[ORAL ARGUMENT REQUESTED]

Nos. 19-2124, -2129, -2130, -2163

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GERALD OHLSEN, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Mexico
[Nos. 1:17-cv-1161, 1:18-cv-096, 1:18-cv-367, 1:18-cv-496, 1:19-cv-237 (Browning, J.)]

BRIEF FOR APPELLEES

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STATEMENT OF RELATED APPEALS PURSUANT TO CIR. R. 28.2(C)(1)

Counsel for the United States is not aware of any prior or related appeals, except for the related appeal in *Homesite Indemnity Co. v. United States*, No. 19-2128, which this Court dismissed for lack of prosecution on September 24, 2019. Order, No. 19-2128 (Sept. 24, 2019); *see* 10th Cir. R. 42.1.

INTRODUCTION

Plaintiffs bring suit against the United States under the Federal Tort Claims Act (FTCA) alleging negligence in connection with the 2016 Dog Head fire in Torrance County, New Mexico.

Many of plaintiffs' allegations focus on alleged negligence by the Pueblo of Isleta, an Indian tribe that performs forest-management work under a cooperative agreement with the Forest Service. The district court correctly determined that these claims could not be brought under the FTCA, which limits the United States' liability to actions taken by employees, and does not render it liable for the asserted negligence of independent contractors. As the district court explained, the Forest Service's agreement with the Pueblo made clear that the parties were entering into an independent-contractor relationship in which the Forest Service did not supervise the performance of the forest-thinning crews.

On appeal, plaintiffs stress that the Forest Service's agreement with the Pueblo was highly detailed. But this Court has already held that "the very length and detail of the contract" suggests "an independent contractor relationship between the parties," because "it is doubtful" that an employer-employee relationship "would require a contract of the type here involved." *Norton v. Murphy*, 661 F.2d 882, 884 (10th Cir. 1981); *see Curry v. United States*, 97 F.3d 412, 415 (10th Cir. 1996). Plaintiffs provide no basis to disregard this Court's analysis.

In addition to claims of negligence based on the conduct of Isleta Pueblo, plaintiffs allege that the Forest Service itself acted negligently in various respects. The district court held that all of these allegations were barred by the FTCA's discretionary-function exception, which precludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

In this Court, plaintiffs challenge the district court's application of the discretionary-function exception to three aspects of the government's conduct. They first claim that the United States was negligent in failing to assure itself that the Isleta Pueblo was performing forest-thinning work according to the participating agreement. But this Court has held that the government's supervision of an independent contractor implicates public-policy concerns and so cannot be the basis for an FTCA suit. Plaintiffs also argue that the Forest Service had a mandatory duty to position its fire trucks in a certain way and to impose certain fire restrictions. But these claims fail at the outset because plaintiffs identify no mandatory directive constraining the government's discretion, and because decisions concerning the distribution of scarce resources and the best way to warn the public of potential dangers are plainly matters capable of policy analysis.

STATEMENT OF JURISDICTION

The plaintiffs in these consolidated appeals invoked the jurisdiction of the district court under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). 1 App. 39 (C

de Baca); 1 App. 70 (Ohlsen); 2 App. 367 (State Farm); 8 App. 1839 (Greene). The district court entered final judgment on June 17, 2019 as to all plaintiffs except Ernest Greene. 7 App. 1796 (C de Baca); 8 App. 1816 (Ohlsen); 8 App. 1825 (State Farm). The district court entered final judgment as to Greene on August 28, 2019. 8 App. 1845. All plaintiffs filed timely notices of appeal. 7 App. 1799 (C de Baca); 8 App. 1818 (Ohlsen); 8 App. 1827 (State Farm); 8 App. 1847 (Greene). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the FTCA's independent-contractor exception bars plaintiffs' claims of negligence committed by the Isleta Pueblo.

2. Whether the FTCA's discretionary-function exception bars plaintiffs' claims of negligence committed by the Forest Service.

3. Whether, if the Court were to reach the question, plaintiffs failed to administratively exhaust some of their claims.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. The Federal Tort Claims Act

The Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, provides a limited waiver of sovereign immunity and creates a cause of action for tort claims based on

"the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *Id.* § 1346(b)(1). The FTCA's definition of employee specifically provides that it "does not include any contractor with the United States." *Id.* § 2671. Accordingly, the statute does not permit suit against the United States based on the actions of an independent contractor.

The government's liability is also cabined by several important exceptions including, as relevant here, the statute's discretionary-function exception, which precludes any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). A claim falls within the scope of this discretionary-function exception if the conduct it challenges involves an element of judgment or choice, and the exercise of that judgment is susceptible to policy analysis. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991).

Before filing suit against the United States under the FTCA, a plaintiff must first exhaust all administrative remedies. *See McNeil v. United States*, 508 U.S. 106, 113 (1993). The statute provides that plaintiffs must present their claim to the "appropriate Federal agency," and must wait until the agency either denies the claim or fails to act within six months. 28 U.S.C. § 2675(a). This Court has explained that a plaintiff's administrative claim must "serve[] due notice that the agency should

investigate the possibility of particular (potentially tortious) conduct." *Staggs v. United States ex rel. Dep't of Health & Human Servs.*, 425 F.3d 881, 884 (10th Cir. 2005).

