

ARTICLES

THE LAW OF FIRE: RESHAPING PUBLIC LAND POLICY IN AN ERA OF ECOLOGY AND LITIGATION

BY

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“Probably the greatest single benefit derived by the community and the nation from forest reserves is insurance against the destruction of property, timber resources, and water supply by fire.” Gifford Pinchot (1905)

“Fire is neither good nor evil; it is part of the natural process of change . . . I challenge the American people to recognize how fire and smoke . . . can and must continue to play an essential, natural role in the life cycle of the wildlands we live in and love.” Bruce Babbitt (1997)

This article explores the relationship between law, fire, and resource management policy on the public lands. It offers an overview of federal fire policy, describing the evolution of that policy and how the current forest health debate has shaped policy options. It reviews and analyzes the legal framework governing fire policy on public lands, focusing on relevant organic legislation and site-specific statutes, the interface between environmental law and fire management including recent Healthy Forests Initiative reforms, the Healthy Forests Restoration Act of 2003, tort liability and other compensation doctrines, and the role of state law in shaping federal policy. It then places the fire policy debate in a broader public land policy context, arguing that the current legal framework is not fundamentally flawed though some reforms are necessary to better accommodate fire on the

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public domain. It concludes that clear legal standards and procedures are necessary to ensure legitimacy and promote accountability in the uncertain and risk-laden wildfire policy setting.

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I. INTRODUCTION

Wildfire plays a central role on western public lands. Whatever its origin, fire has preoccupied federal land management agencies from their earliest days, just as it has long traumatized rural communities, engendered contentious political and scientific debate, and placed an enormous recurrent drain on the federal treasury. Today is no different. A spate of record-setting fire seasons have seen millions of acres burned, hundreds of homes destroyed, numerous lives lost, and multi-million dollar fire suppression bills. Los Alamos was engulfed in flames during 2000, the states of New Mexico, Colorado, Oregon, and Arizona suffered their worst fire seasons ever in 2002, and southern California went through the same in 2003.¹ As a result, wildland fire policy has once again come under scrutiny. But the terms of the debate are different today, focusing on forest ecology, wildland urban interface problems, catastrophic fire threats, and legal gridlock concerns.

Federal fire policy has undergone a remarkable transformation over the past several decades, just as ecology has assumed a more prominent role in public land management policy.² Historically regarded as an evil and

¹ H.R. REP. NO. 108-96, pt. 1, at 2 (2003); ROCKY BARKER ET AL., A CHALLENGE STILL UNMET: A CRITICAL ASSESSMENT OF THE POLICY RESPONSE TO WILDLAND FIRE 2 (2004); U.S. GOV'T ACCOUNTABILITY OFFICE, WILDLAND FIRE MANAGEMENT: IMPORTANT PROGRESS HAS BEEN MADE, BUT CHALLENGES REMAIN TO COMPLETING A COHESIVE STRATEGY 3 (2005) [hereinafter GAO WILDLAND FIRE MANAGEMENT].

² See ROBERT B. KEITER, KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS 2-14 (2003) (introducing the shift to ecosystem thinking in public lands

destructive force, fire has gained new respectability as a vital ecosystem process. Even before the spectacular 1988 Yellowstone fires burned widely across the park landscape,³ agency officials were allowing lightning-ignited fires to burn unchecked in backcountry venues in an effort to reestablish a more normal fire regime after more than a half century of near total fire suppression.⁴ The Yellowstone firestorm introduced the American public to this important policy shift, which was eventually reconfirmed after the smoke and early recriminations faded. By the mid-1990s, following yet more harrowing fire events, the federal agencies formally acknowledged that fire was an important ecological process on the public lands and that prescribed fires would be allowed to burn, so long as they did not endanger human lives or property.⁵ The question, in this new age of ecology, was no longer merely how to suppress fire, but also how to accommodate, control, and use it.

