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A New Era of Federal Prescribed Fire: Defining Terminology and Properly Applying the Discretionary Function Exception

Robert H. Palmer III[†]

Fire cultivates change. This article illustrates how the use of prescribed fire changed over the last century and how the federal courts resolved tort claims resulting from prescribed fires. By first recounting the tumultuous history of prescribed fire and the perplexing terminology used to describe the various categories of wildland fires, this article then dissects prescribed fire litigation. In particular, this article explains why recent policy changes have exposed the federal government from behind the discretionary function exception that typically shields the federal government from tort liability. Thus, this article clarifies confusing terminology and describes why the discretionary function exception should not bar a claim for damages resulting from a prescribed fire.

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I. INTRODUCTION

For the first time, the Forestry Division hired crews to suppress a wildfire A heavy snowfall finally extinguished the fire in the fall, although a telegram to Washington reported, “through our heroic efforts the fire has been put out.”

—Charles Deloney (circa 1900)¹

Although humans have always had a relationship with fire, the relationship experienced dramatic changes in the last century. As society expanded westward during the early half of the twentieth century, the human-fire relationship waned to its lowest level. Fire was perceived as a threat, similar to that of an enemy in war, and the federal government responded by dispatching the Army to aggressively fight fire.² For many communities in the West, fire was the enemy that initiated its attack with a flash of lightning and the rumble of thunder. However, after waging a war against fire for nearly fifty years, the perception of fire slowly changed as federal land managers and society recognized the detrimental effects of aggressive fire suppression: it was expensive, it caused significant environmental damage, and it caused public land to become more vulnerable to future fires.³

1. JOHN DAUGHERTY, NAT'L PARK SERV., GRAND TETON HISTORIC RESOURCE STUDY (1999), http://www.nps.gov/history/history/online_books/grte2/hrs17.htm (last updated July 24, 2004) (quoting Charles “Pap” Deloney, who was the first forest supervisor and who sent the telegram circa 1900).

2. The Army was used extensively from 1872 to about 1916 to fight fires on federal land because the various modern fire agencies, like the National Park Service, did not exist yet or did not have sufficient resources to control fires. HAL K. ROTHMAN, A TEST OF ADVERSITY AND STRENGTH: WILDLAND FIRE IN THE NATIONAL PARK SYSTEM 2 (2005), available at http://www.nps.gov/fire/download/fir_wil_history.pdf.

3. ROTHMAN, *supra* note 2, at 120–24; Biodiversity Assocs. v. Cables, 357 F.3d 1152, 1156–57 (10th Cir. 2004) (stating that fire suppression efforts created unintended consequences: denser forests and greater fire risks).

Instead of aggressive fire suppression, the human-fire relationship changed as society recognized the importance of fire. During the middle of the twentieth century, the primary federal land agencies—the U.S. Forest Service, the National Park Service, the Bureau of Land Management, the U.S. Fish and Wildlife Service, and the Bureau of Indian Affairs⁴—experimented with fire by allowing some fires to burn naturally and even intentionally igniting other fires.⁵ At the same time, Congress enacted environmental laws to give the federal land agencies direction regarding how to better manage federal lands.⁶ The human-fire relationship began to evolve.

In the late twentieth century and early twenty-first century, our relationship with fire—specifically prescribed fire⁷—reached a point at which society accepted that civilization and fire could coexist.⁸ Society finally recognized that fire was not only necessary for many species to survive, but it was also a necessary tool that could improve the health of public lands and protect communities. At the same time, the federal land agencies created a unified prescribed fire policy, which enabled more use of prescribed fire than ever before.⁹ Ultimately, the federal land agencies' increased use of prescribed fire will minimize wildfire threats to communities, but that protective benefit has a risk: an increased likelihood of prescribed fire tort litigation. Because prescribed fires will

4. In this article, the term “federal land agencies” refers only to those five federal agencies that have wildland fire programs and are represented at the National Interagency Fire Center in Boise, Idaho. Although three other agencies—National Oceanic and Atmospheric Administration, Department of Homeland Security U.S. Fire Administration, and the Department of the Interior’s National Business Center Aviation Management Directorate—are also affiliated with the National Interagency Fire Center, this article does not directly apply to them because they do not manage federal land. Additionally, because the National Association of State Foresters is not a federal agency, this article does not apply to it either. *About NIFC*, NAT’L INTERAGENCY FIRE CTR., http://www.nifc.gov/aboutNIFC/about_mission.html (last visited Mar. 30, 2012).

5. ROTHMAN, *supra* note 2, at 120–24.

6. For example, Congress enacted the Wilderness Act on September 3, 1964, which changed the fire response in wilderness areas. Wilderness Act, Pub. L. No. 88-577, § 1, 78 Stat. 890 (1964) (codified at 16 U.S.C. § 1131 (2011)); ROTHMAN, *supra* note 2, at iii. The National Environmental Policy Act was enacted on January 1, 1970. National Environmental Policy Act, Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4321 (2011)).

7. The term “prescribed fire” is defined in more detail in Part III as a human-caused fire intentionally ignited, with authority, to achieve specific objectives identified in an approved prescribed fire plan. Unlike a “wildfire,” which is an unplanned fire, a “prescribed fire” is a planned fire. Additionally, the term “wildland fire” refers to both “wildfires” and “prescribed fires.”

8. ROTHMAN, *supra* note 2, at 120.

9. *Fire Information—Wildland Fire Statistics: Prescribed Fires and Acres by Agency*, NAT’L INTERAGENCY FIRE CTR., http://www.nifc.gov/fireInfo/fireInfo_stats_prescribed.html (last visited Mar. 31, 2012) [hereinafter *NIFC Fire Statistics*] (indicating that national prescribed fire reporting began in 1998).

inevitably burn out of control, escape,¹⁰ and burn unintended property, those resulting damage claims are likely to increase as the federal land agencies increase the use of prescribed fire.¹¹

Unfortunately, the legal framework used to address prescribed fire tort litigation is obscured with misleading and conflicting terminology. As the human-fire relationship changed, the use of prescribed fire waxed and waned, and the federal land agencies also changed the terminology used to describe fire, especially prescribed fire. Instead of using consistent terminology, the federal land agencies described prescribed fire through a potpourri of terms, which confused the public, the employees, and the courts.¹² Recently, the federal land agencies confronted this problem and issued new policies to simplify fire terminology, which also had the effect of altering fire classification systems.¹³ Fortunately, the new fire terminology and classification policies should reduce public confusion and simplify the federal government's defense during litigation.

In addition to recent fire policy changes, the law governing the federal government's liability resulting from a prescribed fire is also changing.¹⁴ As described in Part IV, the discretionary function exception to the Federal Tort Claims Act generally barred any prescribed fire damage claim from even reaching trial.¹⁵ However, recent policy directives and a Florida district court's decision in 2010 should curtail the use of the discretionary function exception in any litigation where a

10. "Escape" is a term of art used to describe an uncontrolled prescribed fire that exceeds the boundaries of the prescribed fire perimeter.

11. *E.g.*, Michigan v. United States, No. 2:11-CV-00303, 2011 WL 7267049 (W.D. Mich. filed Aug. 12, 2011) (currently litigating a motion to dismiss based on the discretionary function exception because a U.S. Forest Service prescribed fire escaped and allegedly damaged \$85,000 of state lands). See generally Paul Keller, Wildland Fire Lessons Learned Center, *Prescribed Fire Escapes: Are We Learning Anything?*, TWO MORE CHAINS, Winter 2012, at 1, available at http://wildfirelessons.net/documents/Two_More_Chains_Winter_2012.pdf (discussing the uptick in the number of recent prescribed fire escapes and feedback to the current prescribed fire review process).

12. See Memorandum from the NWCG Chair to NWCG Committee Chairs and Geographic Area Coordinating Group, NWCG#030-2010, at 1 (July 8, 2010), [hereinafter NWCG#030-2010] available at <http://www.nwcg.gov/general/memos/nwcg-030-2010.pdf> (describing the additional guidance for communicating about managing wildland fire in light of changes in policy guidance and terminology).

13. *Id.*

14. Jonathan Yoder, *Liability, Regulation, and Endogenous Risk: The Incidence and Severity of Escaped Prescribed Fires in the United States*, 51 J.L. & ECON. 297, 320 (2008) (discussing the effects of different prescribed fire laws and concluding that "empirical analysis provides evidence that different liability and regulatory rules affect the number and magnitude of escaped prescribed fires.").

15. Federal Tort Claims Act, 28 U.S.C. § 2680(a) (2011); *e.g.*, Thune v. United States, 872 F. Supp. 921, 922 (D. Wyo. 1995) (holding the discretionary function exception barred the damage claim resulting from an escaped prescribed fire).

federal land agency's prescribed fire escapes and damages non-federal property.¹⁶

Part II of this article provides background information describing how and why the federal land agencies use prescribed fire. Part III describes how the new fire terminology policy changes have altered the fire classification schemes and why the new terminology and classification policy will improve the federal land agencies' ability to communicate about fire, specifically prescribed fire. Part IV examines the prescribed fire jurisprudence in light of recent policy directives. Finally, Part V concludes by reiterating that federal land agencies need to embrace the terminology and classification policy, and it also describes why the discretionary function exception to the Federal Tort Claims Acts should not shield the federal land agencies from prescribed fire tort claims.

II. PRESCRIBED FIRE BACKGROUND

The presence or absence of natural fire within a given habitat is recognized as one of the ecological factors contributing to the perpetuation of plants and animals native to that habitat.

—National Park Service (circa 1968)¹⁷

A. History of Federal Prescribed Fire

Historically, society and the government considered fire an enemy and responded by aggressively suppressing any fire.¹⁸ For nearly a century, from 1872 until the 1960s, a predominately human-centered value system considered fire a threat to society and community development. Under that view, any fire was aggressively suppressed because fire represented an unwanted nuisance to the expanding way of life.¹⁹ In 1935, the U.S. Forest Service (USFS) had fully embraced society's resentment toward fire when the USFS adopted the 10 AM Policy.²⁰ The 10 AM Policy directed USFS fire resources to aggressively

16. See discussion *infra* Part IV; NAT'L WILDFIRE COORDINATING GRP., INTERAGENCY PRESCRIBED FIRE PLANNING AND IMPLEMENTATION PROCEDURES GUIDE 19 (July 2008) [hereinafter 2008 PRESCRIBED FIRE GUIDE], available at <http://www.nwcg.gov/pms/RxFire/rxfireguide.pdf> (describing current, as of Mar. 25, 2012, federal prescribed fire policy); Florida v. United States, No. 4:09-CV-00386, 2010 WL 3469353, at *2 (N.D. Fla. Aug. 30, 2010).

17. ROTHMAN, *supra* note 2, at 120.

18. ROTHMAN, *supra* note 2, at 2.

19. Jan W. van Wagtenonk, *Fires in Wilderness in the National Parks*, PARK SCIENCE, Feb. 21, 2012, at 20, available at <http://www.nature.nps.gov/parkscience/index.cfm?ArticleID=535> (describing that fire suppression dominated fire policy from 1886 to 1967).

20. NAT'L INTERAGENCY FIRE CTR., REVIEW AND UPDATE OF THE 1995 FEDERAL WILDLAND FIRE MANAGEMENT POLICY 1-1 (Jan. 2001) [hereinafter 1995 FEDERAL WILDLAND FIRE

suppress all human-caused fires and to contain any fire by 10 a.m. the next day.²¹ The 10 AM Policy became the dominant fire policy for the United States for the next forty years. During that time, the 10 AM Policy was incredibly effective: fire durations decreased considerably, and the amount of acreage burned dropped dramatically.²² However, the National Park Service (NPS) did not fully embrace the USFS's 10 AM Policy of aggressive fire suppression.

The traditionally human-centered focus shifted towards a more ecologic-centered focus as scientists, land managers, and politicians recognized the importance of fire. In the 1960s, the NPS continued to suppress fires, but the NPS also initiated a new era of fire management: some lightning-caused fires were allowed to burn, and the use of prescribed fires became more prevalent.²³ In addition, by the early 1960s the NPS recognized the need to restore fire within the national parks. At the same time, Congress enacted the Wilderness Act, which directed federal land agencies to allow natural processes, like fire, to occur in wilderness areas.²⁴ Although the NPS was moving away from fire suppression in the 1960s, the USFS maintained the 10 AM Policy for another decade.

