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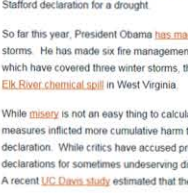
BLOG



# Drought: Always a Disaster, Never a Presidentially Declared One

by [Jeremy Brown](#)

July 11, 2014



States Where Droughts Were Declared, 1974 to 1977

In May, the Senate passed the Emergency Drought Relief Act of 2014 (S. 2198), a bill directing various federal agencies to provide California with additional water supplies during its current drought.

The version of the bill [originally introduced](#) included a title that would have amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act, the country's centerpiece disaster response law. The findings for that title noted that more than 30 years have passed since the president made a Stafford declaration for a drought.

So far this year, President Obama [has made](#) twenty major disaster declarations, mostly for severe storms. He has made six fire management assistance declarations and five emergency declarations, which have covered three winter storms, the [landslides](#) in Snohomish County, Washington, and the [Elk River chemical spill](#) in West Virginia.

While [misery](#) is not an easy thing to calculate or compare, the California drought has by numerous measures inflicted more cumulative harm than numerous other disasters that have received declaration. While critics have accused presidents of acting on [political motives](#) and issuing declarations for sometimes undeserving disasters, there is no doubt that the drought has been brutal. A recent [UC Davis study](#) estimated that the drought could cost the Central Valley \$1.7 billion.

That the California drought – like the 2011 Texas drought and [other significant droughts](#) before it – failed to receive a Stafford declaration reveals much about the [nature of droughts](#) and the structure of our disaster laws.

### American Disaster Law

Natural disasters have far-ranging and complex effects. For each of those effects, Congress has seemingly enacted one or more policy responses.

The United States Code includes a mix of [emergency laws](#) (like the Homeland Security Act of 2002 and the Post-Katrina Emergency Management Reform Act of 2006), discrete emergency-related laws (like those governing flood insurance and crop insurance), and ad hoc laws addressing particular disasters.

Of these, the centerpiece law – and the one under which disaster and emergency declarations are made – is the Stafford Act. It was passed in 1988 and remains the major legislation under which the Federal Emergency Management Agency (FEMA) operates.

Title IV of the law allows the federal government to provide assistance for a “major disaster.” Title V does the same for an “emergency.” The Act delineates the type of assistance that the federal government may provide under both. For a “major disaster,” the federal government may provide greater assistance than for an “emergency.”

### “Major Disasters” and “Emergencies”

The Stafford Act defines a “major disaster” as “any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.” (Emphasis added).

The Act defines “emergency” more broadly: “any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.” In effect, an “emergency” is a catch-all for incidents that do not qualify as major disasters.

To be eligible for Stafford Act assistance, the governor of an affected state must generally request a declaration from the president. As a practical matter, the governor’s office approaches the regional FEMA office. The governor must have found “that the [disaster/ emergency] is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that the Federal assistance is necessary.” (In limited instances, the president may make an emergency (but not a disaster) proclamation proactively, without first having received a request from a state’s governor.)

If the president declares a major disaster, the federal government may provide a broad range of assistance. The act includes provisions for: general federal assistance (which encompasses response, recovery, and evacuation efforts, disaster relief coordination, technical assistance, and distribution of food and medicine), essential assistance, hazard mitigation funding, repairs to public facilities, debris removal, and other services.

For an emergency, the scope of potential federal assistance is narrower. FEMA may help state and local governments with essential services and mitigation but may not repair or replace public infrastructure.

### Trends in Declarations

In 2012, the Congressional Research Service (CRS) released a [study](#) of all declarations made under the Stafford Act or its predecessors. The report spanned the period from 1953, when the first drought declaration was issued, to 2011. Of the most common disaster declarations by incident type, drought did not crack the top ten.

Emergency declarations were added to the pre-Stafford disaster framework by the [Disaster Relief Act Amendments of 1974](#) (1974 Act). Because the 1974 Act defined “emergency” more narrowly than Stafford now does, declarations from that era and the present do not lend themselves to a perfect apples-to-apples comparison. The 1974 Act, for instance, expressly stated that emergency could mean “any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe.” The current Stafford definition of “emergency” no longer includes a list of illustrative incidents (though the definition of “natural disaster” does) but, on its face, remains expansive enough to encompass the incidents that would have qualified under the 1974 Act.