2. The Cooperative Funds and Deposits Act

The Cooperative Funds and Deposits Act (CFDA), 16 U.S.C. § 565a-1 *et seq.*, permits the Secretary of Agriculture to "negotiate and enter into cooperative agreements" with public or private entities for various purposes, including "to perform forestry protection, including fire protection." 16 U.S.C. § 565a-1. The Secretary may enter into cooperative agreements to benefit the public interest, and is "authorized to advance or reimburse funds to cooperators from any Forest Service appropriation available for similar kinds of work." *Id.*

Another section of the CFDA defines cooperators' relationship with the Forest Service. It provides that, "[i]n any agreement authorized by [the CFDA] cooperators and their employees may perform cooperative work under supervision of the Forest Service in emergencies or otherwise as mutually agreed to, but shall not be deemed to be Federal employees other than for the purposes of [the FTCA] and [the Federal Employees' Compensation Act]." 16 U.S.C. § 565a-2.

B. Factual Background

1. The Isleta Pueblo Participating Agreement

In 2014, the Forest Service entered into a cooperative agreement with the Pueblo of Isleta, a federally recognized Indian tribe in New Mexico. 1 App. 128. The purposes of the agreement were to protect the Isleta Tribal Forest, to "accomplish

needed forest management work," and to "provide additional job training and work experience to the Pueblo's Forestry crew." 1 App. 117.

Under the agreement, the Pueblo took responsibility to manage the surrounding forest area. 1 App. 118. The Forest Service, in turn, agreed to reimburse the Pueblo for a share of its expenses, to "[d]esignate work areas and provide cutting guidelines for achieving [the] desired condition," and to "[i]nspect the work to provide feedback on how goals are being accomplished." 1 App. 118-19.

As particularly relevant here, the agreement provided that Pueblo "employees, volunteers, and program participants shall not be deemed to be Federal employees for any purposes including" the Federal Tort Claims Act. 1 App. 121; *see id.* ("The Pueblo shall also supervise and direct the work of its employees, volunteers, and participants performing under this agreement."). The agreement further provided that the Pueblo "shall monitor the performance of the agreement activities to ensure that performance goals are being achieved." 1 App. 124.

The agreement also included an accompanying statement of work that further detailed how the parties agreed the Pueblo should manage the forest. The statement of work was agreed to in 2014, 1 App. 130, and was modified in 2016, 1 App. 135. The amended statement of work, which governed at the times relevant to this suit, set boundaries and other parameters for the Pueblo's forest-thinning work. 1 App. 135-40. Those parameters included "quality performance requirements" that the Pueblo was required to perform. 1 App. 140; *see, e.g.*, 1 App. 141 ("The Partner WILL be

required to lop and scatter the limbs and tops up to 3[-inch] Diameter tops of dropped trees. Maximum slash depth will be 18 [inches].”). The statement of work also contained a section labeled “Emergencies and Fire Plan,” which provided that the Pueblo “may be held liable for all damages and for all costs incurred by the Government for labor, subsistence, equipment, supplies, and transportation deemed necessary to control or suppress a fire set or caused by the [Pueblo] or the [Pueblo]’s agents or employees.” 1 App. 146.

2. The Dog Head Fire

This suit arises out of the Dog Head fire, which started on June 14, 2016 in Torrance County, New Mexico. 6 App. 1500 n.4 (Op. 5 n.4). At the time the fire started, an Isleta Pueblo crew was thinning the surrounding forest, and it is undisputed that the fire began when a machine called a masticator used by the thinning crew sparked and ignited surrounding brush. 6 App. 1585 (Op. 90). When the fire started, no Forest Service employees were in the relevant area, 6 App. 1569 (Op. 74), although Forest Service resources were dispatched one hour after the fire was reported, 1 App. 49-50. The fire was declared contained on July 13, controlled on August 10, and put out on September 12. 1 App. 49. Ultimately, the fire burned over 17,000 acres, *id.*, and destroyed 12 residences and 44 other structures, 6 App. 1500 n.4 (Op. 5 n.4).

C. Prior Proceedings

Plaintiffs are property owners whose property was damaged during the Dog Head fire, as well as insurance companies with subrogated claims. In 2017 and 2018, they submitted administrative claims to the Forest Service, complaining that the Forest Service acted negligently in the events leading up to the Dog Head fire. *See* 2 App. 284-90, 385-406 (claims forms). Plaintiffs then filed various complaints in the District of New Mexico, claiming that the United States was liable under the Federal Tort Claims Act for its allegedly negligent conduct surrounding the fire. *See* 1 App. 38-45 (C de Baca complaint); 1 App. 69-76 (Ohlsen complaint); 2 App. 367-77 (State Farm complaint). The cases were consolidated for the purpose of determining liability.[1] *See* 2 App. 326-27.

Plaintiffs' claims reduce to two categories. First, plaintiffs' complaints allege that the Isleta Pueblo forest-thinning crews were negligent in various respects, and that the United States should be held liable for that negligence. (Plaintiffs have not sued the Isleta Pueblo directly.) Second, plaintiffs' complaints allege that the United States Forest Service itself was negligent, both because it allegedly failed to properly supervise the Pueblo's crews and because it made various decisions before and during the Dog Head fire that plaintiffs claim worsened the fire.

[1] Plaintiff Ernest Greene filed his complaint later, *see* 8 App. 1839-43, and the district court consolidated his case only after final judgment, *see* 8 App. 1845.

The district court granted summary judgment to the United States on all of plaintiffs' claims. It held that plaintiffs' claims alleging negligence by the Isleta Pueblo's thinning crews must be dismissed because those thinning crews were contractors and not federal employees. 7 App. 1704-42 (Op. 209-47). It held that plaintiffs' claims alleging negligence by the Forest Service were barred by the FTCA's discretionary-function exception, because plaintiffs' complaints concerned discretionary choices capable of policy analysis. 7 App. 1742-80 (Op. 247-85). The court also held that plaintiffs failed to exhaust their administrative remedies on some of their claims because their administrative claims forms were too terse to give the Forest Service fair notice of their allegations. The court nevertheless considered all of those claims and held that they were independently barred by either the independent-contractor or discretionary-function exception. 7 App. 1780-89 (Op. 285-94).