Responding to exponentially increasing fire suppression costs and recognizing the potential value of allowing some fires to burn naturally, in 1977, the USFS shelved the 10 AM Policy.²⁵ Like the NPS, the USFS adopted similar wildland fire policies that shifted from strict fire suppression to more holistic fire management.²⁶ After this change, the federal land agencies increased the use of prescribed fire and allowed

MANAGEMENT POLICY], available at http://www.nwccg.gov/branches/ppm/fpc/archives/fire_policy/history/index.htm.

21. *Id.*

22. 1995 FEDERAL WILDLAND FIRE MANAGEMENT POLICY, *supra* note 20, at 1-6.

23. Gregory H. Aplet, *Evolution of Wilderness Fire Policy*, INT'L J. WILDERNESS, Apr. 2006, at 9, available at http://www.wilderness.net/library/documents/IJWApr06_Aplet.pdf.

24. Wilderness Act of 1964, 16 U.S.C. § 1131(a) (2011) (Wilderness areas "shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character . . ."). See generally *Sierra Club v. Block*, 622 F. Supp. 842, 850 (D. Colo. 1985) (describing the purpose and legislative history of the Wilderness Act); FIRE MGMT. POLICY REVIEW TEAM, 1988 REPORT ON FIRE MANAGEMENT POLICY 54 (Dec. 14, 1988) [hereinafter 1988 FIRE MANAGEMENT POLICY REVIEW], available at http://www.nwccg.gov/branches/ppm/fpc/archives/fire_policy/mission/1988_fire_mgmt_preview_team_rpt.pdf; Aplet, *supra* note 23, at 9.

25. 1995 FEDERAL WILDLAND FIRE MANAGEMENT POLICY, *supra* note 20, at 1-1.

26. *Id.*; see also *Cary v. United States*, 552 F.3d 1373, 1375 (Fed. Cir. 2009), *reh'g denied* (2009), *cert. denied*, 129 S. Ct. 2878 (2009) (stating in 1968 the USFS ended its policy of mandatory wildfire suppression that began in 1911, and, instead, the USFS replaced it with a selective suppression policy).

some lightning-caused fires to burn naturally.²⁷ This “let it burn” policy came under significant criticism from the public and politicians in response to the 1988 Greater Yellowstone fires.²⁸ Although lightning, not humans, ignited the 1988 Greater Yellowstone fires, many of these fires were improperly classified as prescribed natural fires because the fires were allowed to burn naturally.²⁹ While the classification of fires has caused turmoil ever since the 1988 Greater Yellowstone fires, the federal land agencies have continued managing fire, especially prescribed fire, for multiple benefits.

B. Benefits and Consequences of Prescribed Fire

Prescribed fire is a tool that land managers now use to improve ecosystems and to reduce wildfire risks to communities.³⁰ When used for ecosystem benefit, a prescribed fire burns vulnerable vegetation, releases nutrients contained in that burned material, and recycles those nutrients by initiating the ecologic cycle.³¹ Some ecosystems, like pine or giant sequoia dominated forests, cannot regenerate without some type of fire disturbance that causes the cones to open to initiate the reproduction cycle.³² Those species that require fire to release their seeds for germination have serotinous cones and are located in many ecosystems across the country.³³ In addition, some animal species, like birds or squirrels, are also dependent upon post-fire habitat.³⁴ When prescribed

27. Federico Cheever, *The Phantom Menace and the Real Cause: Lessons from Colorado's Hayman Fire 2002*, 18 PENN. ST. ENVTL. L. REV. 185, 191–92 (2010) (describing that in 1977 the USFS allowed more prescribed burning as “[f]ire suppression became fire management.”).

28. ROTHMAN, *supra* note 2, at 186; Aplet, *supra* note 23, at 9; Peter H. Froelicher, *Issues of Liability Surrounding Fire Management in the Greater Yellowstone Area*, 27 LAND & WATER L. REV. 123, 124 (1992) (describing that the Greater Yellowstone fires “stirred a heated debate concerning the proper fire management policy”).

29. 1988 FIRE MANAGEMENT POLICY REVIEW, *supra* note 24, at 1.

30. NAT'L INTERAGENCY FIRE CTR., NFES 2724, INTERAGENCY STANDARDS FOR FIRE AND FIRE AVIATION OPERATIONS 17-1 (2012) [hereinafter 2012 REDBOOK], available at <http://www.nifc.gov/PUBLICATIONS/redbook/2012/2012RedBookALL.pdf> (PDF page 286) (explaining that hazardous fuels reduction programs, which include prescribed fire, reduce hazardous fuels and improve the health of the land).

31. Minn. Pub. Interest Research Grp. v. Butz, 358 F. Supp. 584, 610 (D.C. Minn. 1973).

32. *Id.* (stating that jack pine cones will open and allow dispersal of its seeds only if subjected to the intense heat of a fire); California v. U.S. Forest Serv., 465 F. Supp. 2d 942, 946 (N.D. Cal. 2006) (giant sequoia).

33. George Wuerthner, *Fire in the East: Welcoming Back a Native Son*, in WILDFIRE: A CENTURY OF FAILED FOREST POLICY 96 (George Wuerthner ed., 2006).

34. Ecology Ctr., Inc. v. Austin, 430 F.3d 1057, 1061 (9th Cir. 2005) (black-backed woodpecker); San Juan Citizens Alliance v. Stiles, No. 1:08-CV-00144, 2010 WL 1780816, at *14 (D. Colo. May 3, 2010) (hairy woodpecker and bluebird); Forest Guardians v. U.S. Forest Serv., No. 1:05-CV-00372, 2006 WL 4109661, at *28 (D. N.M. Aug. 22, 2006) (Albert's squirrel).

fire is used for ecosystem benefits the fires tend to be large, on the order of hundreds to thousands of acres.³⁵

In addition to ecosystem restoration, land managers also use prescribed fire in conjunction with other fuel treatments to reduce the risks associated with wildfires. Any burnable material, like dry brush, is considered a fuel.³⁶ Additionally, a hazardous fuel consists of readily combustible materials that are arranged in a way that makes fire control difficult and likely causes undesired consequences if burned.³⁷ For example, highly combustible dense brush, like chaparral, adjacent to a house would be considered a hazardous fuel because once the chaparral ignites the resulting fire would likely threaten the house.³⁸ The physical act of fuel removal is called a fuel treatment or a hazard fuel reduction project.³⁹

Land managers use fuel treatments and prescribed fire to protect people, communities, and ecosystems from subsequent wildfires.⁴⁰ Because prescribed fires consume the same fuel necessary to sustain a wildfire, an area previously burned by a prescribed fire has less fuel available. Thus, any subsequent fire burns at a lower intensity, and lower intensity fires are easier to manage than higher intensity fires.⁴¹ Therefore, when prescribed fire is used to reduce the risk of subsequent wildfires, the prescribed fire also tends to be of a lower intensity and smaller size than a prescribed fire used for ecosystem benefit. Sometimes

35. *E.g.*, *Thune v. United States*, 872 F. Supp. 921, 922 (D. Wyo. 1995) (conducting a 3,000-acre fire to improve elk habitat).

36. NAT'L WILDFIRE COORDINATING GRP., GLOSSARY OF WILDLAND FIRE TERMINOLOGY PMS 205, at 88 (May 2011) [hereinafter GLOSSARY], available at <http://www.nwcg.gov/pms/pubs/glossary/pms205.pdf> (defining "fuel" as "[a]ny combustible material, especially petroleum-based products and wildland fuels").

37. GLOSSARY, *supra* note 36, at 95 (defining "hazard fuel" as "[a] fuel complex defined by kind, arrangement, volume, condition, and location that presents a threat of ignition and resistance to control").

38. *See, e.g.*, POWAY CAL. MUN. CODE § 8.76.010 (2011), available at <http://www.codepublishing.com/ca/poway/html/poway08/poway0876.html> (describing that removal of highly flammable chaparral vegetation reduces the risk of wildfire to a structure by creating defensible space); *Defensible Space*, CITY OF POWAY (June 25, 2010), <http://www.poway.org/Index.aspx?page=455> (describing the City of Poway's defensible space program).

39. *Glossary of Terms*, FORESTS & RANGELANDS (May 5, 2011), <http://www.forestsandrangelands.gov/resources/glossary/h.shtml> (defining "hazard fuel reduction").

40. 2012 REDBOOK, *supra* note 30 (describing that hazardous fuels reduction programs, which include prescribed fire, reduce hazardous fuels and improve the health of the land); *W. Watersheds Project v. Lane*, No. 1:07-CV-0394, 2007 WL 2815039, at *1 (D. Idaho Sept. 25, 2007) (describing the Department of Interior's and the Department of Agriculture's creation of a hazard fuel categorical exclusions in response to the Healthy Forest Initiative in 68 Fed. Reg. 33,814 (June 5, 2003)).

41. *See* NAT'L WILDFIRE COORDINATING GRP., NFES 0065, FIRELINE HANDBOOK 91-94 (2004), available at <http://www.nwcg.gov/pms/pubs/410-1/410-1.pdf> (PDF pages 95-98) (describing that at low intensities direct attack tactics can be used, but at higher intensities indirect attack tactics must be used).

a prescribed fire can be as small as a campfire to burn fuel accumulated as a result of a fuel treatment.⁴²

The use of prescribed fire, however, can also impair individuals and the environment. Like any fire, prescribed fires emit smoke, and smoke affects air quality.⁴³ Although wildfire smoke may contribute to climate change, the increased use of prescribed fire, as opposed to higher intensity wildfires, may actually mitigate the rate of climate change.⁴⁴ Moreover, prescribed fires occasionally burn unintended property and occasionally affect aesthetic values because prescribed fire is inherently subject to many uncontrollable environmental factors—fuel characteristics, wind gusts, changes in wind direction, cloud movement and formation, and rapid changes in relative humidity.⁴⁵ Thus, environmental factors can alter the use of prescribed fire.

Prescribed fire projects conducted by the federal land agencies, most notably those of the USFS, have also been challenged in court because the federal land agency allegedly did not properly consider the various interests or effects of a proposed project.⁴⁶ Normally, a prescribed fire project is developed pursuant to a general land management plan or is associated with a broader fuel reduction plan, and those umbrella plans can generate significant litigation.⁴⁷ For example, in the mid-2000s, environmental interest groups litigated numerous commercial timber harvesting projects, which included prescribed fire treatments, for allegedly failing to comply with the National Environmental Policy Act (NEPA).⁴⁸ Specifically, in *Sierra Club v.*

42. *Sierra Nevada Forest Prot. Campaign v. U.S. Forest Serv.*, No. 04-CV-2023, 2005 WL 1366507, at *15 (E.D. Cal. May 26, 2005) (describing the relationship between prescribed fire and other fuel treatments); *Whites Creek Pile Burning Humboldt-Toiyabe National Forest*, U.S. FOREST SERV. (2007), http://www.fs.fed.us/r4/fire/hfr/2007/whitescreek_1.shtml (describing campfire sized prescribed fires to reduce hazardous fuel loading around a housing development).

43. *E.g.*, *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (describing that prescribed fire and logging have potential impacts on air, soil, water quality, wildlife, and forest resources).

44. Christine Wiedinmyer & Matthew D. Hurteau, *Prescribed Fire as a Means of Reducing Forest Carbon Emissions in the Western United States*, 44 ENVTL. SCI. & TECH. 1926 (2010) (describing the relative benefits of prescribed fire as compared to wildfire and the effects on climate change).

45. *E.g.*, *Robinson v. United States*, 175 F. Supp. 2d 1215 (E.D. Cal. 2001) (personal injury and property damage claim); *Anderson v. United States*, 55 F.3d 1379 (9th Cir. 1995) (property damage claim).

46. *E.g.*, *Utah Env'tl. Cong. v. Bosworth*, 372 F.3d 1219, 1223 (10th Cir. 2004) (involving the USFS and alleging National Environmental Policy Act (NEPA) and National Forest Management Act violations).

47. *E.g.*, *Wildwest Inst. v. Bull*, 547 F.3d 1162 (9th Cir. 2008) (involving the USFS and alleging NEPA, National Forest Management Act, and Healthy Forests Restoration Act violations).

48. *E.g.*, *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033–34 (9th Cir. 2007) (concluding the USFS did not satisfy the "hard look" test required of NEPA for the 2002 Fuel categorical exclusion).