The CRS found that droughts accounted for 11.3 percent of all drought declarations issued between 1974 and 2011, falling behind only snowfall/winter storms and hurricanes. The longevity of the study period obscures important trends, however. An Energy Center analysis found that, of the 48 presidential drought declarations, 38 were deemed emergencies and 10 major disasters.

Of the declarations, two-thirds were issued during a single three-year span, from 1974 to 1977. All but one of those mid-seventies declarations were for emergencies rather than natural disasters. They covered twenty-nine different states and three territories (American Samoa, Puerto Rico, and the Virgin Islands).

For that brief period, declarations – and in particular emergency declarations – emerged as a preferred policy response for drought. Indeed, three-quarters of the emergency declarations made in [1977](#) were for drought.

In the nearly 40 years since, however, droughts have been the subject of just five declarations. Of these, only one was for an American state, and that was New Jersey in 1980. The remaining four have been for the Federated States of Micronesia and the Republic of the Marshall Islands, former territories that now exist as states under free association with the United States.

The continued if uncommon use of declarations could conceivably be interpreted as evidence that the Stafford Act has enduring relevance to droughts. But it is debatable whether experiences in the islands – very small countries, far from alternative freshwater sources, and with less developed infrastructure – should be thought of as reliable precedent.

### Trends in Stafford Declarations

This drop-off in declarations for drought is particularly striking because it occurred during the same time period that the number of declarations issued has soared. The CRS found that the average number of major disaster declarations increased from an average of 18 per year between 1960 and 1969 to an average of 56 per year between 2000 and 2009. In 2010 and 2011, the figures climbed even higher, to 81 and 99, respectively, though they have since moderated (dropping to 47 in 2012, 62 in 2013, and 20 so far in 2014).

Emergency declarations have followed a similarly distinct upward march, though they have varied more erratically from one year to the next. (Emergency declarations shot from 7 in 2004, for example, to 68 in 2005, before falling back to 5 in 2006.) From 2000 to 2009, CRS found, an average of 15 emergencies were declared each year.

The trend in Stafford Act declarations is even more dramatic if fire management assistance declarations are taken into account. Section 420 of the Act authorizes the president “to provide assistance, including grants, equipment, supplies, and personnel, to any State or local government for the mitigation, management, and control of any fire on public or private forest land or grassland that threatens such destruction as would constitute a major disaster.”

Section 420 appears in Title IV, which covers major disaster assistance, but does not require a major disaster declaration to be activated. Rather, it directs the president to adopt necessary implementing regulations. To that end, FEMA has developed the regulations codified at 44 C.F.R. Part 204.

The regulations [require](#) a governor (or the governor’s representative) to submit a request to FEMA for a fire management assistance declaration “while the fire is burning uncontrolled and threatens such destruction as would constitute a major disaster.” The FEMA administrator must determine whether to make a declaration. In reaching a determination, the administrator [must consider](#): (1) the threat to lives and improved property, including threats to critical facilities/infrastructure, and critical watershed areas; (2) the availability of state and local firefighting resources; (3) high fire danger conditions, as indicated by nationally accepted indices such as the National Fire Danger Ratings System; and (4) potential major economic impacts.

Fire management assistance declarations are thus different from emergency and major disaster declarations in that they are made [administratively](#) rather than presidentially. But they are part of the Stafford framework. Fires [occasionally receive](#) emergency declarations (but never major disaster declarations) and, but for the fire management assistance declaration, fires would probably receive even more emergency declarations, increasing the total number.

The CRS found that the average number of annual fire management assistance declarations increased from 21 in the 1990s to 54 in the 2000s. Of course, some of these declarations could be indirectly providing drought assistance since drought heightens fire risk and certain fires could be viewed as side effects of drought.