SUMMARY OF ARGUMENT

I. The district court correctly held that the FTCA's independent-contractor exception bars plaintiffs' claims of negligence by the Isleta Pueblo. The Supreme Court has made clear that the question of whether an individual is a government employee or an independent contractor turns on whether the government supervises the day-to-day operations of the individual. This Court has further identified seven factors to determine whether that supervision requirement is met. The district court correctly applied those factors and concluded that every one of them weighed in favor of finding an independent-contractor relationship in this case.

Plaintiffs primarily respond by asking this Court to disregard its own independent-contractor test. According to plaintiffs, a different test should apply because the Forest Service entered into an agreement with the Isleta Pueblo under the authority of the CFDA. But plaintiffs never explain why this Court's precedents, which faithfully apply the Supreme Court's case law, are inapplicable to this situation. And plaintiffs further err in stating that the CFDA, by excluding cooperators from being federal employees for the purposes of most statutes, requires those cooperators to be employees in the FTCA context.

The Isleta Pueblo thinning crews are independent contractors under any formulation of the independent-contractor test. The text of the Forest Service's agreement with the Pueblo makes clear that the parties intended to create an independent-contractor relationship. And, as this Court held in *Curry v. United States*, 97 F.3d 412 (10th Cir. 1996), the detailed nature of the contract does not counsel an employer-employee relationship, and if anything shows that the Forest Service monitored the Pueblo's work only from afar. Similarly, the record in this case shows that Forest Service employees visited the thinning crews only to ensure that the crews were complying with the participating agreement's specifications; *Curry* squarely held that this level of control does not suggest an employer-employee relationship.

II. The district court correctly held that plaintiffs' remaining claims fell within the scope of the FTCA's discretionary-function exception, which bars claims challenging governmental behavior that involves an element of policy judgment or

choice. Plaintiffs appeal the district court's ruling with respect to three asserted bases of liability. Plaintiffs claim that the Forest Service acted negligently in not holding the Isleta Pueblo to all of the terms of the participating agreement. But this Court has already held that the exercise of oversight over an independent contractor is a matter of public policy protected by the discretionary-function exception. *Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1166 (10th Cir. 2004). Plaintiffs supply no persuasive basis to distinguish that case.

Plaintiffs also allege that the Forest Service acted negligently in its positioning of fire trucks and in its choice about whether to impose fire restrictions. But plaintiffs point to no Forest Service policy that fetters the agency's discretion on these questions, and they cannot deny that decisions about fire safety and the allocation of scarce resources are plainly susceptible to policy analysis.

III. If this Court affirms the district court's independent-contractor and discretionary-function holdings, it need not reach the question of whether plaintiffs failed to properly exhaust some of their claims. If the Court reaches the question, however, the district court correctly ruled that plaintiffs' terse administrative claims forms failed to give the Forest Service "due notice" of what plaintiffs wanted it to investigate. *See Staggs v. United States ex rel. Dep't of Health & Human Servs.*, 425 F.3d 881, 884 (10th Cir. 2005).

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo, applying the same standard that applied in the district court. *Sandoval v. Unum Life Ins. Co. of Am.*, 952 F.3d 1233, 1236 (10th Cir. 2020).

ARGUMENT

I. The FTCA's independent-contractor exception bars all claims alleging negligence by the Pueblo or its employees.

As plaintiffs acknowledge (Br. 19, 50), many of their claims allege negligence by the Pueblo's thinning crews. *See, e.g.*, 1 App. 72 (Ohlsen Compl. ¶¶ 12-13). The district court correctly held that all of those claims cannot be brought under the FTCA, because those thinning crews were independent contractors and not federal employees. 28 U.S.C. § 2671; *see* 7 App. 1704-42 (Op. 209-47).

A. This Court's decision in *Lilly* sets forth the relevant test to determine independent-contractor status.

"[T]he question whether one is an employee of the United States is to be determined by federal law." *Lurch v. United States*, 719 F.2d 333, 337 (10th Cir. 1983). The Supreme Court has explained that "a critical element in distinguishing a Government agency from an independent contractor is the power of the Federal Government 'to control the detailed physical performance of the contractor.'" *Id.* (quoting *United States v. Orleans*, 425 U.S. 807, 814 (1976)); *see Logue v. United States*, 412 U.S. 521, 527-28 (1973). The "key inquiry under this control test is whether the

Government supervises the day-to-day operations of the individual." *Lurch*, 719 F.2d at 337 (citing *Orleans*, 425 U.S. at 815).

In *Lilly v. Fieldstone*, 876 F.2d 857 (10th Cir. 1989), this Court synthesized its and the Supreme Court's case law and identified seven "factors" to determine whether an alleged tortfeasor is a federal employee or an independent contractor. *Id.* at 859. Those factors are:

> (1) the intent of the parties; (2) whether the United States controls only the end result or may also control the manner and method of reaching the result; (3) whether the person uses her own equipment or that of the United States; (4) who provides liability insurance; (5) who pays social security tax; (6) whether federal regulations prohibit federal employees from performing such contracts; and (7) whether the individual has authority to subcontract to others.

Id.

The district court carefully examined each of these factors, and, perhaps unsurprisingly, plaintiffs' principal response is to urge that it erred in applying this controlling precedent. Br. 23-31. Plaintiffs premise this assertion on the fact that the Forest Service entered into the contract with the Isleta Pueblo under the CFDA. Plaintiffs assert that "[a]t the time the CFDA was enacted, federal court precedent under the FTCA focused on the common law which defined an employment relationship by the degree of control the Government had over how the work was done, whether that control was exercised or not." Br. 26 (citing *Logue*, 412 U.S. at 527-28). Plaintiffs therefore urge (Br. 28-29) that the district court should have followed the Supreme Court's decision in *Logue*, which emphasized whether the federal government had the

power "to control the detailed physical performance of the contractor." *Logue*, 412 U.S. at 528.