Bosworth, the Sierra Club challenged a USFS categorical exclusion to NEPA that excluded the following projects from the NEPA analysis: all fuel reduction projects up to 1000 acres and prescribed fire projects up to 4500 acres on all national forests.⁴⁹ In granting a preliminary injunction, the court agreed with the Sierra Club and concluded the USFS failed to demonstrate that it made a reasoned decision based on all the competing factors.⁵⁰

Although legal challenges to hazard fuel projects usually originate from environmental interest groups, a timber harvest interest group also challenged the USFS for not appropriately balancing timber production, wildfire risk, and recreation interests.⁵¹ In *California Forestry Ass'n v. Bosworth*, the district court granted the USFS summary judgment on all challenges except the NEPA claim, which it granted summary judgment in favor of the timber interest group because the USFS failed to consider all the reasonable alternatives.⁵²

Finally, the use of prescribed fire has also been challenged for adversely impacting vulnerable populations of specific species.⁵³ Even after numerous legal challenges, the federal land agencies have actually increased the use of prescribed fire.

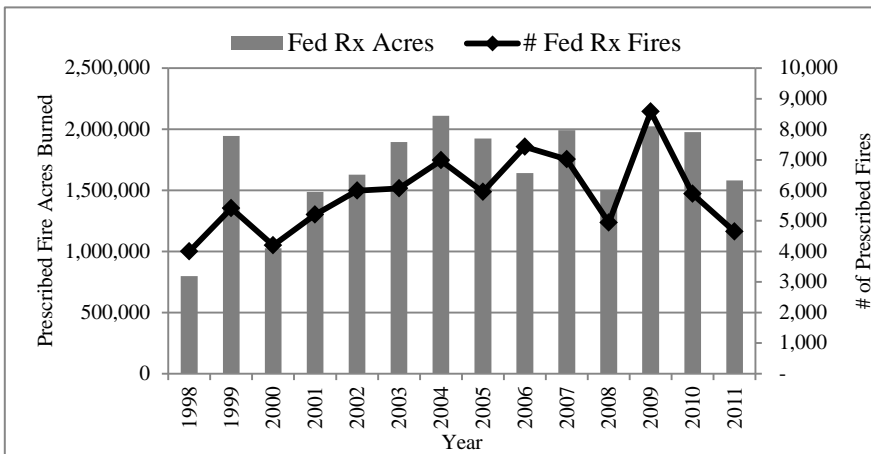


Figure 1. Federal Prescribed Fire Trends, 1988 to 2011.⁵⁴

49. *Id.* at 1018.

50. *Id.* at 1026.

51. *Cal. Forestry Ass'n v. Bosworth*, No. 2:05-CV-00905, 2008 WL 4370074, at *3 (E.D. Cal. Sept. 24, 2008).

52. *Id.* at *20.

53. *W. Watersheds Project v. Bureau of Land Mgmt.*, 552 F. Supp. 2d 1113, 1130 (D. Nev. 2008) (sage grouse).

54. The acronym "Rx" means prescribed fire. The gray bars represent the acres burned by federal prescribed fires, and the black diamonds represent the number of federal prescribed fires con-

As Figure 1 indicates, the acreage treated with prescribed fire nearly doubled between 1998 and 2011.⁵⁵ Specifically, between 1998 and 2003, the acres burned by prescribed fire increased from approximately 0.8 million acres to 1.86 million acres. Since 2003, the acreage burned has remained near the 2003 level, but the number of individual prescribed fires has fluctuated. This increased use of prescribed fire resulted from the modern realization that the reintroduction of fire is necessary for the survival of ecosystems and for community protection.⁵⁶ However, as the use of prescribed fire increased, the federal agencies struggled to use consistent terminology to discuss and differentiate prescribed fire from wildfire.

III. THE NEED FOR CONSISTENT TERMINOLOGY

Sometimes it takes a human generation for the public's collective mind to change on an issue.

—Andy Kerr (circa 2006)⁵⁷

In the 1960s and 1970s, as the federal land agencies transitioned from fire suppression to fire management classifying fires became important. The federal land agencies classified fires into two categories: a prescribed fire or a wildfire.⁵⁸ That initial classification determined what type of response was appropriate.⁵⁹ For example, if a land manager classified the reported fire as a wildfire, then firefighters suppressed it. Alternatively, if the reported fire was actually a prescribed fire and still within the purview of the prescribed fire plan, the federal land agency managed the prescribed fire pursuant to that prescribed fire plan. However, if the reported fire was not a prescribed fire and if the land manager decided to not suppress the fire for ecologic or fuel reduction reasons, the fire did not fit into either of the wildfire or prescribed fire categories. Sometimes land managers called that type of fire “wildland fire use,” “fire use,” “prescribed natural fire,” “natural prescribed fire,”

ducted. *NIFC Fire Statistics*, *supra* note 9 (describing that national prescribed fire reporting began in 1998, and thus, national prescribed fire data that occurred before 1998 is not available); 1988 FIRE MANAGEMENT POLICY REVIEW, *supra* note 24, at 7 (stating that prescribed fire has been used in Florida since the 1950s).

55. See *NIFC Fire Statistics*, *supra* note 9.

56. DOUGLAS J. MARSHALL ET AL., U.S. FOREST SERV., SYNTHESIS OF KNOWLEDGE OF HAZARDOUS FUELS MANAGEMENT IN LOBLOLLY PINE FORESTS, at ii (Nov. 2008), available at http://www.firescience.gov/projects/05-S-04/project/05-S-04_gtr_srs110_synth_loblollypine.pdf.

57. Andy Kerr, *The Ultimate Firefight: Changing Hearts and Minds*, in *WILDFIRE: A CENTURY OF FAILED FOREST POLICY* 277 (George Wuerthner ed., 2006).

58. 1988 FIRE MANAGEMENT POLICY REVIEW, *supra* note 24, at 5.

59. *Id.* at 5–9.

or a “wildfire managed for resource benefit.”⁶⁰ Thus, the lack of consistent terminology is unnecessarily complicating and confusing.⁶¹

The absence of consistent terminology still creates confusion amongst the public, the courts, and the federal land agencies.⁶² In 2010, the National Wildfire Coordinating Group, a group composed of federal land agency fire leadership with policy making authority,⁶³ issued a policy guidance and interpretation memorandum, NWCG#030-2010, explaining the new fire management and terminology changes:

The most effective way for us to communicate about fire with the public is to educate ourselves about what to say and how to say it, and allow each agency and partner to address its own audiences.

. . . .

*For both our internal and external audiences, we need to keep our terminology simple and continue to focus on telling our story versus getting caught up in explaining the difference between unplanned and planned ignitions and between wildfires and prescribed fires.*⁶⁴

Although the various classification definitions may appear facially insignificant, the classification provides guidance to whether the federal land agency’s actions likely fall within the discretionary function exemption to the Federal Tort Claims Act.⁶⁵ As described in Part IV, *infra*, if a court finds that the federal land agency acted pursuant to proper discretion, then any tort claim for money damages terminates because the court is divested of subject matter jurisdiction.⁶⁶ For

60. Van Wagtenonk, *supra* note 19 (describing that fire managers have attempted to curtail the use of terms like “prescribed natural fire” and “wildland fire use”).

61. Ronald H. Wakimoto, *National Fire Management Policy*, J. FORESTRY, Oct. 1990, at 22, 25 (appointed to review the national wildland fire policy after the 1988 Greater Yellowstone fires and concluded that “developing uniform terminology . . . would significantly improve fire management”).

62. NWCG#030-2010, *supra* note 12.

63. In 1943, the Secretaries of Agriculture and Interior entered into a Memorandum of Understanding “to provide adequate wildfire management and protection to the lands under their respective jurisdictions.” Then in 1976, those two departments established the NWCG. The purpose of the NWCG, as a national group, “is to provide national leadership and establish, implement, maintain and communicate policy, standards, guidelines, and qualifications for wildland fire program management and support the National Incident Management System.” Memorandum of Understanding for the National Wildfire Coordinating Group (Oct. 11, 2007), *available at* <http://www.nwcg.gov/general/mou2007.htm>.

64. NWCG#030-2010, *supra* note 62, at 1, 3.

65. Federal Tort Claims Act, 28 U.S.C. § 2680(a) (2011); *Florida v. United States*, No. 4:09-CV-00386, 2010 WL 3469353, at *2 (N.D. Fla. Aug. 30, 2010).

66. *E.g.*, *Johnson v. United States*, 949 F.2d 332, 334 (10th Cir. 1991) (dismissing negligence suit for lack of subject matter jurisdiction because the National Park Service’s actions in conducting a rescue fell within the discretionary function exception).

example, a federal land agency should succeed in defending a damages claim resulting from the agency's response to a wildfire by using the discretionary function exception, but the discretionary function exception is not likely to shield a prescribed fire damages claim.⁶⁷

Ultimately, the classification of wildland fire has changed as federal land agencies react to political pressure and as land managers characterized fire management.⁶⁸ Regardless of the various classifications, wildfires are distinguishable by their cause and by the management response. The following describes the two interrelated classification schemes and concludes by reiterating the need to use consistent terminology.

A. Classification of Fire by Cause

Currently, a federal land agency's response to a wildland fire is primarily dictated by the cause of the fire: (1) whether the fire was intentionally ignited and (2) whether the igniter, the person who actually started the fire, had authority to ignite the fire.⁶⁹

A prescribed fire is a human-caused fire intentionally ignited, with authority, to achieve specific objectives identified in an approved prescribed fire plan.⁷⁰ In 2010, the National Wildfire Coordinating Group (NWCG) further defined prescribed fire as a "planned ignition," but that characterization did not change the definition.⁷¹ Prescribed fire is also synonymous with "prescribed burn."⁷² However, federal land agencies should terminate the use of other colloquial prescribed fire terms, specifically "controlled burn," "prescribed natural fire," and "natural prescribed fire."

The term "controlled burn" is misleading and inaccurate.⁷³ Although a prescribed fire is conducted pursuant to specific weather and fuel prescriptions, neither the fire nor the weather are controllable. For

67. *Miller v. United States*, 163 F.3d 591 (9th Cir. 1998) (holding the discretionary function exception barred recovery resulting from property damage caused by multiple lightning ignited wildfires); *Florida*, 2010 WL 3469353, at *5 (holding the discretionary function exception did not bar recovery resulting from property damage caused by an escaped prescribed fire).

68. See NWCG#030-2010, *supra* note 62, at 1.

69. *Id.* at 3 (recognizing wildland fire to be either (1) wildfire: unplanned ignitions; or (2) prescribed fire: planned ignitions).

70. GLOSSARY, *supra* note 36, at 139 (defining prescribed fire).

71. Memorandum from the NWCG Chair to NWCG Committee Chairs and Geographic Area Coordinating Group, NWCG#024-2010, Attachment A, at 5 (Apr. 30, 2010) [hereinafter NWCG#024-2010], available at <http://www.nwcg.gov/general/memos/nwcg-024-2010.html>; see, e.g., *Thune v. United States*, 872 F. Supp. 921 (D. Wyo. 1995).

72. NWCG#024-2010, *supra* note 71 (stating that "prescribed burn" is a synonym for prescribed fire).

73. *Contra id.* (stating that "controlled burn" is a synonym for prescribed fire).

example, wind shifts commonly cause prescribed fires to escape the prescribed area,⁷⁴ or a prescribed fire can burn something within the prescribed area that was specifically not intended to burn.⁷⁵ Thus, because humans cannot control the weather or where an ember travels, the federal land agencies should not use the term “controlled burn” to describe a prescribed fire. Instead, the federal land agencies should simply use the term prescribed fire.

Additionally, the use of the terms “prescribed natural fire” or “natural prescribed fire” should also be discouraged because the terms are misleading and inaccurate. During the 1980s, the federal land agencies used the terms “prescribed natural fire” or “natural prescribed fire” to describe a fire ignited by lightning that was not suppressed.⁷⁶ Some federal land agencies, like the USFS, still classify fires ignited by lightning and not suppressed as a “prescribed natural fire” or a “natural prescribed fire.”⁷⁷ Pursuant to the prescribed fire definition and as emphasized by the NWCG#030-2010, fires started by lightning are not human-caused and are not prescribed fires. If a term is used, it should be wildfire because only wildfire encompasses unplanned ignitions.⁷⁸ Thus, because a “prescribed natural fire” or a “natural prescribed fire” is not a prescribed fire, the terms inaccurately describe a prescribed fire, and their use should be curtailed.