Curiously, though fire management policies are in flux, the law has surprisingly little to say about wildfire. To be sure, Congress has long given the public land management agencies the basic legal authority to control fire on federal lands.⁶ Congress also adopted the Healthy Forests Restoration Act of 2003,⁷ while the Bush Administration, under the rubric of the Healthy Forests Initiative, has implemented controversial administrative reforms designed to expedite fire control efforts.⁸ But otherwise the law of fire on the public domain is an uncoordinated and fragmented welter of organic statutory provisions, environmental protection mandates, annual budget riders, site-specific legislation, judicial decisions, policy documents,

management); MICHAEL J. DOMBECK ET AL., FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY 163–186 (2003) (discussing the role of ecology in future land management); HANNA J. CORTNER & MARGARET A. MOOTE, THE POLITICS OF ECOSYSTEM MANAGEMENT 11–36 (1999) (describing the evolution of ecosystem management); ECOSYSTEM MANAGEMENT: APPLICATIONS FOR SUSTAINABLE FOREST AND WILDLIFE RESOURCES 1–12 (Mark S. Boyce & Alan Haney eds., 1997) (introducing collected works on ecology and fire management).

³ See ROCKY BARKER, SCORCHED EARTH: HOW THE FIRES OF YELLOWSTONE CHANGED AMERICA 220 (2005) (noting that “1.2 million acres had burned in Yellowstone and the surrounding national forests”); MICAH MORRISON, FIRE IN PARADISE: THE YELLOWSTONE FIRES AND THE POLITICS OF ENVIRONMENTALISM 207 (1993) (noting that 800,000 acres were affected inside the park); Norman Christensen et al., *Interpreting the Yellowstone Fires of 1988*, 39 BIOSCIENCE 678, 679 (1989) (noting that “approximately 45% of Yellowstone National Park burned”); Paul Schullery, *The Fires and Fire Policy*, 39 BIOSCIENCE 686, 691 (1989) (noting that 385,570 acres burned in Yellowstone National Park, and 562,310 acres burned in the area).

⁴ STEPHEN J. PYNE ET AL., INTRODUCTION TO WILDLAND FIRE 260–94 (2d ed., 1996).

⁵ U.S. DEP’T OF THE INTERIOR & U.S. DEP’T OF AGRIC., FEDERAL WILDLAND FIRE MANAGEMENT POLICY AND PROGRAM REVIEW: FINAL REPORT 4 (1995) [hereinafter 1995 FEDERAL FIRE POLICY REVIEW].

⁶ 16 U.S.C. § 551 (2000); 16 U.S.C. § 594 (2000); see *infra* notes 102–10, 117–21 and accompanying text.

⁷ Pub. L. No. 108-148, 117 Stat. 1887 (2004) (codified at 16 U.S.C.A. §§ 6501–6591); see *infra* notes 239–84 and accompanying text.

⁸ See U.S. DEP’T OF THE INTERIOR & U.S. DEP’T OF AGRIC., THE HEALTHY FORESTS INITIATIVE AND HEALTHY FORESTS RESTORATION ACT: INTERIM FIELD GUIDE 4–7 (2004) [hereinafter HEALTHY FORESTS INTERIM FIELD GUIDE] (noting that procedural and administrative hurdles have delayed fuel reduction projects); OFFICE OF THE PRESIDENT, HEALTHY FORESTS: AN INITIATIVE FOR WILDFIRE PREVENTION AND STRONGER COMMUNITIES 13–16 (2002) [hereinafter HEALTHY FORESTS INITIATIVE] (outlining perceived procedural delays); see also *infra* notes 201–32 and accompanying text.

management plans, and diverse state statutory prohibitions. Tempting as it is to characterize the sum of these laws as greater than the individual components, this would attribute far too much foresight to Congress or the agencies. The simple truth is that the law does not comprehensively address fire policy on the public lands,⁹ even though fire management may now claim more agency attention and resources than any other single matter. Yet, paradoxically, it is gospel that the current fire crisis is fueled by too much—not too little—law and litigation.¹⁰

This article explores the relationship between law, fire, and resource management policy on the public lands. It begins with an overview of federal fire policy, not only describing the evolution of fire management policy on the public lands but also examining how the current forest health debate has shaped policy options. The article then reviews the legal framework governing fire policy on public lands, focusing on relevant organic legislation and site-specific statutes, the interface between environmental law and fire management including recent administrative reforms, the Healthy Forests Restoration Act of 2003, tort liability and other compensation doctrines, and the role of state law in shaping federal policy. The article concludes by placing the fire policy debate in a broader public land policy context and by identifying potential legal reforms to better accommodate fire on the public domain.