### Drought, an Uncharismatic Natural Disaster

Unlike virtually all other natural disasters, droughts are slow-moving. The State of Texas [Emergency Management Plan](#) explains: “Drought is not considered a distinct incident and therefore does not linearly follow the traditional four phases of emergency management, namely mitigation, preparedness, response and recovery. Many drought response operations coincide with what have traditionally been classified as mitigation or long term recovery activities, such as establishing secondary water supplies, conservation efforts or drought assistance projects. This makes drought extremely difficult to respond to, as drought impacts may necessitate long-term commodity distribution and mass care measures.”

Just like landscapes and endangered species, natural disasters can be charismatic, as perverse that may sound. Other disasters move dramatically across the screen and leave trails of visual wreckage. Some – like hurricanes and tropical storms – even receive names. Droughts don’t captivate in the same way.

A drought is different, too, in that, as ecologically and economically destructive as it may be, it is not violent. A drought does not topple homes or require urgent evacuations; it does not shut down utility services or send people to Red Cross shelters; it does not require that communities rebuild.

Many of the typical forms of assistance available under the Stafford Act would be financial to droughts. Still, the law includes other forms of assistance that would, such as household financial assistance, unemployment, food stamps, grants to low-income migrant and seasonal farmworkers, legal services, and community disaster loans.

And the president has issued Stafford declarations for other incidents that have been similar to drought in that they have been notable primarily for their economic impacts. In 1964, for example, the [president issued](#) major disaster declarations for California, Oregon, and Washington because of the [effects of El Niño](#) on the salmon industries in those states.

In the time since the most recent domestic drought declaration, the president has declared twelve major disasters for extreme weather. Most of these have been for severe freezes in California, Florida and Texas – all comparatively warm states with significant agricultural industries. A FEMA press release for the most recent such declaration, for California in 2007, explains: “State and federal officials have approved nearly \$23 billion in disaster aid for farm workers, other workers who provide services to the farming community and business owners who suffered \$1.4 billion in damages during the January freeze 2007. To date, more than 9,000 Californians have applied for freeze-related unemployment benefits.”

The assistance touted as part of the freeze response is remarkably similar to the sort of assistance that could help drought victims. But for whatever reasons, drought has not been seen as meriting the same Stafford protection as extreme temperatures.

### USDA and Other Forms of Assistance

The CRS has [observed](#) that “[t]he infrequency of presidential domestic drought declarations increases the uncertainty about the circumstances under which such a declaration is likely to be made. The de facto policy since the 1980s has been that the U.S. Secretary of Agriculture is the lead responding and declaring drought and eligibility for drought assistance.”

Indeed, FEMA is so far removed from drought at this point that, in [another report](#), the CRS said: “Since FEMA has deferred to USDA on drought declarations over the past three decades, there are no sections of the Stafford Act or regulations or policy guidance documents that address, or even appear to lend themselves to, a prolonged drought event as opposed to a disaster incident.”

The United States Department of Agriculture (USDA) operates a disaster assistance program, which complements the Stafford Act, and under which the USDA may declare a disaster area [at the same time](#) that the president declines to do so under Stafford.

For a USDA declaration, a governor must submit a request. If the USDA secretary decides to issue a declaration – which is virtually assured for counties that the United States Drought Monitor has reported as being in severe drought for eight consecutive weeks – the Farm Service Agency may provide emergency loans and other [forms of assistance](#). (Separate but related: the [USDA Risk Management Agency](#) offers crop insurance that can help to offset drought-related losses.)

Additionally, under a provision of the Food Agriculture Conservation and Trade Act of 1990 that has been codified alongside the Stafford Act, the secretary may make grants to public agencies or 501(c)(3) nonprofits that provide emergency services to a low-income migrant or seasonal farmworkers.

The development of agricultural assistance does not appear to perfectly coincide with the drop-off in drought-related Stafford declarations, though a [comprehensive review](#) of the evolution of assorted agricultural relief programs is beyond the scope of this post. See, e.g., 7 U.S.C. §§ 1531 (offering supplemental agricultural disaster assistance and originally enacted in 1938) and 1961 (offering emergency loans and originally enacted in 1961).