Additionally, by using inaccurate, misleading, and inconsistent terms the federal land agencies may face an unnecessary burden to prove the federal land agencies’ action actually falls within the discretionary function exemption of the Federal Tort Claims Act.⁷⁹ As discussed in Part IV, *infra*, if the discretionary function exception applies, then the federal court must dismiss the tort claim because the court lacks subject matter jurisdiction. For example, if the federal land agencies abandoned the “prescribed natural fire” classification and referred to the fire as an

74. *E.g.*, *Thune*, 872 F. Supp. at 922 (describing that the weather changed and the prescribed fire escaped).

75. NAT’L PARK SERV., NPS 72 HOUR REPORT: HOLMES INVESTIGATION 2 (Oct. 5, 2004), available at http://www.nps.gov/fire/download/72HrRpt_GrantWestRxFire.pdf (describing that prescribed fire personnel put a fire line around the base of the snag to keep fire away from the tree, but a flying ember set fire to the top of the snag).

76. 1988 FIRE MANAGEMENT POLICY REVIEW, *supra* note 24, at 1, 8.

77. U.S. FOREST SERV., FSM 2324.22, MANAGEMENT OF FIRE: POLICY (Jan. 22, 2007), available at <http://www.fs.fed.us/im/directives/fsm/2300/2320.doc>; *Florida v. United States*, No. 4:09-CV-00386, 2010 WL 3469353, at *2 (N.D. Fla. Aug. 30, 2010).

78. NWCG#024-2010, *supra* note 71, Attachment A, at 7 (defining “wildfire” as an unplanned ignition caused by, for example, lightning).

79. *Florida*, 2010 WL 3469353, at *2 (discussing effects of naming classification and Federal Tort Claims Act); *Bowen v. United States*, No. Civ. 99-443-HA, 1999 WL 1074080, at *1 (D. Or. Nov. 8, 1999) (improperly classifying a lightning ignited fire as a “prescribed natural fire” that should have been classified as a wildfire or more specifically at the time, a wildland fire use).

unplanned fire or wildfire, the federal land agencies' subsequent actions are in response to a fire and not the cause of the fire.⁸⁰ Generally, a federal land agency's actions responding to a wildfire easily fall under the discretionary function exemption.⁸¹

In contrast to a prescribed fire, most fires are not intentionally ignited or are ignited without authority.⁸² Wildfires result primarily from criminal acts, from negligent acts, and from lightning.⁸³ Although criminal and negligent acts are beyond the scope of this article, further distinguishing lightning-caused fires from prescribed fires will provide some historical clarification. As discussed earlier, lightning-caused fires that were not suppressed were historically classified as either "prescribed natural fires" or "natural prescribed fires." After the significant criticism resulting from the 1988 Greater Yellowstone "prescribed natural fires," the federal land agencies reclassified those unplanned and unsuppressed fires as "Wildland Fire Use" (WFU).⁸⁴

A WFU was a lightning-caused ignition, unintentional and unplanned, that was allowed to burn within established areas to achieve specific resource management objectives pursuant to a fire management plan.⁸⁵ Fire management plans provide, an individual unit within a federal land agency, direction and policy guidance to manage the entire wildland fire program on that unit.⁸⁶ Fire management plans also provide

80. See, e.g., *McDougal v. U.S. Forest Serv.*, 195 F. Supp. 2d 1229 (D. Or. 2002) (improperly calling a lightning ignited fire a "prescribed natural fire" but properly holding the discretionary function exception barred action).

81. *Id.*

82. For example, in 2010 the ratio of unplanned fires (wildfires) to planned fires (prescribed fires) was more than four to one (4:1). NAT'L INTERAGENCY FIRE CTR., 2010 NATIONAL REPORT OF WILDLAND FIRES AND ACRES BURNED BY STATE 70 (Feb. 9, 2011), available at http://www.predictiveservices.nifc.gov/intelligence/2010_statsum/fires_acres.pdf (describing 71,971 wildfires and 16,882 prescribed fires).

83. NWCG#024-2010, *supra* note 71, Attachment A, at 7 (defining wildfire).

84. 1988 FIRE MANAGEMENT POLICY REVIEW, *supra* note 24, at 19 (stating that the NWCG was taking the lead in developing common prescribed fire terminology and agencies were to develop common terminology for "prescribed natural fire" programs); NWCG#024-2010, *supra* note 71, at 8 (describing Wildland Fire Use as an obsolete term).

85. NWCG#024-2010, *supra* note 71, at 8 (defining Wildland Fire Use).

86. For lands managed by the National Park Service, Director's Order #18 requires as follows:

Each park with burnable vegetation must have an approved Fire Management Plan that will address the need for adequate funding and staffing to support its fire management program. Parks having an approved Fire Management Plan and accompanying National Environmental Policy Act compliance may utilize wildland fire to achieve resource benefits in predetermined fire management units. Parks lacking an approved Fire Management Plan may not use resource benefits as a primary consideration influencing the selection of a suppression strategy, but they must consider the resource impacts of suppression alternatives in their decisions.

NAT'L PARK SERV., DIRECTOR'S ORDER #18: WILDLAND FIRE MANAGEMENT 3 (Jan. 16, 2008), available at http://www.nps.gov/fire/download/fir_wil_do18.pdf.

the authority from which hazardous fuel treatments or prescribed fire plans derive. Because a WFU fire was only allowed to burn pursuant to an approved fire management plan, and prescribed fires are only authorized pursuant to an approved prescribed fire plan, the WFU and prescribed fire distinction blurred.⁸⁷ Without knowing the cause of the fire, a prescribed fire ignited for ecosystem benefits resembles a WFU fire managed for ecosystem benefits: both fires are allowed to burn without significant human involvement and are suppressed only when the fire breached some predetermined criteria. In practice, however, the federal land agencies created strict policies that virtually prevented a wildland fire—wildfire, WFU, or otherwise—from being managed for multiple objectives.

B. Classification of Fire by Response Instead of by Cause

In 2010, the National Wildfire Coordinating Group (NWCG) determined that federal land agencies should abandon the traditional fire classification by cause and, instead, describe a fire by the federal land agencies' response.⁸⁸ The NWCG emphasized that classifying fires by cause unnecessarily pigeon-holed the federal land agencies' ability to manage a wildland fire because once a fire was classified as a wildfire, which mandated aggressive suppression strategies, the fire could not then be managed for multiple objectives.⁸⁹ In practice, the traditional policy meant a wildfire that was suppressed had to be completely suppressed; the fire could not also have a portion that was allowed to burn for ecosystem benefits. In contrast, the 2010 policy approach involves an individual fire assessment and allows land managers to adapt the federal land agency's response to the specific circumstances observed and forecasted for that individual fire. This new policy shift toward

For lands managed by the U.S. Forest Service, Forest Service Handbook 5109.19 requires "[e]ach National Forest with burnable vegetation must have an approved fire management plan (sec. 52.2) that has been prepared, reviewed, and approved annually in conformance with requirements set out in [U.S. Forest Service Manuals and Handbooks.]" U.S. FOREST SERV., FOREST SERVICE HANDBOOK—FIRE MANAGEMENT ANALYSIS AND PLANNING HANDBOOK 4 (Jan. 10, 2003), *available at* http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsh?5109.19 (the document is entitled "5109.19_50.doc" and the section is entitled "50.3 Policy").

87. *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, No. 3:02-CV-02708, 2003 WL 22283969, at *2 n.3 (N.D. Cal. Sept. 5, 2003) (improperly calling a naturally ignited fire as a prescribed fires).

88. NWCG#030-2010, *supra* note 62, at 4.

89. *Id.* at 5; WILDLAND FIRE LEADERSHIP COUNCIL, 2008 MODIFICATION TO THE INTERAGENCY STRATEGY FOR THE IMPLEMENTATION OF FEDERAL WILDLAND FIRE MANAGEMENT POLICY (May 2, 2008), *available at* http://www.nwcg.gov/branches/ppm/fpc/archives/fire_policy/index.htm.

individual fire assessments resulted from a policy experimentation approved by the Wildland Fire Leadership Council (WFLC) in 2008.⁹⁰

The Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Homeland Security created and authorized the WFLC. The WFLC is composed of presidential appointees and elected officials and is the intergovernmental committee that guides the implementation and coordination of federal wildland fire policy.⁹¹

The recent WFLC policy and NWCG terminology changes allow land managers the needed flexibility to suppress portions of a lightning-caused fire and to allow a fire to burn for ecosystem benefit in other areas.⁹² For example, if a lightning-caused fire starts near a community and then spreads into a designated wilderness area that has an approved fire management plan, instead of complete suppression as required prior to the WFLC 2008 policy, that fire can now be suppressed adjacent to the community and managed for ecosystem benefits within the wilderness.⁹³ This new approach appropriately balances the need to protect communities while allowing fires to burn in wilderness areas where the Wilderness Act specifically restricts human modification of natural processes.

The new multiple objective policy also strikes the appropriate balance for prescribed fire. Specifically, this policy changes how prescribed fires are managed, especially when a prescribed fire escapes a designated area. Prior to the WFLC 2008 policy, once a prescribed fire escaped, the entire prescribed fire was converted to a wildfire and aggressively suppressed.⁹⁴ Now, the WFLC 2008 policy still converts the escaped prescribed fire into a wildfire, but if portions of the fire are still achieving the intent of the prescribed fire and are not threatening other resources, those portions do not have to be suppressed. This change allows land managers to effectively suppress threatening portions of the fire to resolve any public fear, while not committing destructive suppression actions within the original prescribed fire area.

In conclusion, the federal land managers responsible for wildland fire programs should welcome the recent fire terminology and policy

90. WILDLAND FIRE LEADERSHIP COUNCIL, *supra* note 89.

91. Memorandum of Understanding Wildland Fire Leadership Council (Apr. 12, 2010), *available at* http://www.forestsandrangelands.gov/leadership/documents/mou_wflc_april2010.pdf.

92. 2012 REDBOOK, *supra* note 30, at 09-3 (PDF page 178) (describing that human-caused wildfires will be suppressed at the lowest cost with the fewest negative consequences with respect to firefighter and public safety).

93. Van Wagendonk, *supra* note 19 (describing that as a result of the policy changes wilderness will continue “to be the primary area where wildfires are allowed to burn” because of the remoteness and preference for ecological processes to proceed without human intervention).

94. WILDLAND FIRE LEADERSHIP COUNCIL, *supra* note 89.

changes. During a time when policies could have further limited a land manager's discretion, the recent Wildland Fire Leadership Council's policy change actually encourages discretion and strikes an appropriate balance between community protection and ecosystem health. Federal land managers now have the option to aggressively suppress a portion of a fire while appropriately allowing another portion of the fire to burn naturally.⁹⁵ This adaptive management approach will likely enable the federal land agencies to reestablish fire in fire dependent ecosystems and reduce government spending associated with costly fire suppression. To better communicate this new adaptive management policy change, the National Wildfire Coordinating Group revised the fire terminology to consistently and accurately describe a federal land agency's approach to fire management. The new terminology and classification policy will also minimize confusion during any subsequent legal challenge under the Federal Tort Claims Act.

IV. PRESCRIBED FIRE AND THE FEDERAL TORT CLAIMS ACT

It is a legal document . . . with all the information needed to implement the prescribed fire. Prescribed Fire projects must be implemented in compliance with the written plan.

—National Wildfire Coordinating Group (2008)⁹⁶

A. Overview

When a prescribed fire escapes, especially a prescribed fire conducted to reduce the threat of a wildfire near private property, property damage claims may result.⁹⁷ Those resulting tort claims, when brought against an agency of the federal government, face an unusual

95. *Contra* Karen M. Bradshaw, *A Modern Overview of Wildfire Law*, 21 FORDHAM ENVTL. L. REV. 445, 476 n.162 (2010) (discussing the same source as identified in *supra* note 62 and positing that NWCG#030-2010 was used to facilitate media attention and prolong fire durations).

96. 2008 PRESCRIBED FIRE GUIDE, *supra* note 16; 2012 REDBOOK, *supra* note 30 (describing the 2008 PRESCRIBED FIRE GUIDE is still binding through 2012).

