.<sup>101</sup> In this case, the appropriate authority was IRA and the military purpose was to allow the military convoy to travel unimpeded from Fort Carson to the site of the fire.<sup>102</sup> The use of military vehicles driven by Soldiers to voluntarily evacuate citizens from areas threatened by a wildfire would probably be permissible because it would not constitute actions to “execute the laws” under the PCA.<sup>103</sup> The use of

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, 4TH INFANTRY DIVISION, FORT CARSON, CO AFTER ACTION REPORT BLACK FOREST FIRE RESPONSE 5 (Jan. 2014) [hereinafter BLACK FOREST FIRE AAR]. The 2013 human-caused Black Forest Fire caused \$420.5 million in damages and suppression costs, burned 489 homes in Colorado Springs, Colorado, and killed two people. *Id.*

<sup>91</sup> DCSA, *supra* note 84, para. 4.e.

<sup>92</sup> BLACK FOREST FIRE AAR, *supra* note 90, at 6.

<sup>93</sup> CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FORT CARSON OSJA/U.S. AIR FORCE ACADEMY/NORTHCOM COLORADO WILDFIRES AFTER ACTION REPORT 14-15 (Oct. 10-11, 2012) [hereinafter COLORADO WILDFIRES AAR].

<sup>94</sup> BLACK FOREST FIRE AAR, *supra* note 90, at 1.

<sup>95</sup> Telephone interview with CPT Conner Bidwell, Judge Advocate, U.S. Army (Aug. 27, 2015) [hereinafter Interview with CPT Conner Bidwell]. This scenario was inspired by CPT Bidwell’s experiences as Chief of Operational Law, 4th Infantry Division (Mechanized) at Fort Carson, Colorado, in the summer of 2012. Fort Carson utilized Immediate Response Authority (IRA) to provide a portion of an engineer battalion and

heavy equipment such as bulldozers to dig fireline in support of efforts to contain the Waldo Canyon Fire, a 2012 blaze that burned upwards of 18,000 acres, destroyed 347 homes in Colorado Springs, Colorado, and killed two people. *Id.*

<sup>96</sup> 18 U.S.C. § 1385.

<sup>97</sup> U.S. ARMY NORTH (ARNORTH), STANDARD OPERATING PROCEDURES, WILDLAND FIREFIGHTING, APPENDIX 35 TO ANNEX H (LEGAL) para. 4.G.7.B (repeating a prohibition imposed in JOINT CHIEFS OF STAFF, DEFENSE SUPPORT OF CIVIL AUTHORITIES EXECUTION ORDER para. 3.I.8 (7 JUN. 2013) [hereinafter ARNORTH Wildland Firefighting SOP].

<sup>98</sup> Interview with CPT Conner Bidwell, *supra* note 95.

<sup>99</sup> *Id.*

<sup>100</sup> COLORADO WILDFIRES AAR, *supra* note 93, at 10.

<sup>101</sup> U.S. DEP’T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES 15 (27 Feb. 2013) [hereinafter DoDI 3025.21].

<sup>102</sup> COLORADO WILDFIRES AAR, *supra* note 93, at 10.

<sup>103</sup> Posse Comitatus Act, 18 U.S.C. 1385 (2015).

the same Soldiers and vehicles to enforce a mandatory evacuation order, or to patrol the evacuated areas to prevent looting, would violate the PCA and DoD policy.<sup>104</sup> National Guard resources on state active duty or Title 32 Status, if available, may provide a similarly trained and equipped alternative resource for law enforcement type missions because the PCA does not apply to Guardsmen in either of those statuses.

## V. Deliberate Mobilization of Active Duty Forces to Support Wildfire Suppression

The NIFC serves as the coordination center for WFF operations throughout the United States, and active duty military support can only be employed under either Immediate Response Authority or after a formal request by the NIFC.<sup>105</sup> The Economy Act is the animating federal legislation for the interagency agreement that governs the deliberate employment of active duty forces in support of wildland fire suppression.<sup>106</sup> Department of Defense attorneys have already ensured that the interagency agreement is in compliance with the Economy Act and the Stafford Act, so a judge advocate in the field needs to ensure deliberate WFF operations are executed in compliance with the agreement.