II. UNDERSTANDING FEDERAL WILDFIRE POLICY

A. Fire Policy in Historical Perspective

Fire has shaped the western landscape, and so has its exclusion. Before European settlers arrived on the scene, fire was ubiquitous across the

⁹ A search of the legal literature, for instance, reveals few law journal articles directly addressing fire policy or law on the public lands. See generally Laura Sweedo, *Where There Is Fire, There Is Smoke: Prescribed Burning in Idaho's Forests*, 8 DICK. J. ENVTL. L. & POL'Y 121 (1999) (discussing air quality issues); Peter H. Froelicher, *Issues of Liability Surrounding Fire Management in the Greater Yellowstone Area*, 27 LAND & WATER L. REV. 123 (1992) (examining liability issues from the 1988 Yellowstone fires); Norman J. Wiener, *Uncle Sam and Forest Fires: His Rights and Responsibilities*, 15 ENVTL. L. 623 (1985) (examining federal legal responsibilities for fire on public and private land); see also PYNE ET AL., *supra* note 4, at 329–39 (discussing legal considerations of fire). But recent fire-related legal reforms have generated additional commentary: Reda M. Dennis-Parks, *Healthy Forests Restoration Act—Will It Really Protect Homes and Communities?*, 31 ECOLOGY L.Q. 639 (2004) (arguing that the Act will do more harm than good); Marc Fink, *Logging After Wildfire: Salvaging Economic Value or Mugging a Burn Victim?*, 19 J. ENVTL. L. & LITIG. 193 (2004) (identifying post-fire timber sale litigation issues); Jesse B. Davis, *The Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management*, 34 ENVTL. L. 1209 (2003) (concluding that the Initiative is “unwise and unwarranted” and is designed to increase timber harvests).

¹⁰ See U.S. DEP'T OF AGRIC., FOREST SERV., THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT 5 (2002) [hereinafter PROCESS PREDICAMENT] (asserting that statutory, regulatory, and administrative problems prevent Forest Service from effectively addressing decline in forest health); HEALTHY FORESTS INITIATIVE, *supra* note 8, at 15 (asserting that appeals and court injunctions delay needed fire management).

region. Lightning-ignited fires followed seasonal and climatic patterns, burning intensely during the dry summer months and periods of extended drought. The region's native inhabitants employed fire as a tool for agricultural, hunting, and military purposes.¹¹ Well-acquainted with the use of fire, the early settlers set fires to clear land for agriculture, promote soil productivity, and create buffers against rampaging wildfires. As settlements proliferated and towns grew in size, runaway fires posed a constant threat, exacerbated by the coming of the railroads, which spewed burning embers from coal-fired locomotives and sparks from the metal tracks.¹² Though communities regularly banded together to fight fires, they often lacked the resources necessary to control these blazes.

Once Congress decided to begin reserving the region's forest lands,¹³ the federal government soon found it had a fire problem. Local inhabitants turned to federal forest officers for protection against wildfires, fearing that the new forest reserves, along with the nascent national park system, posed an unacceptable fire risk. Charged with conserving timber resources and watersheds,¹⁴ the new Forest Service viewed wildfire as a significant threat to its mission. Charred forests meant no timber, while burned-over hillsides triggered landslides and other erosion problems that threatened precious water supplies. The agency's initial internal charter—the so-called Use Book—summarized the fire problem:

Probably the greatest single benefit derived by the community and the nation from forest reserves is insurance against the destruction of property, timber resources, and water supply by fire. . . . The burden of adequate protection can not well be borne by the State or by its citizens . . . for it requires great outlay of money to support a trained and equipped force, as well as to provide a fund to meet emergencies. Only the Government can do it, and, since the law does not provide effective protection for the public domain, only in the forest reserves can the Government give the help so urgently needed.¹⁵

¹¹ Indeed, the legendary explorer John Wesley Powell reported that “[Native American set] fires destroyed larger or smaller districts of timber annually . . . and this destruction is on a scale so vast that the amount taken from the lands for industrial purposes sinks by comparison into insignificance.” JOHN WESLEY POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES, H.R. EXEC. DOC. No. 73 (1878), *reprinted in* JOHN WESLEY POWELL, LANDS OF THE ARID REGION OF THE UNITED STATES 15–17 (Harvard Common Press 1983) (1878).

¹² STEPHEN J. PYNE, YEAR OF THE FIRES: THE STORY OF THE GREAT FIRES OF 1910, at 43–45 (2001).