97. *E.g.*, *Michigan v. United States*, No. 2:11-CV-00303, 2011 WL 7267049 (W.D. Mich. filed Aug. 12, 2011) (currently litigating a motion to dismiss based on the discretionary function exception because a U.S. Forest Service prescribed fire—broadcast burning—escaped and allegedly damaged state lands valued at \$85,000); *Wipf v. United States*, No. 5:09-CV-05033, 2010 WL 3333540 (D. S.D. settled Sept. 16, 2010) (plaintiff alleged \$346,056 in property damage resulting from an escaped prescribed fire—pile burning—that the U.S. Forest Service conducted); *Martini v. United States*, No. 0:04-CV-03518, 2005 WL 3024645 (D. Minn. dismissed by stipulation Jan. 9, 2006) (plaintiff alleged \$22,000 in property damage resulting from an escaped prescribed fire—broadcast burning—that the U.S. Forest Service conducted); *Richardson v. United States*, No. 1:03-CV-03177, 2004 WL 3333253 (D. S.C. settled Jan. 20, 2005) (plaintiff alleged prescribed fire plan was too liberal and also alleged \$138,000 in property damage resulting from an escaped prescribed fire—broadcast burning—that the U.S. Forest Service conducted).

procedural and substantive hurdle: the discretionary function exception to the Federal Tort Claims Act. The Federal Tort Claims Act waives the United States' sovereign immunity for negligence suits involving federal government employees.⁹⁸ However, that waiver is limited by the discretionary function exception. If the federal agency's conduct falls within the discretionary function exception, then the tort claim is dismissed because the federal court lacks subject matter jurisdiction.⁹⁹ Thus, the discretionary function exception shields the federal government from liability only in limited circumstances. While the Federal Tort Claims Act provides the traditional means to recover monetary damages, some parties harmed by an escaped prescribed fire have also recovered monetary damages through the political process.

Two escaped prescribed fires—the Lowden Ranch fire in California and the Cerro Grande fire in New Mexico—spurred hundreds of individual damage claims.¹⁰⁰ Surprisingly, nearly all of those claims, which cost the United States more than \$1 billion, settled out-of-court and without litigating the discretionary function exception.¹⁰¹

In 1999, the Bureau of Land Management planned and ignited a 100-acre prescribed fire, the Lowden Ranch prescribed fire, to reduce the spread of noxious weeds near Redding, California.¹⁰² Pursuant to Bureau of Land Management policy, a prescribed fire plan was drafted that included specific conditions, or prescriptions, which had to be satisfied before the prescribed fire was ignited.¹⁰³ With wind speeds exceeding the

98. 28 U.S.C. § 1346(b) (2011) (stating waiver of sovereign immunity for negligence suits); 28 U.S.C. § 2680(a) (2011) (stating what is called the discretionary function exception); *e.g.*, *United States v. Williams*, 514 U.S. 527, 531 (1995) (describing that an ambiguity resulting from a waiver of sovereign immunity is to be construed in favor of immunity); *Zumwalt v. United States*, 928 F.2d 951, 952 (10th Cir. 1991) (describing that the waiver of sovereign immunity is limited by the discretionary function exception).

99. *E.g.*, *Johnson v. United States*, 949 F.2d 332, 334 (10th Cir. 1991) (dismissing negligence suit for lack of subject matter jurisdiction because the National Park Service's actions in conducting a rescue fell within the discretionary function exception).

100. BUREAU OF LAND MGMT., *LOWDEN RANCH PRESCRIBED FIRE REVIEW* 6 (July 22, 1999) [hereinafter *LOWDEN REVIEW*], available at http://www.nationalfiretraining.net/userfiles/GreatBasin/Erin/lowden_escaped_rx_review.pdf; NAT'L PARK SERV., *CERRO GRANDE PRESCRIBED FIRE BOARD OF INQUIRY FINAL REPORT*, at ii (Feb. 26, 2001) [hereinafter *CERRO GRANDE INQUIRY*], available at <http://wildfirelessons.net/documents/Cerro%20Grande%20Final%20Report%202001.pdf>.

101. BARRY T. HILL, U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO/T-RCED-00-257, FIRE MANAGEMENT: LESSONS LEARNED FROM THE CERRO GRANDE (LOS ALAMOS) FIRE 2* (2000) [hereinafter *GAO CERRO GRANDE*], available at <http://www.gao.gov/assets/110/108587.pdf> (describing that the fire burned about 48,000 acres and damages were estimated at \$1 billion).

102. *LOWDEN REVIEW*, *supra* note 100, at 10 (describing a prescribed fire of 100-acres at Lowden Ranch ignited in an effort to eliminate star thistle and improve the ecosystem).

103. *Held v. Dept of the Interior*, SF-0752-00-0298-I-1, 2002 WL 31305205, at ¶3 (M.S.P.B. Sept. 30, 2002) (describing that the prescribed fire plan defined the maximum allowable wind speed and the number of required fire engines).

maximum prescription and without sufficient fire engines, the prescribed fire was ignited.¹⁰⁴ Consequently, within three hours of ignition the prescribed fire escaped and a wildfire was declared.¹⁰⁵ Eventually, the fire was suppressed, and the federal government alone spent nearly \$20 million to suppress it.¹⁰⁶ In addition, over 350 tort claims were filed pursuant to the Federal Tort Claims Act after the Lowden Ranch prescribed fire burned over 2,000 acres and damaged twenty-three homes.¹⁰⁷ Although the vast majority of the cases appear to have settled, a few cases proceeded through motion practice and likely settled without trial.¹⁰⁸ Interestingly, of the reported cases and briefs, the United States did not invoke the discretionary function exception to shield the Bureau of Land Management from liability.¹⁰⁹ Thus, for the victims of the Lowden Ranch prescribed fire, the United States settled smaller claims through the administrative process¹¹⁰ and larger claims pursuant to the Treasury's Judgment Fund process.¹¹¹

Rather than use the Federal Tort Claims Act, the victims of the Cerro Grande fire used a special victim compensation statute that Congress quickly enacted as an alternate process to settle damage claims. In particular, the National Park Service prepared and approved a prescribed fire plan to reduce hazard fuels in Bandelier National Monument, New Mexico.¹¹² On May 4, 2000, the National Park Service ignited the Cerro Grande prescribed fire to burn up to 900 acres, but the

104. *Id.*; LOWDEN REVIEW, *supra* note 100, at 27–29 (describing wind speeds exceeded maximum allowable and only one fire engine, of the required four, was onsite).

105. LOWDEN REVIEW, *supra* note 100, at 14–15 (describing the prescribed fire was ignited at 10:50 AM and a wildfire was declared by 1:00 PM).

106. *Held*, 2002 WL 31305205, at ¶2.

107. *Robinson v. United States*, 175 F. Supp. 2d 1215, 1218 (E.D. Cal. 2001) (describing more than 350 other claims and three other cases were pending).

108. *E.g., id.* at 1218 n.2 (describing that this decision will likely help resolve more than 100 similar cases); Brief of Defendant-Appellee at 3, *Trinity County v. United States*, No. 02-16654, 2002 WL 32625738 (9th Cir. 2002) (describing that the United States offered to settle during the administrative process).

109. *Robinson*, 175 F. Supp. 2d at 1215; Brief of Defendant-Appellee at 3, *Trinity County v. United States*, No. 02-16654, 2002 WL 32625738 (9th Cir. 2002).

110. 28 U.S.C. § 2672 (2011) (describing that the head of the appropriate federal agency may settle and pay up to \$2,500 for a tort claim during the administrative process); 28 U.S.C. § 2675(a) (2011) (describing that the claimant must initially submit the tort claim to the appropriate federal agency, which then has six months to settle or deny the claim, before the claim may be filed in court); 28 C.F.R. § 14.2(a) (2011) (describing that Standard Form 95 can initiate the administrative tort claim).

111. 31 U.S.C. § 1304 (2011) (describing the judgment fund's application for claims greater than the \$2,500 payable by the agency pursuant to 28 U.S.C. § 2672); *The Judgment Fund Background*, U.S. DEP'T OF TREASURY (Mar. 11, 2011), <http://fms.treas.gov/judgefund/background.html>.

112. CERRO GRANDE INQUIRY, *supra* note 100, at 6 (describing the prescribed fire plans for Upper Frijoles burn units, which later became known as the Cerro Grande prescribed fire).

prescribed fire escaped.¹¹³ By the time the resulting wildfire was contained on May 19, it had burned nearly 48,000 acres, caused damages amounting to \$1 billion, and damaged 235 structures including parts of the Los Alamos National Laboratory.¹¹⁴ The National Park Service openly admitted responsibility for the damages caused by the prescribed fire, and Congress responded by appropriating more than \$660 million to compensate injured victims.¹¹⁵ Because Congress passed the victim compensation statute on July 13, 2000—less than two months after the fire was contained—those injured parties never had to use the Federal Tort Claims Act to litigate tort liability.¹¹⁶ Thus, if a federal land agency openly admits responsibility for the damages and if Congress enacts a special victim compensation fund, then injured parties of a prescribed fire do not need the Federal Tort Claims Act.

Even though injured parties from the escaped Cerro Grande prescribed fire successfully recovered damages through non-judicial methods, future injured parties should not have to rely on the enactment of special legislation. Congress specifically enacted the Federal Tort Claims Act to accord injured parties a reliable recovery opportunity.

Congress enacted the Federal Tort Claims Act (FTCA) to provide injured parties a mechanism to remedy damages by waiving the federal government's sovereign immunity.¹¹⁷ However, Congress did not completely waive the United States' sovereign immunity with the passage of the FTCA. Indeed, the FTCA included a preliminary threshold requirement that divests a federal court of subject matter jurisdiction.¹¹⁸ That threshold bar is known as the discretionary function

113. GAO CERRO GRANDE, *supra* note 101, at 2–4 (describing the Cerro Grande prescribed fire started on May 4 and was substantially contained by May 19).

114. *Id.* at 2 (describing that the fire burned about 48,000 acres and damages were estimated at \$1 billion); CERRO GRANDE INQUIRY, *supra* note 100, at ii (destroying more than 235 structures and damaging other resources including the Los Alamos National Laboratory).

115. CERRO GRANDE INQUIRY, *supra* note 100, at ii (describing the National Park Service admission of responsibility); Cerro Grande Fire Assistance Act, Pub. L. 106-246, div. C, §§ 101–106, 114 Stat. 511, 582–590 (July 13, 2000) (appropriating more than \$660 million to remedy damages).

116. The federal courts adjudicated two cases related to the Cerro Grande prescribed fire, but they did not involve tort claims. One case involved a disputed settlement agreement derived from the victim compensation fund. *Evans-Carmichael v. United States*, 343 Fed. App'x 294 (10th Cir. 2009). The other case involved criminal charges resulting from fraudulent attempts to receive victim compensation funds. *United States v. Medley*, 476 F.3d 835, 836 (10th Cir. 2007).

117. *Berkovitz v. United States*, 486 U.S. 531, 535 (1988) (indicating the FTCA partially waived the federal government's sovereign immunity).

118. 28 U.S.C. § 2680(a) (2011) (discretionary function exception to the FTCA); *Dalehite v. United States*, 346 U.S. 15, 17–18 (1953) (stating that 28 U.S.C. § 2680 limits subject matter jurisdiction granted by 28 U.S.C. § 1346(b)).

exception, and federal land agencies have used it extensively in response to damage claims caused by wildfires and prescribed fires.¹¹⁹

The discretionary function exception is a powerful shield for the federal government. Regardless of the underlying negligence action, once a federal land agency successfully convinces a federal district court that the discretionary function exception applies, the case is dismissed without the court even considering the underlying negligence claim.¹²⁰ However, even if the plaintiff ousts the government from behind the discretionary function exception shield, the plaintiff must still prove the underlying negligence action to the court.¹²¹ Because the discretionary function exception has been used and construed so favorably for the federal government, the number of prescribed fire related tort claims that exposed the government from behind that shield was almost nonexistent until recently.

In *Florida v. United States*, decided in 2010, the district court appropriately concluded the discretionary function exception did not apply to a prescribed fire tort claim, and the rationale used in that decision will likely alter the way future courts construe the discretionary function exception as applied to prescribed fire.¹²² Specifically, when a federal land agency actually creates the fire hazard by intentionally igniting a prescribed fire pursuant to a non-discretionary prescribed fire plan and that prescribed fire consequently escapes and causes harm, courts should follow the rationale used in *Florida* and conclude the discretionary function exception does not apply.¹²³ That conclusion best comports with Congress' intent in enacting the FTCA, the recent line of prescribed fire cases, and the Supreme Court's precedent.