In the past, the NIFC was required to “[e]nsure that all available or suitable civilian resources have been committed, and the requested support is not in competition with private enterprise,” but that requirement was eliminated in 2006, and the NIFC is merely required to determine that civilian resources are not readily available.<sup>107</sup> United States Joint Forces Command (JFCOM) is officially listed as the DoD’s

Executive Agent for Wildfire Support in the most recent interagency agreement, but JFCOM was eliminated in 2011 and Northern Command (NORTHCOM) assumed responsibility for Defense Support of Civil Authorities (DSCA), including WFF.<sup>108</sup> Northern Command assigns a Defense Coordinating Element (DCE), essentially a robust liaison package headed by a post-brigade command O-6 level Defense Coordinating Officer (DCO) to each of the Department of Homeland Security/Federal Emergency Management Agency (DHS/FEMA)’s ten nationwide regions.<sup>109</sup> The DCO validates the DSCA’s requests and passes them through NORTHCOM for approval by the Secretary of Defense, and the DCO remains DoD’s primary point of contact between supporting military forces and the supported civilian authorities.<sup>110</sup>

The NIFC is authorized to request military resources in battalion strength, the equivalent of twenty-five hand crews.<sup>111</sup> Recent operational deployments have also consisted of an order for ten hand crews and a battalion command element, the equivalent of a reinforced company.<sup>112</sup> Northern Command has the authority to request forces for DCSA through a standing DCSA execution order (EXORD) or via a request for forces (RFF) through the Joint Staff.<sup>113</sup> Prior to the annual fire season, Army Forces Command (FORSCOM) publishes a planning order that designates available Army battalions to support the WFF mission.<sup>114</sup> If activated, available battalions will be placed under the operational control (OPCON) of NORTHCOM, which will OPCON them to the service component command, such as ARNORTH, and the service component command will OPCON the forces to the DCO for the FEMA region where the fire occurs.<sup>115</sup> Operational control is defined as “the authority to perform those functions of command over

<sup>104</sup> See DoDI 3025.21, *supra* note 101.

<sup>105</sup> MOBILIZATION GUIDE, *supra* note 53, at 24.

<sup>106</sup> U.S. DEP’T OF AGRIC., U.S. DEP’T OF INTERIOR, & U.S. DEP’T OF DEF., INTERAGENCY AGREEMENT FOR THE PROVISION OF TEMPORARY SUPPORT DURING WILDLAND FIREFIGHTING OPERATIONS AMONG THE UNITED STATES DEPARTMENT OF THE INTERIOR, THE UNITED STATES DEPARTMENT OF AGRICULTURE, AND THE UNITED STATES DEPARTMENT OF DEFENSE (2010) [hereinafter INTERAGENCY AGREEMENT FOR THE PROVISION OF TEMPORARY SUPPORT DURING WFF OPERATIONS].

<sup>107</sup> U.S. DEP’T OF AGRIC., U.S. DEP’T OF INTERIOR, & U.S. DEP’T OF DEF., MODIFICATION NO. 01 TO INTERAGENCY AGREEMENT FOR THE PROVISION OF TEMPORARY SUPPORT DURING WILDLAND FIREFIGHTING OPERATIONS AMONG THE UNITED STATES DEPARTMENT OF THE INTERIOR, THE UNITED STATES DEPARTMENT OF AGRICULTURE, AND THE UNITED STATES DEPARTMENT OF DEFENSE (2006) (superseded by an identically named interagency agreement ratified in 2010, *see* INTERAGENCY AGREEMENT FOR THE PROVISION OF TEMPORARY SUPPORT DURING WFF OPERATIONS, *supra* note 106). The agreement was modified due to Congressional concern that the previous requirement to ensure all private resources were committed was more restrictive than the Economy Act required, particularly with regard to aircraft. *See* OFF. OF MGMT. & BUDGET, A REVIEW OF EXISTING AUTHORITIES AND PROCEDURES FOR USING MILITARY ASSETS IN FIGHTING WILDFIRES 10 (2004).

<sup>108</sup> HEADQUARTERS, U.S. DEP’T OF ARMY, DEFENSE SUPPORT OF CIVIL AUTHORITIES EXECUTION ORDER 191-13 para 3.C.4.O (Aug. 29, 2013) [hereinafter EXORD 191-13].