¹³ See General Revision Act of 1891, 26 Stat. 1095, 1103, *repealed by* 90 Stat. 2792 (1976) (authorizing withdrawal of forest lands); SAMUEL T. DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES 55–61 (2d ed. 1980) (discussing the General Revision Act); CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 122 (1992) (describing the history of the General Revision Act and the first forest reserves).

¹⁴ Act of June 4, 1897, ch. 2, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–482, 551 (2000)); see DANA & FAIRFAX, *supra* note 13, at 61–67 (discussing the Organic Administration Act); *United States v. New Mexico*, 438 U.S. 696, 707 (1978) (stating that “Congress intended national forests to be reserved for only two purposes . . . [to] conserve the water flows, and to furnish a continuous supply of timber for the people”).

¹⁵ U.S. DEPT. OF AGRIC., FOREST SERV., THE USE OF THE NATIONAL FOREST RESERVES:

Forest rangers had “no duty more important than protecting the reserves from forest fires,”¹⁶ and they were enjoined that “after every electric storm a special effort is needed to locate and extinguish any such fires before they are well under way.”¹⁷ Congress agreed and promptly established a unique open funding process that essentially gave the agency a blank check for its firefighting efforts.¹⁸

Nonetheless, fire was not uniformly condemned. Settlers continued to use fire as a land management tool, and light burning advocates cautioned that fire was an essential element in shaping the region’s forests.¹⁹ Even the Use Book acknowledged that settlers would continue utilizing fire, instructing forest officers to use “the utmost tact and vigilance” in making “it well understood that [forest] reserve interests will be protected by every legal means.”²⁰ Any notion that fires may be beneficial either for human purposes or for the environment, however, vanished in the smoke of the 1910 fire season when hundreds of lightning-ignited fires erupted into giant conflagrations across northern Idaho and northwestern Montana, leaving over 3 million acres charred, 85 people dead, and several towns in ashes.²¹

Traumatized by its inability to control these blazes, the new Forest Service embraced a blanket fire suppression policy. Although light burning proponents in California and elsewhere continued to argue that fire could serve beneficial purposes (both in maintaining resilient forest ecosystems and safeguarding against catastrophic fires), the Forest Service adopted a fire exclusion policy that treated every fire, regardless of its source or location, as a threat and subject to extinguishment. Legislation like the Weeks Act of 1911²² and the Clarke-McNary Act of 1924²³ promoted cooperative federal-state firefighting agreements and provided federal funding to finance these arrangements.²⁴ Any effort to reinstitute light burning was resisted actively, as were calls for scientific studies to examine

REGULATIONS AND INSTRUCTIONS 63 (1905) [hereinafter THE USE BOOK].

¹⁶ *Id.* at 65.

¹⁷ *Id.* at 68.

¹⁸ STEPHEN J. PYNE, FIRE IN AMERICA: A CULTURAL HISTORY OF WILDLAND AND RURAL FIRE 263–64 (1982).

¹⁹ On the use of “light burning” among settlers to control forest growth and fire risks, see *id.* at 100–22 (providing “a history of the light burn controversy”); DAVID CARLE, BURNING QUESTIONS: AMERICA’S FIGHT WITH NATURE’S FIRES 11–55 (2002) (detailing the “professional” versus “Indian Forestry” debate); ASHLEY SCHIFF, FIRE AND WATER: SCIENTIFIC HERESY IN THE FOREST SERVICE 51–115 (1962) (discussing official resistance to research into the benefits of controlled burning).

²⁰ THE USE BOOK, *supra* note 15, at 66. In fact, the Use Book outlined potential legal remedies, including criminal prosecution, injunctions, and damage claims, that forest officers might invoke to protect against careless human-caused fires. *Id.* at 67.

²¹ For a dramatic account of the fires, see PYNE, YEAR OF THE FIRES, *supra* note 12; see also PYNE, FIRE IN AMERICA, *supra* note 18 at 242–59 (providing “A Fire History of the Northern Rockies”).

²² Pub. L. No. 61-435, ch. 186, 36 Stat. 961 (codified as amended at 16 U.S.C. § 515 (2004)); see *infra* notes 111–13 and accompanying text.

²³ Pub. L. No. 68-270, ch. 348, 43 Stat. 653 (repealed 1978); see *infra* notes 114–16 and accompanying text.