This argument fails in all respects. As an initial matter, the standards for determining the government's liability under the FTCA do not turn on the state of the law at the time that an authorizing statute was enacted. In any event, *Lilly* is an explication of Supreme Court precedents including *Logue,* not a departure from those decisions. *Lilly* itself makes clear that the seven factors identified in the case are simply a means to help courts analyze the "critical determination" of whether the government "control[s] the detailed physical performance of the contractor" set forth in *Logue*. *Lilly*, 876 F.2d at 858 (quoting *Logue*, 412 U.S. at 528); *see Curry v. United States*, 97 F.3d 412, 414 (10th Cir. 1996) (stating that the Court looks to the *Lilly* factors in "answering th[e] question" posed by *Logue*); *Bird v. United States*, 949 F.2d 1079, 1084 (10th Cir. 1991) ("We have searched without success . . . to find interpretive authority more helpful than *Lurch* and [*Lilly v.*] *Fieldstone* in the light of . . . *Logue*."). Plaintiffs are therefore wrong to contend that there are two tests for determining independent-contractor status, one set out in *Lilly* and the other in *Logue*. If plaintiffs believe that *Lilly* misapplied *Logue*, that argument must be presented to this Court sitting en banc, not to a panel that is bound by *Lilly*. *See Green Sol. Retail v. United States*, 855 F.3d 1111, 1115 (10th Cir. 2017).

Plaintiffs are on no firmer ground in arguing that several of the *Lilly* factors do not apply to CFDA agreements because, in such contracts, "[t]here is no bidding or

procurement process, the cooperator is often a Tribe or a local or state government entity; [and] payment is by advance or simple reimbursement." Br. 27. Plaintiffs never explain why those facts should alter the independent-contractor analysis, or how they bear on the analysis at all. If anything, as the district court held, the fact that cooperators in CFDA agreements are reimbursed by the government but manage their own funds counsels in favor of an independent-contractor relationship. 7 App. 1738-39 (Op. 243-44).

Plaintiffs' reliance (Br. 27) on the text of 16 U.S.C. § 565a-2 is similarly misplaced. That provision of the CFDA states that cooperators "shall not be deemed to be Federal employees other than for the purposes of" the FTCA and one other statute. 16 U.S.C. § 565a-2. It categorically *excludes* CFDA cooperators from being treated as federal employees for all but two statutes; it does not *require* that all CFDA cooperators be treated as employees in suits brought under FTCA, nor does it evince any intent by Congress to alter the FTCA's independent-contractor inquiry. If Congress had intended to entirely displace the FTCA's independent-contractor test, it could have done so explicitly. *See United States v. Dawes*, 951 F.2d 1189, 1193 (10th Cir. 1991). Particularly given that the FTCA's waiver of immunity is to be "strictly construed," *Bradley v. United States ex rel. Veterans Admin.*, 951 F.2d 268, 270 (10th Cir. 1991), there is no basis to read the CFDA's language as displacing the FTCA's test—and plaintiffs point to no authority that would support that extraordinary result.

B. The Pueblo and its forest-thinning crews were independent contractors under *Lilly* or under any other test.

In all events, however, the United States would prevail in this case under any understanding of the independent-contractor analysis. The district court correctly held that all seven of these *Lilly* factors suggest that the Pueblo forest-thinning crews were independent contractors. On appeal, plaintiffs challenge the district court's holding only with respect to its analysis of the first two factors. *See* 7 App. 1735-42 (Op. 240-47). Their arguments as to each are unavailing.

First, with respect to the intent of the parties, the participating agreement is clear that both the United States and the Pueblo intended to create an independent-contractor relationship. The parties agreed that any Pueblo "employees, volunteers, and program participants shall not be deemed to be Federal employees." 1 App. 121. They further agreed that the Pueblo would "provide any necessary training to the Pueblo's employees, volunteers, and program participants," and that "[t]he Pueblo shall also supervise and direct the work of its employees, volunteers, and participants." *Id.*; *see also* 1 App. 122 ("The Pueblo shall keep effective internal controls to ensure that all United States Federal funds received are separately and properly allocated to the activities described in the agreement."); 1 App. 124 ("The Pueblo shall monitor the performance of the agreement activities to ensure that performance goals are being achieved."). The participating agreement assigned to the United States only the responsibilities to reimburse the Pueblo, to "[d]esignate work

areas and provide cutting guidelines for achieving desired condition[s]," and to "[i]nspect the work to provide feedback on how goals are being accomplished." 1 App. 119. All of those provisions led the district court to conclude that "the Forest Service and Isleta Pueblo did not intend the Forest Service to supervise the thinning crew's work." 7 App. 1708 (Op. 213).

In arguing to the contrary, plaintiffs urge that that the participating agreement and subsequent revisions contain "highly detailed" instructions from the Forest Service. Br. 32. They correctly note that the participating agreement and subsequent modifications provide geographical and other specifications for the Pueblo's work, *see, e.g.*, 1 App. 135-36, and that that Forest Service personnel issued silvicultural "prescriptions" explaining how to best care for the forest, *see, e.g.*, 4 App. 905-06.