The USDA programs are not a perfect substitute for Stafford Act declarations, moreover, because they may inflict ample non-agricultural harms. There are federal programs designed to respond to soften drought impacts, but Stafford Act could still be relevant.

Although the president has declined since 1980 to make declarations, governors have requested them. In December 2013, for instance, Senator Feinstein and Representative Costa [urged](#) Governor Brown to seek a federal disaster declaration for California.

### Amending Stafford for Drought

In S. 2198, Senator Feinstein originally included a title devoted to amending Stafford. Although that title was removed from the version of the bill passed by the Senate, it does reflect a continued appreciation in certain quarters for the value that Stafford could contribute to drought response and relief.

Title II included four findings. The first reiterated that, even though Stafford defines “major disaster” to include drought, the president has not made a major disaster declaration for drought in more than 30 years. The second reaffirmed that “a domestic drought shall be eligible to be declared a major disaster or state of emergency by the President on the request of the Governor of any State.”

The third finding stated that, while droughts may have “a different type of impact,” the “scale of the impact of a major drought can be equivalent to other disasters that have been declared by the President to be a major disaster.” The fourth described the sort of impact that a drought can have.

Building upon these findings, Title II recommended several amendments to Section 502(a) of the Stafford Act. It is doubtful, however, that these amendments would have actually increased the likelihood of a drought being declared a major disaster.

For starters, the amendments would have been to Section 502, which governs the assistance the federal government may provide in response to a declared emergency rather than a declared major disaster.

The amendments would have allowed the federal government to provide three forms of assistance for emergencies that it can already provide for major disasters: employment assistance, nutritional assistance, and crisis counseling. In fact, the amendments described these forms of assistance by referring back to the relevant Stafford Act, Title IV, provisions for major disasters.

The amendments would not have made major disasters any procedurally easier to declare for droughts, and they would not have made the assistance offered for major disasters any better suited to droughts.

If the reason that droughts never receive Stafford declarations is because they do not rise to the level of major disasters but would not benefit from the assistance given under emergencies – that is, if drought falls between the cracks of these two Stafford Act tracks – the amendments might have substantively helped. Otherwise, the amendments at best would have served symbolic and political functions, by expressing the Congressional intention that FEMA should be using Stafford Act tools to aid drought victims.

### Stafford Assistance and Droughts

The disaster assistance currently available through the USDA, as discussed above, does not address all types of drought impacts. In February, President Obama [visited Fresno](#) to announce a \$183 million drought relief package, most of which would flow toward California. The [package included](#):

- \$100 million for livestock producers
- \$60 million for food banks that serve families economically affected by drought
- \$5 million for farmers and ranchers to invest in conservation practices
- \$5 million to protect watersheds (such as by stabilizing stream banks)
- \$3 million for rural drinking water

Roughly two-thirds of this relief goes toward agricultural producers. Other community members who are only affected by the drought indirectly – such as workers at feed stores or restaurants that do most of their business with agricultural producers – are not eligible. Food banks may serve the community as a whole, but they address only one discrete drought impact, and that is the inability to afford groceries.

The Stafford Act takes a more holistic view, particularly of major disasters, and provides a broader range of relief. The amendments in S. 2198 highlight three forms of relief that drought victims do not receive but could find of value.

The first is unemployment assistance. Section 410 of the Stafford Act authorizes the president to provide [unemployment benefits](#) to people who have lost their jobs because of a major disaster and already exhausted all other available unemployment benefits. The unemployment benefits may continue no longer than 26 weeks after the major disaster was declared (an important element for a protracted disaster like drought.) In addition, a state must provide, and the federal government may provide, reemployment assistance.

If unemployment benefits are appropriate for extreme weather events – which like droughts are primarily economic incidents that primarily affect the agricultural sector – they would presumably be just as appropriate for droughts.

The second relevant form of relief is that, during a major disaster, the federal government may distribute supplemental nutrition assistance (formerly food stamps) and surplus commodities to low-income households.

The third form of relief is crisis counseling, which the Stafford Act makes available to emergency workers and major disaster victims “to relieve mental health problems caused or aggravated by such major disaster or its aftermath.”