²⁴ HAROLD K. STEEN, THE U.S. FOREST SERVICE: A HISTORY 129–30 (1976); see also *supra* notes 14–16 and accompanying text.

whether fire might play a beneficial role in forest health. In fact, the Forest Service suppressed several research studies that seemed to endorse the use of prescribed fire in the southern pine woods.²⁵

But for several decades, the suppression policy existed more in name than reality. With backcountry venues relatively inaccessible, the Forest Service necessarily confined its firefighting efforts to readily accessible front country areas where valuable timber was visibly at risk and where adjacent landowners sought federal protection. Besides, lacking its own firefighting force, the Forest Service had to rely on local volunteers to curb fires. Forest fires meanwhile continued to burn unabated in remote wilderness locations across the West.

By the mid 1930s, however, that began to change as the federal agencies expanded their fire control efforts. The New Deal brought the Civilian Conservation Corps (CCC) to the forest and provided the Forest Service with a labor force that could be employed to battle forest fires. The CCC road building projects also began to open the backcountry, rendering it more accessible for firefighting purposes. With these developments, the Forest Service announced its legendary “10 a.m. policy,” designed to ensure all fires were controlled by mid-morning the day after they were first reported.²⁶

After World War II, the Forest Service further expanded its fire control efforts, intent on protecting a newly mobile populace that was moving from the cities to suburbs where greater wildfire danger lurked. It initiated the highly effective Smokey Bear national fire prevention campaign and began purchasing surplus military airplanes and other hardware to mechanize its firefighting capabilities.²⁷ The upshot was a notable reduction in the annual acreage burned: From 1946 to 1978, wildfires burned less than one million acres annually, whereas they often exceeded two million acres during earlier years.²⁸ Of course, this development could also be attributed to the modest fuel build-up in the forests where most fires had previously been allowed to burn, which thus reduced the available fuel levels.²⁹

Just as the federal government seemed on the verge of conquering fire, scientists began to raise their voices to question the wisdom of the all-out suppression policy. While isolated dissenters had over the years persistently argued that fire was an essential ecological process,³⁰ a scientific consensus began to emerge by mid-century that fire played an important and irreplaceable role in shaping the landscape and in reducing wildfire intensity. It also was becoming evident that the high costs associated with

²⁵ SCHIFF, *supra* note 19, at 51–115.

²⁶ PYNE, *FIRE IN AMERICA*, *supra* note 18, at 272–77.

²⁷ On the Forest Service’s post World War II fire suppression effort, see PYNE, *FIRE IN AMERICA*, *supra* note 18, at 287–90, and STEPHEN J. PYNE, *AMERICA’S FIRES: MANAGEMENT ON WILDLANDS AND FORESTS* 22–23 (1997).

²⁸ STEPHEN F. ARNO & STEVEN ALLISON-BUNNELL, *FLAMES IN OUR FOREST: DISASTER OR RENEWAL?* 20–21 (2002).

²⁹ *Id.* at 20.

³⁰ See CARLE, *BURNING QUESTIONS*, *supra* note 19, at 11–77 (detailing the history of the “professional” versus “Indian Forestry” debate and providing examples of early proponents of controlled burning); SCHIFF, *supra* note 19, at 15–115 (discussing official resistance to research into the benefits of controlled burning).

the total suppression policy were hard to justify, particularly for those fires that burned in remote wilderness venues and posed no threat to human life or property. Moreover, the wilderness movement had gained a foothold with passage of the Wilderness Act of 1964,³¹ and public attitudes about wild nature were shifting toward minimizing human intrusions in undeveloped public lands, whether for firefighting or other purposes. A prolonged 1970 fire season, which saw fires blazing across northern California and central Washington late into the fall, confirmed the need to modify the total suppression policy.