119. See, e.g., *Miller v. United States*, 163 F.3d 591, 597 (9th Cir. 1998) (holding the discretionary function exception applied to the USFS resulting from wildfire spreading from national forest to private ranch); *Backfire 2000 v. United States*, 273 Fed. App'x 661 (9th Cir. 2008) (holding the discretionary function exception applied to the USFS's decision to set backfires while combating a wildfire); *Thune v. United States*, 872 F. Supp. 921, 925 (D. Wyo. 1995) (holding the discretionary function exception barred personal property damages claim resulting from an escaped prescribed fire).

120. *Layton v. United States*, 984 F.2d 1496, 1502 (8th Cir. 1993) ("Whether these employees were negligent in making any of these decisions is irrelevant."); *Autery v. United States*, 992 F.2d 1523, 1528 (11th Cir. 1993) (stating that the discretionary function exception applies even when the acts constitute an abuse of discretion); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989) (concluding that negligence is simply irrelevant to the discretionary function exception inquiry).

121. 28 U.S.C. § 2402 (describing that there is no right to a jury trial under the Federal Tort Claims Act); *United States v. Neustadt*, 366 U.S. 696, 700 n.10 (1961) (describing no right to a jury trial).

122. *Florida v. United States*, No. 4:09-CV-00386, 2010 WL 3469353 (N.D. Fla. Aug. 30, 2010).

123. *Id.*

B. The Federal Tort Claims Act

In 1948,¹²⁴ Congress enacted the FTCA as a means of holding the federal government liable “in the same manner and to the same extent as a private individual under like circumstances.”¹²⁵ Yet, Congress retained sovereign immunity for certain discretionary government functions.¹²⁶ Additionally, the FTCA provides the federal courts with exclusive jurisdiction of all civil claims seeking monetary damages against the United States:

[To all civil actions 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.¹²⁷

However, if the alleged tort derived from a permissible exercise of policy judgment, then the discretionary function exception shields the government from liability, and the court is divested of subject matter jurisdiction.¹²⁸ Specifically, the discretionary function exception to the FTCA provides the following:

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

124. In 1948, Congress repealed the 1946 version of the Federal Tort Claims Act, and Congress also reenacted the Federal Tort Claims Act as it substantively appears today. *Compare* 28 U.S.C. § 1346 (2011) (enacted June 25, 1948, ch. 646, 62 Stat. 933), *and* 28 U.S.C. § 2671 (2011) (enacted June 25, 1948, ch. 646, 62 Stat. 982), *with* *United States v. Muniz*, 374 U.S. 150, 154 (1963) (describing that the Federal Tort Claims Act was part of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (Aug. 2, 1946) and was intended to “eliminate the burden on Congress of investigating and passing upon private bills seeking individual relief.”).

125. 28 U.S.C. § 2674 (2011).

126. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984).

127. 28 U.S.C. § 1346(b)(1) (2011).

128. *Berkovitz v. United States*, 486 U.S. 531, 537 (1988) (describing that the discretionary function exception insulates the government from liability from permissive discretionary acts); *Dalehite v. United States*, 346 U.S. 15, 17–18 (1953) (stating that 28 U.S.C. § 2680 limits subject matter jurisdiction granted by 28 U.S.C. § 1346(b)); *Green v. United States*, 630 F.3d 1245, 1249–50 (9th Cir. 2011) (stating that if the discretionary function exception is satisfied, then the federal district court lacks subject matter jurisdiction).

agency or an employee of the Government, whether or not the discretion involved be abused.¹²⁹

Thus, Congress enacted the Federal Tort Claims Act as a means of providing injured parties an opportunity to recover damages caused by the federal government. However, because the FTCA did not specifically define “a discretionary function,” the Supreme Court has had the opportunity to interpret the meaning of the discretionary function provision.

1. The *Berkovitz* Two-Pronged Test

In *Berkovitz v. United States*, the Supreme Court articulated a two-pronged test to determine whether the alleged tortious government action falls within the limited confines of the discretionary function exception.¹³⁰ In particular, the *Berkovitz* Court provided the following principles for lower courts to use when analyzing whether the discretionary function exception applies:

This 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 . . . it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.¹³¹

Although the plaintiff bears the burden of presenting sufficient evidence to establish an issue of material fact, the government bears the burden of proving both prongs of the discretionary function exception.¹³² Thus, if the court concludes that the government failed to satisfy either prong, the discretionary function exception does not apply.¹³³

First, a court determines whether the government employee’s conduct is a matter of judgment or choice.¹³⁴ The discretionary function exception does not apply where “a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow

129. 28 U.S.C. § 2680 (2011).

130. *Berkovitz*, 486 U.S. at 536–37.

131. *Id.* at 536.

132. *Miller v. United States*, 163 F.3d 591, 594 (9th Cir. 1998) (describing the plaintiff’s and the government’s burdens); *McDougal v. U.S. Forest Serv.*, 195 F. Supp. 2d 1229, 1232 (D. Or. 2002).

133. *Sabow v. United States*, 93 F.3d 1445, 1454 n.10 (9th Cir. 1996) (concluding that if the government fails to satisfy the second part of the two-part test, the court does not need to address whether the government satisfied the first part of the test).

134. *Berkovitz*, 486 U.S. at 536.

because the employee has no rightful option but to adhere to the directive.”¹³⁵

Second, if the conduct involved an element of judgment, then the court determines whether “that judgment is of the kind that the discretionary function exception was designed to shield.”¹³⁶ The Supreme Court has construed this prong as preserving the separation of federal powers; Congress created the discretionary function exception “to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, or political policy through the medium of an action in tort.”¹³⁷ In particular, the *Gaubert* Court provided the following example to show that not all discretionary acts fall within the discretionary function example:

There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.¹³⁸

Thus, once a mandatory directive prescribes a course of action, like obeying traffic laws in the *Gaubert* example, that directive terminates any further use of discretion the employee originally had because the employee has no rightful option but to adhere to the directive. Therefore, the discretionary function exception protects only governmental actions and decisions based on a permissible exercise of policy judgment.

2. Applying the Discretionary Function Exception to Prescribed Fire

The federal land agencies have used the discretionary function exception extensively in response to damages caused by wildfire, but

135. *United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Miller*, 163 F.3d at 593 (citing *Berkovitz*, 486 U.S. at 536). *But see* *Sabow v. United States*, 93 F.3d 1445, 1453 (9th Cir. 1996) (“[T]he presence of a few, isolated provisions cast in mandatory language does not transform an otherwise suggestive set of guidelines into binding agency regulations.”).

136. *Berkovitz*, 486 U.S. at 536–37.

137. *Id.*

138. *Gaubert*, 499 U.S. at 325 n.7; *Duke v. Dep't of Agric.*, 131 F.3d 1407, 1411 (10th Cir. 1997) (concluding the discretionary function exception did not apply to a U.S. Forest Service decision not to warn campers of danger from rolling boulders); *Caplan v. United States*, 877 F.2d 1314, 1316 (6th Cir. 1989) (stating that the discretionary function exception would not apply when a federal employee runs a red light with a motor vehicle and causes an accident).

courts have only adjudicated its use in response to escaped prescribed fires in two cases.¹³⁹ However, the government has asserted the discretionary function exception in response to prescribed fire claims at least five times, and the plaintiffs recovered through settlement in four of the five cases.¹⁴⁰

Although wildfires and prescribed fires may appear similar, a federal land agency's conduct is completely different between the two. On a prescribed fire, the federal land agency's actions actually create the hazard by intentionally igniting the fire. In contrast, on a wildfire, the federal land agency's actions, generally, focus on suppressing fire.

In response to a wildfire, the federal land agencies have significantly more discretion in deciding which strategy to use: whether to suppress the fire in its entirety, whether to allow the fire to burn for ecosystem benefits, or whether to choose a combination of suppression and natural burning. Additionally, given one of the above responses, a federal land agency has significant discretion in choosing tactics and where to apply those tactics. For example, a federal land agency could choose to use hand crews¹⁴¹ to construct minimal fire breaks, or it could choose to deploy heavy equipment into the area to construct expansive fire breaks.¹⁴² Thus, the federal land agency has discretion when responding to a wildfire, but it does not have such discretion when it

139. *Florida v. United States*, No. 4:09-CV-00386, 2010 WL 3469353, at *2 (N.D. Fla. Aug. 30, 2010) (holding the discretionary function exception did not apply and the parties later settled). *Contra Thune v. United States*, 872 F. Supp. 921 (D. Wyo. 1995) (holding the discretionary function exception shielded the United States).

140. *Compare Wipf v. United States*, No. 5:09-CV-05033, 2010 WL 3333540 (D. S.D. settled Sept. 16, 2010) (plaintiff alleged \$346,056 in property damage, the United States asserted the discretionary function exception, but the parties later settled), and *Florida*, 2010 WL 3469353, at *2 (plaintiff alleged \$2.8 million in property damage, the court held the discretionary function exception did not apply, and the parties later settled), and *Martini v. United States*, No. 0:04-CV-03518, 2005 WL 3024645 (D. Minn. dismissed by stipulation Jan. 9, 2006) (plaintiff alleged \$22,000 in property damage, the United States asserted the discretionary function exception, but the parties later settled), and *Richardson v. United States*, No. 1:03-CV-03177, 2004 WL 3333253 (D. S.C. settled Jan. 20, 2005) (plaintiff alleged \$138,000 in property damage, the United States asserted the discretionary function exception, and the parties later settled), with *Thune v. United States*, 872 F. Supp. 921 (D. Wyo. 1995) (dismissing the \$43,000 tort claim because the discretionary function exception shielded the United States). See *Michigan v. United States*, No. 2:11-CV-00303, 2011 WL 7267049 (W.D. Mich. filed Aug. 12, 2011) (currently litigating a motion to dismiss based on the discretionary function exception because a U.S. Forest Service prescribed fire escaped and allegedly damaged state lands valued at \$85,000).

141. Traditionally, a hand crew is a twenty-person fire crew outfitted with hand tools like shovels and chainsaws.

142. A fire break involves removal of enough burnable material to prevent a fire from spreading across that line. A fire break constructed by a hand crew, generally, involves removing an eight foot swath of vegetation, while a fire break constructed by heavy equipment, like a dozer, is at least as wide as the dozer's blade.

intentionally ignites a prescribed fire because of the mandatory prescribed fire plan.

A federal land agency's actions involving prescribed fire are on the opposite side of the discretionary continuum. Because prescribed fires are intentionally ignited, the appropriate inquiries should focus on (1) whether the federal land agency planned the prescribed fire pursuant to agency directives, and (2) whether the federal land agency implemented the prescribed fire in accord with those agency directives and the mandatory prescribed fire plan. However, courts have inconsistently applied the *Berkovitz* two-pronged test to prescribed fire claims.

3. Prescribed Fire Cases

In 1995, two prescribed fire tort liability cases were decided that reached opposite outcomes—one by the Ninth Circuit Court of Appeals holding the USFS liable, and the other by the U.S. District Court of Wyoming holding the discretionary function exception applied and that barred any further litigation.¹⁴³ Those two cases from 1995 provided confusing judicial guidance that lasted until 2010. In 2010, the U.S. District Court for the Northern District of Florida broke the fifteen year silence by holding the discretionary function exception *did not* bar recovery resulting from a prescribed fire tort claim.¹⁴⁴

a) Anderson: Liability Without a Discretionary Function Exception Analysis

In *Anderson v. United States*, the Ninth Circuit Court of Appeals concluded the USFS was liable, under the Federal Tort Claims Act, for “negligently setting and controlling” the escaped prescribed fire that resulted in private property damage.¹⁴⁵

In *Anderson*, the USFS and the California Department of Forestry planned a 500-acre prescribed fire to reduce the threat of subsequent wildfires by removing available fuel.¹⁴⁶ This specific prescribed fire project was primarily conducted by the USFS to burn highly flammable, chaparral, vegetation on the Cleveland National Forest in Southern California. In 1990, the USFS ignited the prescribed fire, but on the eighth day post-ignition, the prescribed fire, pushed by gusty winds,¹⁴⁷

143. *Anderson v. United States*, 55 F.3d 1379 (9th Cir. 1995); *Thune*, 872 F. Supp. at 921.

144. *Florida*, 2010 WL 3469353, at *4–5.

145. *Anderson*, 55 F.3d at 1382.

146. *Id.* at 1380.