<sup>109</sup> CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, DOMESTIC OPERATIONAL LAW 2013 HANDBOOK 21 (Oct. 2013).

<sup>110</sup> U.S. ARMY NORTH, USARNORTH OPORD AN-OPORD-15-008-01 FOR 2015 SUPPORT TO THE NATIONAL INTERAGENCY FIRE CENTER AND USNORTHCOM WILDLAND FIRE FIGHTING EFFORTS, para. 3.A.1 (Jul. 1, 2015) at para 3.B.3 (DCO is the primary DoD coordinating official to support NIFC) (on file with author); *See also* E-mail to author from Mr. Steven O’Brien, Defense Coordinating Element Region X, dated Mar. 14, 2016 (on file with author) [hereinafter USARNORTH WFF OPORD];

<sup>111</sup> Military Use Handbook, *supra* note 43, at 5.

<sup>112</sup> E-mail from Steven O’Brien, Defense Coordinating Element Region X, to author (Mar. 14, 2016 (on file with author)).

<sup>113</sup> *See* EXORD 191-13, *supra* note 108.

<sup>114</sup> U.S. ARMY FORCES COMMAND, FORSCOM EXORD ISO DEFENSE SUPPORT TO CIVIL AUTHORITIES FY16/17 para. 3.D.7.A.1 (18 Nov. 2015) (on file with author). Two WFF battalions are geographically sourced annually with one on the west coast and one in the central United States. *Id.*

<sup>115</sup> USARNORTH WFF OPORD, *supra* note 110, para. 5.A.4; *see also* E-mail from Robert Gonzales, U.S. Army North, to author (Mar. 12, 2016) (on file with author).

subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission.”<sup>116</sup> Operational control does not, in and of itself, include authoritative direction for logistics or matters of administration, discipline, internal organization, or unit training.<sup>117</sup>

Some sources, including the NIFC’s handbook for federal wildland fire agencies who receive military resources, suggest that tactical control (TACON) of the tasked battalion is passed to the civilian Incident Commander managing the wildfire.<sup>118</sup> Tactical command consists of “authority over forces that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish missions or tasks assigned.”<sup>119</sup> Tactical control does not provide authority to change organizational structure or direct administrative and logistical support, although the NIFC always provides some wildfire-specific logistical support such as boots and firefighting tools.<sup>120</sup> In recent operational deployments the tasked battalion has been given the purpose of “rapidly and effectively support NORTHCOM and [the] NIFC to mitigate the effects of wildland fires, while maintaining public confidence and support for DoD support of civil authorities.”<sup>121</sup> Operational and tactical control of the mobilized battalion was given to the DCO and the DCO was directed to provide mission command for the tasked battalion.<sup>122</sup> The tasked battalion was authorized and encouraged to coordinate with the civilian IC, but no formal command relationship was specified.<sup>123</sup> The command relationship between the IC and the tasked battalion is generally understood as that of “direct support.”<sup>124</sup> Direct support is defined as “a mission requiring a force to support another specific force and authorizing it to answer directly to the supported force’s request for assistance.”<sup>125</sup> The IC is the supported force and must communicate his or her

requirements and intent through the DCO to the battalion command element for execution.<sup>126</sup>

Once NORTHCOM identifies the specific battalion that will support NIFC’s request from available units identified by the service components, NIFC will dispatch an advance party to the supporting unit’s home station. The advance party will consist of a Battalion Military Liaison, an experienced wildfire supervisor who will integrate into the battalion staff as a subject matter expert and liaison with the IMT, as well as twenty-eight Military Crew Advisors who will provide overhead for the battalion’s hand crews.<sup>127</sup> These individuals will deploy and remain with the unit throughout the incident.<sup>128</sup> The NIFC advance party will also consist of appropriate cadre to train the battalion’s Soldiers in wildfire suppression techniques; the NIFC cadre will conduct a half-day of classroom training at home station and two days of field training at the incident site to certify the battalion’s Soldiers as wildland firefighters pursuant to applicable federal standards.<sup>129</sup> The NIFC is also expected to equip the battalion with personal protective equipment and tools, as well as diesel fuel and shower facilities.<sup>130</sup> The NIFC will also issue radios for communication between incident overhead and military crews because although military units will deploy with organic communications systems to facilitate internal mission command, military radios are not generally compatible with those used by civilian responders.<sup>131</sup>