This Court has made clear, however, that the "detailed nature" of a contract is "consistent with the finding that [a tortfeasor] was an independent contractor." *Curry*, 97 F.3d at 415; *see also Norton v. Murphy*, 661 F.2d 882, 884 (10th Cir. 1981) (holding that "the very length and detail of the contract" suggests "an independent contractor relationship between the parties," because "it is doubtful that a master-servant relationship, where the master tells the servant what to do and when to do it, would require a contract of the type here involved"). The district court correctly applied these precedents in observing that the Forest Service's contracts and prescriptions "reflect that the Forest Service directed the Isleta Pueblo's work from afar." 7 App. 1717 (Op. 222).

Plaintiffs seek to distinguish *Curry* on the ground that the contract there did not "describe . . . how the result will be accomplished." Br. 33. That characterization is simply inaccurate. The contract in *Curry* provided that "all work shall be performed in accordance with these specifications and in conformity with the attached drawings." *Curry*, 97 F.3d at 413 (alteration adopted). *Curry* is on all fours with the present case, and the district court correctly applied that decision in rejecting plaintiffs' arguments that the participating agreement and related documents evidence an employer-employee relationship.

Second, with regard to the degree of the Forest Service's control, the district court thoroughly examined the record and concluded that the Forest Service did not "supervise[] the thinning crew's daily activity." 7 App. 1735 (Op. 240). The court noted that Pueblo employees, not Forest Service personnel, "oversaw the thinning project's daily operations." 7 App. 1724 (Op. 229). It concluded that Forest Service personnel visited the thinning crew "irregularly" and for the purpose of "record[ing] the thinning crew's progress." 7 App. 1725-27 (Op. 230-32). In this respect also, this case parallels *Curry*, which found an independent-contractor relationship where a Forest Service employee "recorded the work done, the payments made, and any problems encountered" and "gave specific orders . . . making sure that [the alleged torfeasor] complied with the contract's specifications." 97 F.3d at 414; *see also Roditis v. United States*, 122 F.3d 108, 111 (2d Cir. 1997) ("The only arguable indicia of control, the government's retention of a right to inspect the progress of construction,

does not convert a contractor into a federal employee."); *Berkman v. United States*, 957 F.2d 108, 114 (4th Cir. 1992) ("[W]e cannot accept the suggestion that a contractor . . . becomes an 'employee' of the government in every case in which the government writes into the contract sufficient procedural safeguards to ensure compliance with the terms of the agreement.").

Plaintiffs' attacks on the district court's conclusion reflect misunderstandings of both *Curry* and the record in this case. First, plaintiffs contend that Forest Service employees visited the forest-thinning crews frequently and "determined the date the crew would start for the season, the number of days the crew had to complete each Unit, and the days work would be halted." Br. 36. That is not a plausible reading of the participating agreement, which provides for a "performance period" of several months (for example, "August [through] November 2014"), and provides that the Pueblo "shall maintain progress at a rate that will assure completion within the performance period."[2] 3 App. 569-70. In any event, the district court correctly held that, "in any independent contractor relationship, a principal has a timeframe in which

[2] Although plaintiffs claim (Br. 5-6) that the Forest Service "determine[d] when weather requires a day off" and that "[t]he only days off controlled by the Pueblo were ceremony dates," the page of the record that plaintiffs cite confirms that the Pueblo supervisor authorized days off for "inclement weather" and for other purposes. 4 App. 939. Plaintiffs' representation without citation (Br. 6) that "[i]n order to meet the Forest Service's schedule, the Pueblo crews were required to work every day" also appears to be incorrect. For example, from August to November 2014, the participating agreement required the Pueblo to work a total of 52 days. 3 App. 570.

he, she, or it desires the contractor to complete the work," noting, for example, that "[a] homeowner may hire, for instance, a professional painter and expect the painter to complete the work within several days' time." 7 App. 1720-21 (Op. 225-26).

Plaintiffs also assert (Br. 14-16, 37-38) that Forest Service employees told the Pueblo forest-thinning crews which areas to treat, and that Forest Service officials otherwise provided feedback on the crews' work. But again, plaintiffs fail to meaningfully distinguish *Curry*, where the Forest Service employees had authority to "issu[e] orders to suspend or resume work" and to "g[i]ve specific orders such as to remove certain debris or to go back and finish cleaning certain areas." 97 F.3d at 414. "[G]eneral supervisory authority to make sure that . . . performance conformed with the contract specifications" does not create an employer-employee relationship. *Id.* And here, as in *Curry*, there is no evidence that the Forest Service directed any more of the Pueblo's work than was necessary to ensure proper performance of the participating agreement. As in *Curry*, there is no evidence that the Forest Service told the Pueblo "whom to hire or how to operate [their] equipment." *Id.* And as in *Curry*, the Pueblo "understood that [they] w[ere] responsible for public safety." *Id.*; *see* 1 App. 143 (requiring the Pueblo to "provide the public with adequate warning of[] hazardous or potentially hazardous conditions associated with [the Pueblo]'s operations"); 1 App. 146 ("The [Pueblo] may be held liable for all damages and for all costs incurred by the Government . . . deemed necessary to control or suppress a fire set or caused by the [Pueblo] or the [Pueblo]'s agents").

In sum, the district court correctly held that, as in *Curry*, the Forest Service "exercised considerable control over" the Pueblo "to the extent that the contract was very detailed and specific, but it did not supervise" the Pueblo's "day-to-day operations in a way that made" its thinning crews federal employees. *Curry,* 97 F.3d at 415. Plaintiffs' contrary arguments cannot be squared with this Court's holding that, "under the Supreme Court holdings in *Logue* and *Orleans*, detailed regulations and inspections are not in and of themselves evidence of an employer-employee relationship." *Id.*

II. The FTCA's discretionary-function exception bars plaintiffs' remaining claims.

In addition to their claims alleging negligence by the Pueblo thinning crew, plaintiffs also alleged that various Forest Service employees acted negligently in the period surrounding the Dog Head fire. The district court correctly held that all of these claims were barred by the FTCA's discretionary-function exception.