147. Jim Carlton and Ted Johnson, *A Summer Siege*, L.A. TIMES, June 29, 1990, http://articles.latimes.com/print/1990-06-29/local/me-951_1_carbon-canyon-fire (“The fire jumped

escaped and caused at least \$4 million in damages to several homes and vehicles.¹⁴⁸ The appellate court concluded that because a private party would be liable under California law for “negligently setting and controlling the fire,” the USFS was liable.¹⁴⁹

Interestingly, the USFS did not assert the discretionary function exception,¹⁵⁰ and thus the *Anderson* court did not evaluate the *Berkovitz* two-pronged test.¹⁵¹ Therefore, *Anderson* stands for the proposition that, in a negligence analysis, a federal land agency can be liable for property damage resulting from an escaped prescribed fire, but *Anderson* has limited value in discretionary function exception analysis because the question was never raised.

b) Thune: The Discretionary Function Exception Barred the Claim

In a similar case, decided the same year as *Anderson*, a district court in another circuit reached a different conclusion. Unlike the appellate court in *Anderson*, the district court in *Thune v. United States* concluded the USFS’s conduct fell within the discretionary function exception.¹⁵²

In *Thune*, the USFS planned a 3000-acre prescribed fire to improve elk habitat in the Bridger-Teton National Forest in northwest Wyoming.¹⁵³ The plaintiff was a hunting guide, operating under a USFS license, who maintained a base camp within the national forest.¹⁵⁴ In 1991, the USFS ignited the prescribed fire pursuant to a prescribed fire plan.¹⁵⁵ During the following afternoon, the wind and weather changed and that caused the prescribed fire to escape.¹⁵⁶ The government ordered evacuations, and following those orders the plaintiff left the area but did

the control line Sunday afternoon, however, and by Wednesday had flared into a raging inferno under 105-degree temperatures and high winds, Olson said.”)

148. *Anderson*, 55 F.3d at 1380; JACQUES BOURRINET, WILDLAND FIRES AND THE LAW 150 (1992), available at <http://books.google.com> (search “Wildland fires and the law”; click on book hyperlink; then search “Bedford Fire”) (calling the escaped prescribed fire the Bedford Fire and causing more than \$4,000,000 in claims against the United States).

149. *Anderson*, 55 F.3d at 1382.

150. Generally, the Assistant United States Attorney requests approval from the appropriate Torts Branch staff prior to raising a discretionary function exception. UNITED STATES ATTORNEY MANUAL, TORTS BRANCH PROCEDURES—SUBSTANTIVE CONSIDERATIONS IN FTCA LITIGATION 4-5.220 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title4/5mci.v.htm#4-5.220.

151. *Miller v. United States*, 163 F.3d 591, 597 n.2 (9th Cir. 1998) (describing the lack of discretionary function analysis in *Anderson*).

152. *Thune v. United States*, 872 F. Supp. 921 (D. Wyo. 1995).

153. *Id.* at 922.

154. *Id.* at 922–23.

155. *Id.* at 922 (describing the prescribed fire was conducted pursuant to a prescribed fire plan, but the *Thune* decision does not indicate whether the prescribed fire plan was a mandatory directive—like current prescribed fire plans—or an optional guidance document).

156. *Id.* at 922–23.

not have the necessary six to nine hours to completely pack up his camp.¹⁵⁷ As a result, the escaped prescribed fire burned the plaintiff's camp causing approximately \$43,000 in personal property damage.¹⁵⁸ The plaintiff brought a tort claim alleging the USFS was negligent in (1) setting and controlling the fire, and (2) providing insufficient evacuation notice.¹⁵⁹

The district court, however, dismissed the tort claim because it concluded the USFS's conduct fell within the discretionary function exception.¹⁶⁰ The district court applied the *Berkovitz* two-pronged test and determined it lacked subject matter jurisdiction because (1) the USFS ignited the prescribed fire based on a number of fuel, weather, and policy factors that required the USFS to make discretionary judgments, and (2) those discretionary judgments were based on the public policy to improve elk habitat.¹⁶¹ Thus, the *Thune* court completed both prongs of the *Berkovitz* test and concluded the USFS's conduct was a permissive exercise of discretion.

The plaintiff also asserted a claim for inverse condemnation, but he later withdrew that claim believing the district court lacked subject matter jurisdiction on that issue.¹⁶² That second claim was then re-filed with the Federal Court of Claims, which later dismissed it for lack of subject matter jurisdiction because it sounded in tort.¹⁶³

Although *Thune* was decided by a district court, the decision stood for the proposition that a federal land agency could use the discretionary function exception as a liability shield resulting from a prescribed fire. After fifteen years, however, that proposition was severely weakened by another district court.

c) Florida: the Discretionary Function Exception Does Not Apply

In stark contrast to the district court in *Thune*, the district court in *Florida v. United States* determined that the USFS's conduct in planning and implementing the prescribed fire did not fall within the discretionary function exception.¹⁶⁴

In *Florida*, the USFS planned a 1500-acre prescribed fire to reduce the threat of wildfires by removing fuel on the Osceola National Forest

157. *Id.*

158. *Id.*

159. *Id.* at 924.

160. *Id.* at 925.

161. *Id.* at 924–25.

162. *Id.* at 923.

163. *Thune v. United States*, 41 Fed. Cl. 49, 54 (1998).

164. *Florida v. United States*, No. 4:09-CV-00386, 2010 WL 3469353, at *2 (N.D. Fla. Aug. 30, 2010).

in Florida.¹⁶⁵ In 2004, the USFS ignited the prescribed fire, and within a few hours USFS staff determined the fire was out of control and not in prescription.¹⁶⁶ Five days after ignition, the USFS declared the escaped prescribed fire a wildfire and began suppression actions.¹⁶⁷ The fire eventually burned more than 34,000 acres.¹⁶⁸ The USFS's internal investigation found (1) the planning and (2) the implementation of the initial prescribed fire did not comply with USFS policy directives and (3) strong wind gusts contributed to the escape.¹⁶⁹

The *Florida* court determined the USFS failed the first prong of the *Berkovitz* two-pronged test because the USFS's "admissions demonstrate a clear disobedience to mandates that are not discretionary. While [the USFS] may have had discretion as to the analysis conducted within the [Prescribed Fire] Plan, [the USFS] had no judgment or choice whether to complete a [Prescribed Fire] Plan and then follow it once approved."¹⁷⁰ Therefore, *Florida* stands for the proposition that the discretionary function exception does not apply to a tort claim resulting from planning or implementing a prescribed fire that later escapes.

4. Comparing *Anderson*, *Thune*, and *Florida*

A court attempting to distinguish the differences among these three cases may end up creating holographic distinctions. Factually, all three of these cases are identical: all three cases involved the USFS igniting large prescribed fires on USFS administered property; all three cases involved prescribed fires escaping the prescribed areas and damaging private property; and all three prescribed fires escaped as a result of changing weather factors, primarily strong gusty winds.

Although the fact patterns are identical, the courts reached different outcomes by framing the discretionary function exception or liability analysis at different moments. The *Thune* court framed the discretionary function exception analysis at the time the USFS decided to actually ignite the prescribed fire. The *Thune* court described that the USFS employee initiating the prescribed fire had to use judgment and had to

165. *Id.* at *4–5; U.S. FOREST SERV., OSCEOLA RANGER DISTRICT COMPARTMENTS 16 AND 117 ESCAPED FIRE REVIEW 1–2 (Mar. 19, 2004) [hereinafter OSCEOLA], available at http://training.nwcg.gov/pre-courses/rx301/Impassable_Bay_Compartments_16_and_117_Review_2004.pdf (describing that the escaped prescribed fire involved in *Florida* was initially called the Compartments 16 and 117 Prescribed Fire and later called the Impassable Bay Fire).

166. OSCEOLA, *supra* note 165, at 2.

167. *Id.*

168. *Id.* at 1.

169. *Id.* at 13–17.

170. *Florida*, 2010 WL 3469353, at *4.

make decisions based on weather, seasonal factors,¹⁷¹ but those judgments would now be subject to the mandatory prescribed fire plan. Unfortunately, the *Thune* court based its decision on analogy to a lightning-caused wildfire case.¹⁷² Because the *Thune* court framed the issue by improper analogy to discretionary government conduct in response to a wildfire, as opposed to a prescribed fire, the district court did not evaluate whether the USFS mandated the employee to plan and implement the *Thune* prescribed fire pursuant to the prescribed fire plan.

In contrast, current federal land agency policy now mandates that employees must plan and implement prescribed fire pursuant to non-discretionary requirements.¹⁷³ Therefore, the rationale used in *Thune* has limited utility because prescribed fire policies have changed significantly since 1991, and the current policy specifically delineates a course of action that a government employee must follow.

The *Florida* court appropriately framed the issue by not only considering the USFS employee's judgment at the time burning initiated, but it also analyzed the overall context. The court primarily evaluated (1) whether that specific prescribed fire plan *complied* with USFS policy directives; and (2) whether that specific prescribed fire was *implemented* pursuant to that prescribed fire plan and USFS policy directives. Without analyzing whether the USFS was negligent or judicially second guessing the USFS's purpose for the prescribed fire, the court appropriately concluded that the USFS did not have "judgment or choice whether to complete a [Prescribed Fire] Plan and then follow it once approved."¹⁷⁴ This contextual distinction is critical to assessing whether the government's conduct fell within the discretionary function exception.

When the USFS ignited the prescribed fire in *Florida*, the USFS had mandated planning and implementation directives for prescribed fire that the USFS employees failed to follow.¹⁷⁵ Because the USFS had conducted a thorough escaped-fire investigation and found that its employees had failed to follow mandated USFS policies, the USFS essentially provided the plaintiffs the necessary evidence to successfully defeat a discretionary function exception motion. Since the USFS ignited

171. *Thune v. United States*, 872 F. Supp. 921, 924 (D. Wyo. 1995) (concluding the USFS employee had to consider the temperature, the wind, the weather forecast, the season, and other considerations, including the broad policy behind the prescribed fire).

172. *Id.* at 925 (citing *Parsons v. United States*, 811 F. Supp. 1411 (E.D. Cal. 1992)) (describing a lightning ignited wildfire).

173. 2008 PRESCRIBED FIRE GUIDE, *supra* note 16, at 3 (describing the new requirements as a result of the 2003 Interagency Strategy for the Implementation of Federal Wildland Fire Management Policy, which was developed after the 2000 Cerro Grande prescribed fire escape).

174. *Florida*, 2010 WL 3469353, at *4.

175. *OSCEOLA*, *supra* note 165, at 4–6.

the *Florida* prescribed fire in 2004, all the federal land agencies have actually strengthened their non-discretionary prescribed fire mandates and agreed to abide by a mandatory set of prescribed fire planning and implementation requirements.¹⁷⁶

5. Prescribed Fire Plans

After the 2000 Cerro Grande prescribed fire escape, the federal land agencies addressed a number of policy level weaknesses.¹⁷⁷ Initially in 2006, and then again in 2008, the federal land agencies agreed that “[p]rescribed fire projects can only be implemented through an approved Prescribed Fire Plan.”¹⁷⁸ Specifically, the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Land Management, the Bureau of Indian Affairs, and the U.S. Forest Service agreed that the *2008 Prescribed Fire Guide* would provide “unified direction”¹⁷⁹ and set the requirements for “what is minimally acceptable for prescribed fire planning and implementation.”¹⁸⁰ Like other policy documents published by the National Wildfire Coordinating Group, the *2008 Prescribed Fire Guide* was drafted by representatives and subject matter experts from the federal land agencies and remains in effect until superseded.¹⁸¹ Additionally, although individual federal land agencies are free to impose more restrictive standards and policies directives, the agencies all agreed to the minimum mandates articulated in the *2008 Prescribed Fire Guide*.¹⁸²

In particular, the *2008 Prescribed Fire Guide* mandates how a federal land agency shall plan and implement a prescribed fire. First, the *2008 Prescribed Fire Guide* requires that a thorough planning and review process must be conducted to generate a site-specific

176. 2008 PRESCRIBED FIRE GUIDE, *supra* note 16, at 3.

177. CERRO GRANDE INQUIRY, *supra* note 100, at i (describing that the 2000 Cerro Grande fire exposed a number of policy weaknesses and that the federal land agencies “will provide remedies for these problems and strengthen the prescribed fire program at all levels”).