Within five days of notification, a battalion can be trained, equipped, and ready to commence travel to an incident site.<sup>132</sup> The battalion is expected to deploy with the Battalion Aid Station and organic transportation assets.<sup>133</sup> Recent active duty deployments in support of WFF have also included an aeromedical evacuation section with hoist capability.<sup>134</sup>

“[A] Judge Advocate can be attached to a [Battalion] Headquarters” for a wildfire suppression deployment.<sup>135</sup> When appropriate, the mobilized battalion’s general court-

<sup>116</sup> U.S. DEP’T OF ARMY, DOCTRINE PUB. 1-02, TERMS AND MILITARY SYMBOLS para. 1-63 (Feb. 2015) [hereinafter ADRP 1-02].

<sup>117</sup> U.S. DEP’T OF ARMY, DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS para. 2-17 (May 2012) [hereinafter ADRP 5-0].

<sup>118</sup> MILITARY USE HANDBOOK, *supra* note 43, at v.

<sup>119</sup> ADRP 1-02, *supra* note 116, para. 1-63.

<sup>120</sup> ADRP 5-0, *supra* note 117, para. 2-17.

<sup>121</sup> U.S. ARMY NORTH, FRAGO 1 TO USARNORTH OPORD, AN-OPORD-15-008-01 FOR 2015 SUPPORT TO THE NATIONAL INTERAGENCY FIRE CENTER AND USNORTHCOM WILDLAND FIRE FIGHTING EFFORTS para. 3.A.1 (14 Aug. 2015).

<sup>122</sup> *Id.* para. 3.C.3.C.

<sup>123</sup> *Id.* para 3.C.5.E.

<sup>124</sup> E-mail from Mr. Steven O’Brien, Defense Coordinating Element Region X, to author (Mar. 14, 2016) (on file with author).

<sup>125</sup> ADRP 1-02, *supra* note 116, para. 1-29.

<sup>126</sup> E-mail to author from Mr. Steven O’Brien, Defense Coordinating Element Region X, dated Mar. 14, 2016 (on file with author).

<sup>127</sup> MILITARY USE HANDBOOK, *supra* note 43, at 10-11.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 13.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 52.

<sup>132</sup> MILITARY USE HANDBOOK, *supra* note 43, at 1.

<sup>133</sup> *Id.* at v.

<sup>134</sup> Off. of the Judge Advocate Gen., U.S. Army, Int’l and Operational Law Division, U.S. Army Support to Firefighting Efforts in Western States (Aug. 18, 2015) (unpublished information paper) (on file with author).

<sup>135</sup> MILITARY USE HANDBOOK, *supra* note 43, at 21.

martial convening authority may designate a legal advisor to deploy with the unit and advise the commander and staff on legal issues affecting military plans and operations.<sup>136</sup> Although a battalion could certainly deploy with the parent brigade's brigade judge advocate or trial counsel, it is significantly more likely that the brigade combat team's operational law judge advocate would be attached to the battalion headquarters.<sup>137</sup> However, in a recent active duty WFF mobilization, only the battalion paralegal deployed with the headquarters to provide legal support.<sup>138</sup>

Soldiers assigned to a wildfire incident remain subject to the Uniform Code of Military Justice, as well as state and local laws at the incident location. Although NIFC advises Incident Managers that "[t]he military quickly addresses disciplinary questions, rather than deferring resolution until redeployment to home bases," it is almost certain that the majority of military justice actions during a month-long fire deployment would be handled upon return to home station.<sup>139</sup> A report of any incident during a wildland fire suppression mobilization that might be the basis for court-martial charges must be forwarded to the ARNORTH Office of the Staff Judge Advocate.<sup>140</sup> Military justice actions will likely be minimal due to a high operational tempo and the fact that "officers and non-commissioned officers will enforce a no alcohol policy at all times and closed camp policies when necessary."<sup>141</sup>