A. The discretionary function exception protects governmental choices based on policy concerns.

The FTCA effects a "limited waiver of sovereign immunity" that authorizes certain lawsuits against the United States under state tort law. *United States v. Orleans,* 425 U.S. 807, 813 (1976). This waiver of sovereign immunity is limited by several exceptions, including the discretionary-function exception, which forecloses lawsuits "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 808 (1984). It "prevent[s] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814.

The Supreme Court has established a two-step framework to govern application of the discretionary-function exception. First, courts must determine whether the conduct at issue was in fact "discretionary in nature"—that is, whether it involved "an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991). This requirement will generally be satisfied so long as no mandatory directive bars the challenged action, but the discretionary-function exception will not apply if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536 (1988). However, if an agency policy does not specifically prescribe a course of action and does not remove federal "employees' choice or judgment regarding what measures to take," *Hardscrabble Ranch L.L.C. v. United States*, 840 F.3d 1216, 1221 (10th Cir. 2016), then this first requirement is satisfied. *See also Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998) (discretion is removed only when a

directive is "specific and mandatory," such that the government "has no rightful option but to adhere to the directive").

Absent a clear removal of discretion, the Court proceeds to the second step of the discretionary-function test, which assesses whether the discretion exercised was "of the kind that the . . . exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. In this analysis, "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325; *see also Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008) ("[W]e do not inquire into the intent of the government [actor] . . . and neither do we ask 'whether policy analysis is the *actual* reason for the decision in question.'" (citation omitted)). If the "conduct at issue can be based on policy concerns," the discretionary-function exception applies and the suit is barred. *Sydnes*, 523 F.3d at 1185; *see also Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993) ("[W]e will not assume a nonpolicy decision unless the record shows something to the contrary.").

B. The district court correctly applied the discretionary-function exception to plaintiffs' claims.

The district court correctly held that "the discretionary function exception bars claims against the Forest Service based on its fire suppression choices." 7 App. 1772 (Op. 277). As this Court and its sister circuits have repeatedly held, decisions concerning wildfires—which require "balancing of the needs to protect private

property, ensure firefighter safety, reduce fuel levels, and encourage natural ecological development"—"are precisely the kind of social, economic, and political concerns the discretionary function exception was designed to shield from 'judicial second guessing.'" *Hardscrabble Ranch*, 840 F.3d at 1222-23; *see also Miller v. United States*, 163 F.3d 591, 594-95 (9th Cir. 1998); *Layton v. United States*, 984 F.2d 1496, 1501-04 (8th Cir. 1993).

On appeal, plaintiffs do not dispute many of the district court's holdings that plaintiffs' allegations are barred by the discretionary-function exception. *See* 7 App. 1743 (Op. 248) (decision to masticate); 7 App. 1768 (Op. 273) (safety plan); 7 App. 1769 (Op. 274) (training); 7 App. 1773 (Op. 278) (maintenance of equipment); 7 App. 1774 (Op. 279) (fire-extinguishment tools); 7 App. 1775 (Op. 280) (forest undergrowth); 7 App. 1776 (Op. 281) (slash and boles); 7 App. 1776-77 (Op. 281-82) (employment decisions). Instead, plaintiffs take issue with three aspects of the district court's discretionary-function analysis. None of plaintiffs' objections has merit.

First, plaintiffs observe that the participating agreement between the Forest Service and the Pueblo required the Pueblo to permit no more than eighteen inches of "slash"—woody debris—to accumulate. They therefore contend (Br. 45-47) that the discretionary-function exception does not protect the Forest Service's alleged failure to enforce that limit.

As the district court explained, however, and as plaintiffs do not dispute, the agreement's "prescriptions about slash depth did not apply to the Forest Service, but

applied to Isleta Pueblo." 7 App. 1754 (Op. 259). At the first *Gaubert* step, plaintiffs do not point to any language in the participating agreement that fettered the Forest Service's discretion about how and when to assure compliance with the participating agreement. *Cf.* 1 App. 118 (stating that the Pueblo, not the Forest Service, will "manage the [Pueblo] employees so that work is completed as mutually agreed upon"). Nor do they meaningfully dispute that, at the second *Gaubert* step, how closely to monitor an independent contractor is a question that fully susceptible to policy analysis. This Court has made clear that "the amount of government oversight over the daily operations" of an independent contractor is "a matter of public policy," because it requires "balancing use of federal lands with the appropriate degree of governmental interference in that use." *Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1166 (10th Cir. 2004). The district court correctly applied that precedent here.

Plaintiffs suggest that *Harshman* is distinguishable because "the cooperative Project was performing work central to the mission of the Forest Service." Br. 46. But even if that were so, plaintiffs cite no authority for the proposition that a discretionary decision becomes less discretionary when that decision is at the heart of an agency's mission. If anything, the opposite should be true, because courts should be especially reticent to engage in "judicial second-guessing" of decisions at the core of the Forest Service's competence. *Berkovitz*, 486 U.S. at 536-37.

Plaintiffs also err in relying on the Ninth Circuit's decision in *Marlys Bear Medicine v. United States*, 241 F.3d 1208 (9th Cir. 2001). In that case, the Ninth Circuit held that a federal agency's allegedly negligent supervision of a logging operation was not discretionary. *Id.* at 1214-15. The Ninth Circuit reached that conclusion based on its view that the agency's "own operational manual" imposed a mandatory duty to "ensure adherence to basic policy and forestry practices." *Id.* at 1215 (internal quotation marks omitted). Because plaintiffs point to no similar "statutes, regulations, or policies" in this case, *Harshman*, 379 F.3d at 1166, the district court correctly found that *Marlys Bear Medicine* is not applicable, 7 App. 1756 n.213 (Op. 261 n.213). Plaintiffs attempt to liken the provision here to the directives in *Berkowitz* is equally far afield. The Supreme Court in that case held that failing to conduct certain tests "would violate a specific statutory and regulatory directive." 486 U.S. at 542-43. No such "specific statutory and regulatory directive" exists here.