178. 2008 PRESCRIBED FIRE GUIDE, *supra* note 16, at 7. If any prescribed fire was conducted after September 2006 but before July 2008, the prior version would be binding. 2006 INTERAGENCY PRESCRIBED FIRE PLANNING AND IMPLEMENTATION PROCEDURES GUIDE 6 (Sept. 2006), available at <http://www.fws.gov/mountain-prairie/fire/PDFs/rxfireguide.pdf>.

179. 2008 PRESCRIBED FIRE GUIDE, *supra* note 16, at 4.

180. *Id.* at 7. The 2006 version also had the same or similar non-discretionary language. 2006 INTERAGENCY PRESCRIBED FIRE PLANNING AND IMPLEMENTATION PROCEDURES GUIDE 6 (Sept. 2006), available at <http://www.fws.gov/mountain-prairie/fire/PDFs/rxfireguide.pdf>.

181. 2012 REBOOK, *supra* note 30 (PDF page 286) (describing the 2008 PRESCRIBED FIRE GUIDE is still binding through 2012); Memorandum from the NWCG Chair to Interagency Wildland Fire Management Personnel, NWCG#015-2008, Interagency Prescribed Fire Planning and Implementation Procedures Guide (Aug. 6, 2008), available at http://www.nwcg.gov/branches/pm/fpc/archives/fire_policy/rx/rx-memo.pdf.

182. 2008 PRESCRIBED FIRE GUIDE, *supra* note 16, at 7.

implementation plan for each prescribed fire.¹⁸³ During the planning process, a federal land agency must draft the prescribed fire plan—the site specific implementation plan—using the twenty-one element prescribed fire plan template.¹⁸⁴ The required template includes the following elements and appendices:¹⁸⁵

1. Signature Page
2. Go/No-Go Checklists
3. Complexity Analysis
4. Description of the Prescribed Fire Area
5. Objectives
6. Funding
7. Prescription
8. Scheduling
9. Pre-burn Considerations and Weather
10. Briefing
11. Organization and Equipment
12. Communication
13. Public and Personnel Safety, Medical
14. Test Fire
15. Ignition Plan
16. Holding Plan
17. Contingency Plan
18. Wildfire Conversion
19. Smoke Management and Air Quality
20. Monitoring
21. Post-burn Activities
22. Appendices
 - A. Maps
 - B. Technical Review Checklist
 - C. Complexity Analysis
 - D. Job Hazard Analysis
 - E. Fire Behavior Modeling or Empirical Evidence

Thus, by requiring the drafter of a prescribed fire plan to methodically and thoroughly address each element in the template, the federal land agencies created a system to minimize prescribed fire escapes to avoid an event like the Cerro Grande prescribed fire disaster.

183. *Id.* at 11.

184. *Id.* at 19; e.g., NAT'L PARK SERV., REFERENCE MANUAL 18: WILDLAND FIRE MANAGEMENT, ch. 7, at 35–36 (2008), available at http://www.nps.gov/fire/download/fir_wil_rm18.pdf (PDF pages 147–48) (describing twenty-one element requirement of prescribed fire plans in chapter 7.3).

185. 2008 PRESCRIBED FIRE GUIDE, *supra* 16, at 19–27.

After the federal land agency drafts the prescribed fire plan, the plan must receive a technical review and approval before ignition occurs.¹⁸⁶ The technical reviewer must not have actually prepared the prescribed fire plan but should have sufficient knowledge of the proposed project to ensure the stated objectives can be safely and successfully achieved when properly implemented.¹⁸⁷ Once the prescribed fire plan passes the technical review process, it goes to the agency administrator for approval. After the agency administrator approves the plan, it becomes the site-specific implementation document: the “[p]rescribed fire projects must be implemented in compliance with the written plan.”¹⁸⁸ Importantly, the prescribed fire plan “is a legal document that provides the agency administrator the information needed to approve the plan and the Prescribed Fire Burn Boss with all the information needed to implement the prescribed fire.”¹⁸⁹ Because the *2008 Prescribed Fire Guide* specifically prescribes a course of action for planning and implementing a prescribed fire, a federal land agency employee has no rightful choice but to adhere to the prescribed fire plan.

Therefore, when a federal land agency implements a prescribed fire and that fire subsequently escapes causing property damage, the federal district court should (1) conclude the discretionary function exception does not apply and (2) allow the injured party to proceed to litigate liability.

6. FTCA Guidance from the Supreme Court

In addition to the current *2008 Prescribed Fire Guide*, the U.S. Supreme Court has also provided specific guidance to lower courts when evaluating a wildland fire tort claim under the Federal Tort Claims Act.¹⁹⁰ *Rayonier v. United States* represents the Supreme Court’s first, and currently only, detailed analysis applying the FTCA to federal wildland fire issues.¹⁹¹

186. *Id.* at 11.

187. *Id.* at 12.

188. *Id.*

189. *Id.* at 19.

190. *Rayonier v. United States*, 352 U.S. 315 (1957), *on remand*, *Arnhold v. United States*, 284 F.2d 326, 329–30 (9th Cir. 1960) (holding USFS liable under Washington law for negligently failing to control a fire started on federal land), *cert. denied*, 368 U.S. 876 (1961).

191. *Anderson v. United States*, 55 F.3d 1379, 1381 (9th Cir. 1995) (citing *Rayonier*, 352 U.S. at 319–21).

Rayonier involved damage claims resulting from wildfires ignited by sparks from a railroad locomotive near Forks, Washington.¹⁹² The plaintiffs claimed the USFS negligently suppressed the wildfires and negligently maintained the property, and that negligence caused harm to the plaintiffs.¹⁹³ While not explicitly described, the government did not appear to assert the discretionary function exception, likely because the USFS had entered into an agreement to suppress fires in the specific area where the fires occurred.¹⁹⁴ The district court dismissed the claims for failing to state a claim upon which relief could be granted, yet the district court cited a discretionary function exception case for authority.¹⁹⁵ The Supreme Court, however, vacated and remanded.¹⁹⁶ In doing so, the Court provided plaintiff friendly guidance to the lower courts when evaluating future wildland fire liability pursuant to the FTCA.¹⁹⁷

In *Rayonier*, the Court stated “[i]t may be that it is novel and unprecedented to hold the United States accountable for the negligence of its fire-fighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.”¹⁹⁸ The Supreme Court also stated that although the potential damage caused by fires can include burning entire communities and that may impose great burdens on the public treasury, Congress believed imposing such liability onto the United States was “in the best interest of the nation.”¹⁹⁹ The Supreme Court also expressed that it will not read “exemptions into the Act beyond those provided by Congress,” and “[i]f

192. *Rayonier*, 352 U.S. at 316–17; *The Great Forks Fire of 1951*, OLYMPIC PENINSULA CMTY. MUSEUM, <http://content.lib.washington.edu/cmpweb/exhibits/forksfire/index.html> (last visited Jan. 6, 2012) (describing one of the fires ignited due to a logging train traveling on the Port Angeles and Western Railroad); Karen M. Bradshaw, *Backfired! Distorted Incentives in Wildfire Suppression Techniques*, 31 UTAH ENVTL. L. REV. 155, 163 (2011) (mistakenly stating the fire in *Rayonier* was a prescribed fire when it was actually a wildfire—an unintentional ignition without authority).

193. *Rayonier*, 352 U.S. at 316–17.

194. *Arnhold v. United States*, 284 F.2d 326, 328 (9th Cir. 1960) (“[I]n this case the United States had entered into a cooperative agreement, under 16 U.S.C. § 572 and R.C.W. 76.04.400, whereby the United States had undertaken to protect all non-United States owned land in the region from fire and to take ‘immediate vigorous action’ to control all fires breaking out in the protected area.”); Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 ENVTL. L. 301, 352 (2006) (stating that the United States, curiously, did not assert the discretionary function defense in *Rayonier*).

195. *Rayonier*, 352 U.S. at 317 (stating that the lower courts cited to *Dalehite v. United States*, 346 U.S. 15, 43 (1953) (dismissing because the alleged government conduct fell within the discretionary function exception)).

196. *Rayonier*, 352 U.S. at 321.

197. *Id.* at 319–21.

198. *Id.* at 319.

199. *Id.* at 319–20.

the Act is to be altered that is a function for the same body that adopted it.”²⁰⁰ Thus, the Supreme Court has expressly provided direction to limit the application of the Federal Tort Claims Act waiver of sovereign immunity in the specific context of wildland fire.

The Supreme Court’s interpretation of the Federal Tort Claims Act should only be applied to prescribed fire claims and not to wildfire claims. Unlike the government’s conduct in response to a wildfire, which requires a variety of permissive discretionary choices,²⁰¹ the government does not have discretion planning or implementing a prescribed fire. During a wildfire response, the government needs discretion to quickly evaluate each emergency and determine how to respond. In contrast, the government is not entitled to that discretion with a prescribed fire because the *2008 Prescribed Fire Guide* requires the government to plan and implement the prescribed fire in accord with the site-specific prescribed fire plan.²⁰² Once the government completes a prescribed fire plan, the only “choice” it has involves whether to implement the prescribed fire, and that fettered decision is regulated by the prescribed fire plan. Thus, because the *2008 Prescribed Fire Guide* specifically mandates the planning and implementation of a prescribed fire, a federal land agency does not have discretion to ignore those mandates.

Therefore, consistent with *Florida*, the *Berkovitz* test, the *2008 Prescribed Fire Guide*, and the policies articulated by the Supreme Court in *Rayonier*, the discretionary function exception should not apply to prescribed fire tort claims. Specifically, under the first prong of the *Berkovitz* test, a court analyzes whether the federal land agency’s conduct in planning and implementing the prescribed fire was a matter of judgment or choice. Because the *2008 Prescribed Fire Guide* provides mandatory directives for planning and implementing a prescribed fire, a court should conclude the federal land agency employee’s conduct was not a matter of judgment or choice. Thus, the discretionary function exception does not apply to prescribed fire tort claims. This analysis comports with the recent *Florida* decision and with the limited waiver of sovereign immunity articulated in *Rayonier*. Therefore, when a prescribed fire damage claim is brought against the United States, a federal land agency should no longer use the discretionary function exception as a shield.

200. *Id.* at 320.

201. *See, e.g., Miller v. United States*, 163 F.3d 591, 596–97 (9th Cir. 1998) (distinguishing *Rayonier* and *Anderson* regarding the application of the discretionary function exception to wildland fire claims); Bradshaw, *supra* note 95, at 457 (concurring that in response to a wildfire “government agencies must make difficult decisions under exigent circumstances”).

202. *See, e.g., Miller*, 163 F.3d at 597 (holding the discretionary function exception barred recovery resulting from property damage caused by multiple lightning ignited wildfires).

V. CONCLUSION

Although the recent terminology changes may appear insignificant, the new terminology and resulting classification scheme will likely improve the public's understanding of both wildfires and prescribed fires. It will also simplify any subsequent litigation under the Federal Tort Claims Act. Because the new terminology clarifies the distinction between wildfires and prescribed fires, misleading and inaccurate terms such as "controlled burn," "prescribed natural fire," or "natural prescribed fire" have been shelved. Abandoning those terms will also enable a court to better understand the classification distinction between prescribed fires and wildfires. Additionally, the new terminology describing fires based on the federal land agency's response will also benefit the agency when it asserts the discretionary function exception in response to a wildfire.

Should a federal court consider a discretionary function exception issue involving a prescribed fire, the federal court should combine the contextual prescribed fire analysis into the *Berkovitz* two-pronged test as the *Florida* court did. Under the first prong, the court should analyze whether the employee's prescribed fire planning and implementation was a matter of judgment or choice. Because all federal prescribed fires are strictly regulated by the prescribed fire plan created pursuant to the *2008 Prescribed Fire Guide* and because all of the federal land agencies have adopted and agreed that the *2008 Prescribed Fire Guide* provides mandatory direction, the first prong of the *Berkovitz* test will always be answered in the negative: prescribed fire planning or implementation is not discretionary. Thus, a federal land agency employee does not have the choice whether to follow the *2008 Prescribed Fire Guide's* planning and implementation requirements for any prescribed fire, large or small. Even if a federal land agency asserts that it had discretion in formulating the prescribed fire plan, the *2008 Prescribed Fire Guide* also requires that the federal land agency employee implement the prescribed fire pursuant to the prescribed fire plan. Thus, the *2008 Prescribed Fire Guide* erodes any permissive discretion the federal land agencies had in planning and implementing a prescribed fire. Therefore, the discretionary function exception should not bar a claim for damages resulting from a prescribed fire.