## VI. Fiscal and Administrative Law

The core tenants of fiscal law from the Judge Advocate Officer Basic Course (purpose, time, and amount) are applicable to active duty support for WFF operations, whether executed deliberately or under IRA. The Stafford Act provides express statutory authorization for federal disaster assistance to state or local governments "with or without reimbursement" to the agency.<sup>142</sup> Department of Defense support to federal fire-fighting agencies is always on a

reimbursable basis utilizing the Economy Act.<sup>143</sup> The Economy Act provides general authority for a requesting federal agency to transfer funds to another servicing federal agency.<sup>144</sup> The Interagency Agreement that governs active duty support for wildland suppression requires the USDA to provide "reimbursement of DoD expenditures . . . for goods and services provided through the NIFC to the various firefighting agencies for response to wildland fire emergencies."<sup>145</sup> Interestingly, "all DoD incurred costs in support [of wildland fire suppression] will be reimbursed in accordance with . . . the Economy Act to include pay and allowances."<sup>146</sup> The DoD, DOI, and USDA are required to conduct a post-fire season reimbursement workshop not later than December of each year to "ensure all DoD support to NIFC has been fully reimbursed for the previous fire season."<sup>147</sup> Economy Act reimbursements for services rendered or supplies furnished may be credited to the appropriation or fund of the activity performing the reimbursable work, versus being deposited in the Treasury as miscellaneous receipts.<sup>148</sup> Operations and Maintenance, Army (OMA) funds are the appropriate source of funds for operations in support of wildfire suppression, subject to reimbursement.<sup>149</sup> An Economy Act order may be placed on any form that is acceptable to both the requesting and servicing agencies. Within the DoD, Economy Act orders are typically executed using a DD Form 448, "Military Interdepartmental Purchase Request (MIPR)."<sup>150</sup>

The DoD Financial Management Regulation provides that the bona fide needs determination for an Economy Act transaction is made by the requesting activity and not by the servicing activity.<sup>151</sup> This means that NIFC, not the Army, would be responsible for the bona fide needs determination when active duty forces or equipment provide deliberate support to wildfire suppression operations. The ordering agency must certify that it has available funds for the supplies or service, as well as provide a "Certification of Availability as to Purpose" that certifies that funds are properly chargeable

<sup>136</sup> ARNORTH Wildland Firefighting SOP, *supra* note 97.

<sup>137</sup> Policy Memorandum 14-08, Off. of the Judge Advocate Gen., U.S. Army, subject: Location, Supervision, Evaluation and Assignment of Judge Advocates in Brigades (2014) (assigning a dual position administrative law and operational law judge advocate in the grade of captain to brigade combat teams).

<sup>138</sup> E-mail from Major Benjamin Perry, Brigade Judge Advocate, 17th Field Artillery Brigade, Joint Base Lewis-McCord, Washington, to author (Aug. 18, 2015) (on file with author).

<sup>139</sup> MILITARY USE HANDBOOK, *supra* note 43, at 21.

<sup>140</sup> ARNORTH Wildland Firefighting SOP, *supra* note 97, tab B to app. 35 of annex H (Legal) (providing a sample legal paragraph for a wildland fire suppression OPOD).

<sup>141</sup> MILITARY USE HANDBOOK, *supra* note 43, at 21.

<sup>142</sup> 42 U.S.C. § 5170a(1) (2015).

<sup>143</sup> 31 U.S.C. §§ 1535-1536 (2011).

<sup>144</sup> CONTRACT & FISCAL LAW DEPT., THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK ch. 2-54 (2015) [hereinafter 2015 FISCAL LAW DESKBOOK].

<sup>145</sup> Interagency Agreement for the Provision of Temporary Support During WFF Operations, *supra* note 106, at II.

<sup>146</sup> U.S. Northern Command, FRAGO 172.000 to OPOD 01-13 DOD Ground Support to NIFC 2015, para. 4.B.1.B (Aug. 18, 2015).

<sup>147</sup> INTERAGENCY AGREEMENT FOR THE PROVISION OF TEMPORARY SUPPORT DURING WFF OPERATIONS, *supra* note 106, at IV.

<sup>148</sup> U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 11A, ch. 3, para. 030103 C [hereinafter DoD FMR].

<sup>149</sup> Policy Memorandum, Asst. Chief of Staff for Installation Mgmt., U.S. Army, subject: Army Wildland Fire Policy Guidance, para. 8.1 (Sept. 4, 2002) ("Funding for . . . wildland fire suppression . . . is an installation operations and maintenance responsibility.").

<sup>150</sup> DoD FMR, *supra* note 148, vol. 11A, ch. 3, para. 030101.