Second, plaintiffs argue (Br. 47-48) that the discretionary-function exception does not bar claims challenging the Forest Service's decisions as to where to place fire guards and fire trucks. The participating agreement provides that the Pueblo, not the Forest Service, "will provide fire guard[s]," and so any challenge to the failure to provide fire guards is independently barred by the independent-contractor exception. 1 App. 149; *see supra* Part I. But in all events, "the distribution of limited resources" is a function that courts "have long held to be protected under the discretionary

function exception." *Marlys Bear Medicine*, 241 F.3d at 1217; *see Varig Airlines*, 467 U.S. at 820 (noting "the reality of finite agency resources").

Plaintiffs nevertheless contend that they may challenge the Forest Service's placement of fire trucks on the grounds that Forest Service "policy required the fire trucks to be located either in areas of public events or of high fire risk." Br. 48 (citing 4 App. 879-81). But plaintiffs fail to cite any actual Forest Service policy so stating; they instead cite only a deposition of a Forest Service employee that confirms that the placement of fire trucks is at the "discretion of the operator." 4 App. 880; *see* 7 App. 1748-49 (Op. 253-54) ("Plaintiffs cite no evidence of a mandatory requirement directing the fire engine's location, and the Court's independent research revealed none."). And, as to *Gaubert*'s second prong, plaintiffs do not dispute that the allocation of limited resources is susceptible to policy analysis; they only doubt (Br. 47) whether the Forest Service has articulated a permissible policy concern on this record. This Court need not answer that question, however, because it is settled that courts do not inquire "whether policy analysis is the *actual* reason for the decision in question," only whether the "conduct at issue can be based on policy concerns." *Sydnes*, 523 F.3d at 1185.

Third, plaintiffs assert (Br. 48-49) that the Forest Service had a non-discretionary duty to impose fire restrictions on the day of the Dog Head Fire because of the high fire risk on that day. But, again, plaintiffs cite no written "statute, regulation, or policy" requiring the Forest Service to make plaintiffs' preferred policy

choice. *Berkovitz*, 486 U.S. at 536. Instead, they rely entirely on two sentences of deposition testimony, which again emphasized that the question of whether to impose restrictions was "up to the discretion" of individual Forest Service units. 4 App. 884 ("Again . . . every district's unique. But again . . . it's up to the discretion of the unit—and when I say 'the unit' the forest—and the input from the district managers . . . ."); *see* 7 App. 1766 (Op. 271) ("The Fire Management Guidelines give no mandatory requirements on fire management; they instead direct the Forest Service to consider several principles . . . in developing fire management."). And plaintiffs' theory, raised for the first time on appeal, that "the record includes evidence that the Forest Service has already made the decision to go into Stage 1 restrictions prior to the fire starting, but failed to timely communicate and implement that decision," Br. 49, directly contradicts plaintiffs' assertion in district court that "Stage I restrictions were never put into effect for this area," 4 App. 794 (Opp'n to Mot. to Dismiss), and therefore is waived. *See McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002) ("[A]bsent extraordinary circumstances, we will not consider arguments raised for the first time on appeal.").

Even if the Court were to consider plaintiffs' new understanding of the facts, however, this Court has held that the government's decisions "about the appropriate manner in which to warn the public about potential hazards . . . are also discretionary . . . as those decisions implicate the exercise of a policy judgment of an economic nature, including . . . the relative risks to the public health and safety from alternative

actions." *Harrell v. United States*, 443 F.3d 1231, 1239 (10th Cir. 2006). The discretionary-function exception would therefore bar plaintiffs' belated claim that the Forest Service is liable for allegedly failing to "communicate and implement" a fire restriction. Br. 49; *see Elder v. United* States, 312 F.3d 1172, 1183 (10th Cir. 2002) ("[I]t is difficult to see how any means of warning here could fail to implicate public policy.").[3]

III. Although this Court need not reach the question, plaintiffs failed to exhaust some of their claims.

Finally, plaintiffs argue that the district court erred in holding that they failed to exhaust some of their claims. The Court need not reach the exhaustion question, but if it were to do so, it should affirm this holding as well. The FTCA requires a plaintiff to file with the appropriate federal agency "a written statement sufficiently describing the injury to enable the agency to begin its own investigation." *Cizek v. United States*, 953 F.2d 1232, 1233 (10th Cir. 1992). Accordingly, an administrative claim must provide "notice of the facts and circumstances underlying [the] claim." *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 853 (10th Cir. 2005). In this case, many of the plaintiffs filed barebones, single-sentence claims that failed to describe

[3] The Ninth Circuit case that plaintiffs cite is of course not binding on this Court, and in any event the rule in that case is that, where "the Government has undertaken responsibility for the safety of a project," the "execution of that responsibility is not subject to the discretionary function exception." *Marlys Bear Medicine*, 241 F.3d at 1215. Here, as discussed above, the Pueblo and not the Forest Service bore responsibility for fire safety. *Supra* pp. 7, 20. And plaintiffs' claims against the Pueblo cannot be brought against the United States. *Supra* Part I.

their alleged injuries sufficiently to give the Forest Service notice of their legal theories.