B. Charting a New Course

By the mid-1960s, the federal agencies had begun re-examining their fire policies. The National Park Service, in response to the seminal 1963 Leopold Report,³² adopted new resource management policies that allowed natural fires to burn when they promoted wildlife or vegetation management objectives.³³ Shortly thereafter, the Park Service permitted lightning-caused fires to continue burning in the backcountry of several western parks.³⁴ Once the Forest Service assumed new congressionally decreed wilderness management responsibilities, it too began reevaluating the ecological, economic, and institutional costs associated with its total suppression policy. Soon, the Forest Service also announced that “prescribed fires” would be allowed to burn in wilderness backcountry areas (within certain carefully defined or “prescribed” parameters), and it dropped its 10 a.m. policy, stating that it would concentrate on managing rather than controlling wildfires.³⁵ Both agencies also authorized the use of human-ignited fires (within prescription) for resource management purposes, generally to mimic natural fires in an effort to restore a more natural ecological order on the altered landscape. In addition, cognizant that wildfires defied administrative boundaries, the federal public land agencies established the Boise Interagency Fire Center to coordinate the federal response to wayward blazes.³⁶

³¹ 16 U.S.C. §§ 1131–1136 (2000); see Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 288 (1966) (describing the conditions of economic surplus and wilderness scarcity that converged to lead to the passage of the Wilderness Act); Symposium, *Wilderness Act of 1964: Reflections, Applications, and Predictions*, 76 DENV. U. L. REV. 331–679 (1999) (reflecting on the pathbreaking 1964 Wilderness Act and the values it seeks to protect).

³² A. Starker Leopold et al., *Wildlife Management in the National Parks*, in TRANSACTIONS OF THE TWENTY-EIGHTH NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE 29 (1963), reprinted in AMERICA’S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 237 (Larry M. Dilsaver ed., 1994).

³³ NATIONAL PARK SERVICE, ADMINISTRATIVE POLICIES FOR NATURAL AREAS (1968), reprinted in DILSAVER, *supra* note 32, at 354–55; Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DENV. U. L. REV. 649, 656–57, 664–65 (1997).

³⁴ ALFRED RUNTE, AMERICA’S NATIONAL PARKS: A HISTORY 201–08 (2d ed. 1987); PYNE, FIRE IN AMERICA, *supra* note 18, at 295–305.

³⁵ PYNE, FIRE IN AMERICA, *supra* note 18, at 303–04.

³⁶ PYNE, FIRE IN AMERICA, *supra* note 18, at 311–14; see also National Interagency Fire

For more than a decade, the agencies quietly pursued their nascent fire management policy without incident, allowing non-threatening natural fires to burn. Then, in the summer of 1988, the Yellowstone fires ignited amid drought conditions and rampaged across more than 1.5 million acres of national park and national forest lands, sparking national headline coverage as well as myriad investigations and recriminations.³⁷ Once the flames were extinguished, following an early fall snow storm, both the Park Service and Forest Service suspended their prescribed fire policies pending further review. Although scientists agreed that the fires largely mimicked the region's historic fire regime and served to regenerate an ecologically resilient landscape,³⁸ local politicians viewed the fires as a disaster that had devastated the park's verdant forests, endangered local communities, and ruined the summer tourist season. Moreover, the Yellowstone fires highlighted another growing problem: even in this wilderness-like setting, communities and homes now abutted once wild public lands, placing the ecological benefits of fire in conflict with private landowners.

In the aftermath, the federal agencies reaffirmed the prescribed fire policy but severely criticized implementation of the policy.³⁹ The Interagency Fire Management Policy Review team recommended tightening the prescriptions governing natural fires, utilizing human-ignited fires to reduce hazardous fuels, and promoting public involvement in the planning process.⁴⁰ In the meantime, the agencies ordered land managers to control all fires regardless of origin or location. The fire planning process moved slowly, however, while the corresponding fuel build-up threatened yet more catastrophic fires. And that is what happened during the calamitous 1994 fire

Center, <http://www.nifc.gov> (last visited Apr. 23, 2006) (describing the National Interagency Fire Center and its activities).

³⁷ See MORRISON, *supra* note 3, at 207–10 (discussing the devastation of the 1988 Yellowstone fires and the attention it brought to fire management); Pamela Lichtman, *The Politics of Wildfire: Lessons from Yellowstone*, J. OF FORESTRY, May 1, 1998, at 4, 4–9 (arguing that citizens' and politicians' view of wildfire as a crisis can undermine the stability of natural resource agencies).