<sup>151</sup> 2015 FISCAL LAW DESKBOOK, *supra* note 56, at 3-26.

for the purposes cited in the order.<sup>152</sup> Economy Act transactions also generally require the requesting activity to prepare a Determinations and Findings (D&F) statement that the use of interagency support capabilities is in the best interest of the government and that the required goods or services cannot be obtained as conveniently or economically by contracting with a private source.<sup>153</sup> A judge advocate cannot be completely asleep at the switch, however, as a servicing agency should refuse to accept an Economy Act request if it is obvious that the request does not serve a need existing in the fiscal year for which the appropriation is available.<sup>154</sup> In general, NIFC should not request active duty support unless there is a bona fide need for that support due to exhaustion of available civilian resources.

Administrative law concerns center mostly around the use of military assets by civilians, including civilian firefighters. Military aviation transportation is authorized for “employees of other U.S. Government agencies . . . when traveling on official business for DoD.”<sup>155</sup> This authority would allow Army aircraft to transport civilian federal firefighters, especially the military crew advisors assigned to each military hand crew. Army aircraft can also be used to fly civic leaders and news media for public affairs purposes, so long as the passengers execute a hold harmless agreement and the responsible commander determines the flight is in the interest of the Army.<sup>156</sup> There is no authority for transporting other categories of passengers, such as federal civilian contractors, local firefighters or law enforcement officers, or non-profit employees, absent an exception for aero-medical evacuation when there is a threat to life, limb, or eyesight, and no other adequate evacuation means is available.<sup>157</sup> Judge advocates should be especially attuned to the fact that contractors are very common in wildland fire suppression operations, often wearing the same yellow and green nomex uniforms and performing the same functions as federal employees.<sup>158</sup> Service and DoD regulations apply even when forces are supporting civilian authorities under IRA. For example, a proposal to place civilian law enforcement officers on Army aircraft to act as air traffic controllers during the Black Forest Fire was disapproved because there was no

applicable exception to Army restrictions on civilians in aircraft.<sup>159</sup>

Another potential areas of concern for judge advocates is claims stemming from wildland fire suppression operations. Claims for damage to property, personal injury, or death that arise out of the activities of a federal agency or employee responding to a disaster are barred by the Federal Tort Claims Act (FTCA) when such claims are “based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty.”<sup>160</sup> Government action in the suppression of wildland fires has repeatedly been held to be a discretionary function because “[a]s the protector of public lands the federal government and agents of the United States are entrusted with many discretionary decisions [related to fighting wildfires] and these actions should not be hampered by hindsight judgments by judges and juries.”<sup>161</sup> Thus, any negligent or tortious acts by active duty forces supporting WFF are not compensable under the FTCA. That said, commanders must still investigate and document any damage caused by unit personnel or other incidents that might give rise to a claim, and incidents that occur on the way to or from the sight of a fire could still give rise to a colorable claim.

In cases where the military causes a fire, the claims process is utilized to compensate those who lose property or sustain injuries. A destructive wildfire caused by military operations could qualify as a disaster for the purpose of claims planning and processing.<sup>162</sup> If a wildfire is considered a disaster, a special claims processing office will be established and the local claims officers “must be equipped with cash for immediate payment of claims.”<sup>163</sup> In 2007, a New Jersey Air National Guard F-16 ejected a flare during a training flight; the flare started a wildfire that burned to over 17,000 acres and destroyed forty structures.<sup>164</sup> The Air Force reimbursed local fire agencies for the \$230,000 cost of suppression, as well as settled over \$2,000,000 worth of private claims. An Army artillery-caused wildfire at the Yukon Training Area in Alaska scorched 87,000 acres and resulted in the evacuation of residents in 2013.<sup>165</sup> The rapid and fair adjudication of claims probably does as much to mitigate the negative fallout

<sup>152</sup> For a thorough and useful primer on agency to agency Economy Act transactions, see Major John R. Longley, *Traditional Economy Act Transactions – A Hidden Opportunity for On-the-Job Training*, ARMY LAW. Mar. 2013, at 7, 10.

<sup>153</sup> DoD FMR, *supra* note 148, vol. 11A, ch. 3, para. 030102.

<sup>154</sup> *Id.* para. 030403.