### Costs of Applying the Stafford Act to Droughts

FEMA pays for Stafford Act assistance through the Disaster Relief Fund (DRF), which relies upon Congressional appropriations. Historically, when determining allocations to the DRF, Congress [considered](#) such factors as the amounts remaining in the fund and the five-year rolling average of “normal” declared incidents, or those with costs of less than \$500 million. Because Congress did not factor extreme incidents into its budgeting, and because disasters are impossible to predict, the DRF was chronically underfunded.

Over time, as discussed above, the number of declared incidents increased significantly, and with them so too did Stafford costs. The rise in costs was attributable to hurricanes more than any other type of incident. The CRS found that, [between 1998 and 2013](#), fifteen natural disasters carried costs greater than \$500 million. All but one – the 2008 Midwest floods – was a hurricane.

When Congress passed the [Budget Control Act of 2011](#) (Public Law 112–25), it imposed limits on the discretionary spending, including spending on disaster relief. The act generally capped Stafford spending according to a ten year rolling average calculated by the Office of Management Budget.

In the Fiscal Year 2014 Consolidated Appropriations Act ([P.L. 113-76](#)), Congress transferred \$6.2 billion to the DRF. It is difficult to estimate the additional burden that the enhanced use of the Stafford Act for drought would place on the DRF. Numerous factors would influence drought-related Stafford spending, including:

- The number, severity and duration of future droughts. (Weather has never been predictable, and climate change will make it less so. Hotter temperatures and more extreme weather events will probably lead to more frequent and more extreme droughts. At a certain point, dry conditions may come to represent a new normal, in which what were once considered drought conditions become the new averages. But those averages can only be calculated using hydrologic history, which itself will be less reflective and reliable as climate changes.)
- The number, nature and scope of related declarations. (Would the president declare a major disaster or emergency, for instance? And what would a state have to do to qualify for a declaration? Would a certain amount of square mileage – or a certain percentage of the state’s total area – have to be under a drought? How bad would the drought have to be? The U.S. Drought Monitor operates a five-level classification system, which runs from abnormally dry up through exceptional drought. Would all or only some of these support declarations? Once a declaration is made, how long would it remain in effect? If a drought lasts for years, could a declaration?)
- The discretion exercised under the declarations. (The Stafford Act – like other disaster laws, including those at the state level – gives broad authority to the executive branch, to better shape the response effort to the particular needs of the incident. But as a consequence, the nature and generosity of federal assistance depends significantly on the discretion of the executive. To give one example, Section 407 of the Act allows, but does not require, the president to support debris removal “whenever he determines it to be in the public interest.” The president may do so by instructing federal agencies and departments to remove the debris or by making grants for that purpose to state or local governments or to nonprofits.)

### Disaster Relief for an Unusual Form of Disaster

In the 1960s, the Australian government tried to wean the agricultural sector off of drought relief. It said farmers and ranchers should approach the prospect of drought the same way they would any other business risk. In many respects, this is an eminently reasonable view of things. Water is one of many inputs that go into the agricultural production process, and for most industries, the government does not come to the rescue when an input increase in price or falls into short supply.

In one of its annual volumes on the global water resources, the Pacific Institute surveyed policy quoted the Australian saying “everybody else gets assistance if there is a flood or a fire. Why shouldn’t the farmers get assistance?”

This reasoning equates droughts with other natural disasters rather than with other business risks. The trouble is that both analogies ring true. Compared to fast-moving disasters like floods and fires, drought is primarily economic. Yet, like other disasters, it is the result of meteorological phenomena, as the Australian farmer argued, and as the original version of S. 2198 found.

Because drought straddles this hybrid space – as a natural disaster unlike other disasters, and unsuited to catch-all disaster frameworks – it has not inspired Stafford declarations for more than three decades. Whether drought warrants greater Stafford relief – or other forms of disaster relief – may turn more on philosophical preferences regarding the role of government than on a technocratic cost-benefit analysis.

This blog post benefited from the research assistance of Camila Cossio ‘16, a rising 2L at UT Law and a summer intern at the Energy Center.

[Disaster](#) [drought](#) [water](#)

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