³⁸ See AFTER THE FIRES: THE ECOLOGY OF CHANGE IN YELLOWSTONE NATIONAL PARK 4–5 (Linda L. Wallace ed., 2004) (attributing the fires to a relatively infrequent combination of drought, high winds, high temperatures, and numerous lightning strikes); MARY ANN FRANKE, YELLOWSTONE IN THE AFTERGLOW: LESSONS FROM THE FIRES 21 (2000) (describing studies that largely attribute the fires to hundreds of years of natural fuel accumulation); G. Wayne Minshall & James T. Brock, *Observed and Anticipated Effects of Forest Fire on Yellowstone Stream Ecosystems*, in THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE 123, 132 (Robert B. Keiter & Mark S. Boyce eds., 1991) (concluding that “the recent fires appear to provide a mechanism for rejuvenating productivity, maintaining or enhancing high systemwide diversity, and . . . tempering the impact of physical disturbance in lotic ecosystems”).

³⁹ “The objectives of prescribed natural fire programs in national parks and wildernesses are sound, but the policies need to be refined, strengthened, and reaffirmed.” U. S. Dep’t of Agric. & U. S. Dep’t of the Interior, Fire Policy Management Review Team, Final Report on Fire Management Policy, 54 Fed. Reg. 25,660, 25,660 (June 16, 1989). Specifically, the report noted that 1) many agency fire management plans did not meet current policies, 2) planned burning could reduce hazardous fuel build-ups, 3) social and economic concerns must be balanced against the ecological benefits of fire; and 4) the public should be more involved in developing fire management plans.

⁴⁰ 54 Fed. Reg. at 25,660.

season that ravaged nearly five million acres in the drought-ridden West, claiming thirty-four lives (including fourteen firefighters in Colorado's South Canyon fire), costing the federal treasury \$965 million in suppression funds, and reconfirming the urban-wildland interface problem.⁴¹ According to one respected scholar: "Almost every observer agreed that fire management had become badly unbalanced, that wildfire was a greater threat than ever, that the failure of America's fire strategy threatened the productivity and ecological health of the protected public lands."⁴²

Once again, the agencies were forced to reexamine their fire policies, and once again they endorsed fire on the public lands while also calling for greater uniformity and cooperation among themselves. The 1995 Federal Wildland Fire Management Report acknowledged that wildfire is "a critical natural process [that] must be reintroduced into the ecosystem" through resource planning processes using the best available science.⁴³ The report promoted interagency coordination as well as cooperation with state, local, and tribal jurisdictions, particularly in at-risk wildland-urban interface zones where non-federal governmental entities are primarily responsible for firefighting and prevention.⁴⁴ The report also called for more public involvement in establishing fire management plans along with expanded public education efforts.⁴⁵ For the federal agencies, safeguarding human life was the first priority in wildland fire management, while the report listed protecting property along with natural and cultural resources as secondary priorities.⁴⁶ In sum, the agencies officially committed themselves to a prescribed fire policy based upon the ecological role of fire yet tempered by the need to coordinate with state and local officials to address growing urbanization and other local concerns.

Since then, federal fire management policies have come under even more intense pressure in the wake of several explosive fire seasons. In 2000, a Park Service-initiated controlled burn at Bandelier National Monument in New Mexico roared out of control, scorching 40,000 acres while destroying 240 Los Alamos homes and nearly incinerating the Los Alamos National Laboratory.⁴⁷ More than eight million acres burned during the hot, dry summer season, including the expansive Valley fire complex in western

⁴¹ On the deadly South Canyon fire, see FINAL REPORT OF THE INTERAGENCY MANAGEMENT REVIEW TEAM: SOUTH CANYON FIRE (1995), available at <http://www.fs.fed.us/land/scanyon2.htm>; JOHN A. MACLEAN, FIRE ON THE MOUNTAIN: THE TRUE STORY OF THE SOUTH CANYON FIRE 210 (1999).

⁴² PYNE, AMERICA'S FIRES, *supra* note 27, at 10.

⁴³ 1995 FEDERAL FIRE POLICY REVIEW, *supra* note 5, at iii, 7-16.

⁴⁴ *Id.* at iii, 21-27.

⁴⁵ *Id.* at iv, 21-27.

⁴⁶ *Id.* at iii, 17-20.