<sup>155</sup> U.S. DEP’T OF ARMY, REG. 95-1, AVIATION FLIGHT REGULATIONS para. 3-7(a)(4) (2014) [hereinafter AVIATION FLIGHT REGULATIONS].

<sup>156</sup> U.S. DEP’T OF ARMY, Reg. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM 41 (2011).

<sup>157</sup> AVIATION FLIGHT REGULATIONS, *supra* note 155, para. 3-3n(3).

<sup>158</sup> See George Lavender, *Fighting Fires is Big Business for Private Companies*, EARTH ISLAND JOURNAL (Oct. 29, 2013), [http://www.earthisland.org/journal/index.php/elist/eListRead/fighting\\_fires\\_is\\_big\\_business\\_for\\_private\\_companies](http://www.earthisland.org/journal/index.php/elist/eListRead/fighting_fires_is_big_business_for_private_companies).

<sup>159</sup> BLACK FOREST FIRE AAR, *supra* note 90, at 9.

<sup>160</sup> U.S. DEP’T OF ARMY, PAM. 27-162, LEGAL SERVICES CLAIMS PROCEDURES para. 2-42 (21 Mar. 2008) [hereinafter CLAIMS PROCEDURES]; 42 U.S.C. § 5148 (2015).

<sup>161</sup> Thune v. United States, 872 F. Supp. 921, 924 (D. Wyo. 1995).

<sup>162</sup> CLAIMS PROCEDURES, *supra* note 160, ch.1-21.

<sup>163</sup> *Id.*

<sup>164</sup> *Another Military Jet Starts a Fire*, WILDFIRE TODAY, <http://wildfiretoday.com/2008/05/16/another-military-jet-starts-a-fire> (last visited May 10, 2015).

<sup>165</sup> Emily Schwing, *Army Claims Responsibility for Stuart Creek 2 Wildfire*, KTOO PUBLIC MEDIA (Oct. 22, 2013), <http://www.ktoo.org/2013/10/22/army-claims-responsibility-for-stuart-creek-2-wildfire/>.

from a military-caused wildfire as any efforts, active duty or otherwise, towards actually putting out the fire.

## VII. Conclusion

Active duty support for WFF is not a regular event, but it is a recurring one. As the Army returns from overseas contingency operations to settles into garrison during an era of constrained government resources and ever-longer fire seasons, active duty support for WFF is likely to become more common. Active duty forces from 18th Airborne Corps, 101st Airborne Division, 4th Infantry Division, 1st Cavalry Division, 2nd Infantry Division, 1st Infantry Division, 7th Infantry Division, and I Marine Expeditionary Force have all contributed ground troops to battle wildfires since 2000.<sup>166</sup> Numerous active duty aviation units have also been tasked to support wildfire suppression efforts.<sup>167</sup> A working knowledge of the mechanics behind active duty support to WFF operations will make judge advocates more broadly skilled practitioners, ready to respond when things heat up.<sup>168</sup>

---

<sup>166</sup> Gary Sheftick, *Army Units Rotate in Fight Against Wildfires* ARMY NEWS SERV., Nov. 8, 2000; LeAnn Swieczkowski, *Clinton Visits Firefighting Troops in Idaho*, ARMY NEWS SERV., Aug. 13, 2000; C. Marie Smith, *1st Cavalry Division Soldiers Assisting with Wildfires in Montana*, TEMPLE DAILY TELEGRAPH (Aug. 31, 2003), [http://www.tdtnews.com/archive/article\\_e704e292-67ca-5421-9edc-597dfe343f5f.html](http://www.tdtnews.com/archive/article_e704e292-67ca-5421-9edc-597dfe343f5f.html); Patti Bielling, *Firefighting Mission Ends for Army's Task Force Blaze*, AMERICAN FORCES PRESS SERV. (Sept. 3, 2006), <http://archive.defense.gov/news/newsarticle.aspx?id=680>; Jason Jacoby,

*Monument Fire Heats Up, Grows*, LA GRANDE OBSERVER, Jul. 17, 2002; *NIFC Mobilizes Active Duty*, *supra* note 1.

<sup>167</sup> Hlad, *supra* note 58.

<sup>168</sup> This is the only deliberate wildfire related pun in the article, despite ample opportunities to reference 'burning questions,' etc.