This court need not decide that question, however. Although the district court concluded that some of plaintiffs' claims were not properly exhausted, *see* 7 App. 1782-83 (Op. 287-88) (slash depth); 7 App. 1783-84 (Op. 288-89) (claims against Pueblo); 7 App. 1787 (Op. 292) (fire-extinguishment tools); 7 App. 1788 (Op. 293) (slash and boles), it independently concluded that those same claims were barred by the independent-contractor and discretionary-function exceptions, *see* 7 App. 1704 (Op. 209) (claims against Pueblo); 7 App. 1754 (Op. 259) (slash depth); 7 App. 1774 (Op. 279) (fire-extinguishment tools); 7 App. 1776 (Op. 281) (slash and boles). Plaintiffs do not challenge the district court's discretionary-function holdings, except for the district court's conclusion concerning slash depth, which is correct for the reasons discussed above. *Supra* pp. 24-25. Because plaintiffs "neglect[] to challenge the second, independent ground" for granting summary judgment on many of their claims, and because the arguments that they do raise are meritless, the Court can affirm without reaching any question of exhaustion. *Metzger v. Unum Life Ins. Co. of Am.*, 476 F.3d 1161, 1168 (10th Cir. 2007).

If this Court chooses to reach the exhaustion question, it should affirm the district court. The district court carefully parsed plaintiffs' claims and correctly held that, while plaintiffs exhausted their administrative remedies on many of their claims,

they failed to exhaust their administrative remedies on others. Plaintiffs' brief provides no reasoned basis to overturn that result.

First, plaintiffs assert (Br. 50-52) that the Ohlsen plaintiffs administratively exhausted their "claims of negligence by the Pueblo crews." But the Ohlsen plaintiffs' notice of claim asserts only that the Forest Service failed to "reasonably exercise its retained control of the work being performed," failed to "take reasonable precautions as to [its] contractor operations," and failed to "employ a competent and careful contractor." 2 App. 290. The notice of claim never alerted the United States to plaintiffs' theory that the government was directly liable for the alleged negligence of the thinning crews. Because plaintiffs' claim failed to "serve[] due notice that the agency should investigate the possibility of particular (potentially tortious) conduct" by the thinning crews, rather than by Forest Service employees, the district court appropriately held that plaintiffs failed to exhaust those claims. *Staggs v. United States ex rel. Dep't of Health & Human Servs.*, 425 F.3d 881, 884 (10th Cir. 2005); *see* 7 App. 1783 (Op. 288).

Second, plaintiffs assert (Br. 53-54) that other plaintiffs exhausted their claims about forest growth and fire-extinguishment tools. But they do not dispute the district court's conclusion that their own terse, one-sentence notice of claim failed to alert the Forest Service to their theories. *See* 2 App. 284 ("As a result of negligent operation of equipment, and/or negligence in commencing fire suppression activity, the Dogs Head Fire commenced and spread."). Instead, they contend only that the

Forest Service should have been on notice of their theories because they appended two governmental and media reports to their notice of claim, and those reports stated various facts about the fire. *See* 5 App. 1043-56.

Plaintiffs did not make that argument below, *see* 5 App. 1020-21, and have therefore waived it before this Court, *see McDonald*, 287 F.3d at 999. But in any event, plaintiffs cite no authority for the position that attaching a series of reports to a claim serves "due notice" of what the agency "should investigate." *Staggs*, 425 F.3d at 884. And at least one court of appeals has squarely rejected that view. *See Chronis v. United States*, 932 F.3d 544, 547 (7th Cir. 2019) ("[W]e will not force agencies to search for claims buried within pages and pages of attachments."). If this Court chooses to reach the exhaustion issue, it should also hold that a plaintiff cannot provide the government due notice of its claims simply by attaching voluminous material, written by others, to its claims form.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellee believes that oral argument would be of assistance to this Court, and respectfully requests oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8042 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua Revesz
Joshua Revesz

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (1) all required privacy redactions have been made; (2) any paper copies of this document submitted to the Court are exact copies of the version filed electronically; and (3) the electronic submission was scanned for viruses and found to be virus-free.

s/ Joshua Revesz
Joshua Revesz

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Joshua Revesz
Joshua Revesz

ADDENDUM

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28 U.S.C. § 1346

§ 1346. United States as defendant

* * *

(b)

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

* * *

28 U.S.C. § 2671

§ 2671. Definitions

* * *

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

* * *

28 U.S.C. § 2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * *

28 U.S.C. § 2675

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

* * *

28 U.S.C. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

16 U.S.C. § 565a-1

§ 565a-1. Cooperative agreements between Secretary of Agriculture and public or private agencies, organizations, institutions, and persons covering Forest Service programs; authority; funding

To facilitate the administration of the programs and activities of the Forest Service, the Secretary is authorized to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons to construct, operate, and maintain cooperative pollution abatement equipment and facilities, including sanitary landfills, water systems, and sewer systems; to engage in cooperative manpower and job training and development programs; to develop and publish cooperative environmental education and forest history materials; and to perform forestry protection, including fire protection, timber stand improvement, debris removal, and thinning of trees. The Secretary may enter into aforesaid agreements when he determines that the public interest will be benefited and that there exists a mutual interest other than monetary considerations. In such cooperative arrangements, the Secretary is authorized to advance or reimburse funds to cooperators from any Forest Service appropriation available for similar kinds of work or by furnishing or sharing materials, supplies, facilities, or equipment without regard to the provisions of section 3324(a) and (b) of title 31, relating to the advance of public moneys.

16 U.S.C. § 565a-2

§ 565a-2. Federal employee status of cooperators

In any agreement authorized by section 565a–1 of this title, cooperators and their employees may perform cooperative work under supervision of the Forest Service in emergencies or otherwise as mutually agreed to, but shall not be deemed to be Federal employees other than for the purposes of chapter 171 of title 28 and chapter 81 of title 5.