⁴⁷ See generally U.S. GEN. ACCOUNTING OFFICE, LESSONS LEARNED FROM THE CERRO GRANDE (LOS ALAMOS) FIRE (2000) [hereinafter GAO CERRO GRANDE FIRE] (recounting the prescribed burn policy and administrative weaknesses revealed during the Cerro Grande fire and making recommendations for systemic changes); NATIONAL PARK SERV., CERRO GRANDE PRESCRIBED FIRE INVESTIGATION REPORT (2000), available at <http://www.nps.gov/cerrogrande/rc00273t.pdf> (discussing the lessons learned from the Cerro Grande Fire, including how future burns should be planned and implemented); see also CARLE, *supra* note 19, at 225-45 (discussing the Cerro Grande Fire and its aftermath).

Montana that blackened 292,000 acres, torched 240 structures, and burned for over two months.⁴⁸ Two years later, summer wildfires scorched another seven million acres, claiming the lives of 23 firefighters and 800 structures. When it was over, the 2002 fire season proved to be the worst in modern history for Colorado, New Mexico, Arizona, and Oregon, costing over \$2 billion in federal suppression funds.⁴⁹ In 2003, it was southern California's turn to experience its worst ever fire season; more than 750,000 acres burned, costing 3600 homes, 24 lives, and \$250 million in suppression expenses.⁵⁰ Such devastation not only summoned the federal agencies to further action, but also spurred Congress to enter the fire policy fray. The devastation also highlighted another mounting concern: that the nation's forests were unhealthy owing to longstanding fire suppression policies, which in turn demanded action to remedy the problem.⁵¹

In rapid succession, the federal agencies produced a series of reports and plans, all designed to further improve fire management planning and coordination. A 2001 review of the 1995 Fire Management Policy reaffirmed its fundamental principles (including the role of fire in the ecosystem and the need to develop fire management plans), but concluded that the policy had not been fully implemented.⁵² Noting that the wildfire risk was greater and the wildland-urban interface problem more complex than previously thought, the report called for improved coordination between federal, state, local, and tribal officials to address high risk areas.⁵³ The report further explained that more than seventy million acres of federal lands were at high fire risk, primarily due to unnatural fuel accumulations attributable to prior fire suppression policies.⁵⁴ In direct response to the unrelenting 2000 fire season, the agencies also produced a National Fire Plan to guide the immediate federal response to the heightened wildfire danger and to the need for extensive restoration work.⁵⁵ The document called for federal

⁴⁸ See PETER H. MORRISON ET AL., ASSESSMENT OF SUMMER 2000 WILDFIRES: LANDSCAPE HISTORY, CURRENT CONDITIONS AND OWNERSHIP 20–28, available at <http://www.pacificbio.org/Projects/fires2000/wildfire2000.pdf> (discussing the devastation of the Valley fire complex).

⁴⁹ See H.R. REP. NO. 108-96, pt.1, at 2–3 (2003) (describing the 2000 and 2002 fire seasons as among the worst in the last 50 years); S. REP. NO. 108-121, at 3 (2003) (noting that over 7.2 million acres burned in 2002 alone, which was more than twice the 10-year average).

⁵⁰ BARKER ET AL., *supra* note 1, at 2.

⁵¹ See, e.g., HEALTHY FORESTS INITIATIVE, *supra* note 8; U.S. GEN. ACCOUNTING OFFICE, WESTERN NATIONAL FORESTS: CATASTROPHIC WILDFIRES THREATEN RESOURCES AND COMMUNITIES (1998) [hereinafter GAO WESTERN NATIONAL FORESTS]; ASSESSING FOREST ECOSYSTEM HEALTH IN THE INLAND WEST (R. Neil Sampson & David L. Adams eds., 1994).

⁵² U.S. DEP'T OF THE INTERIOR ET AL., REVIEW AND UPDATE OF THE 1995 FEDERAL WILDLAND FIRE MANAGEMENT POLICY, at ii, iii, 9, 10 (2001) [hereinafter 2001 FEDERAL FIRE POLICY REVIEW AND UPDATE].

⁵³ *Id.* at 11–12, 15–16.

⁵⁴ *Id.* at 7–8.

⁵⁵ U.S. DEP'T OF AGRIC. & U.S. DEP'T OF THE INTERIOR, MANAGING THE IMPACT OF WILDFIRES OF COMMUNITIES AND THE ENVIRONMENT: A REPORT TO THE PRESIDENT IN RESPONSE TO THE WILDFIRES OF 2000 (2000), available at <http://www.fireplan.gov/reports/8-20-en.pdf> [hereinafter NATIONAL FIRE PLAN]. This National Fire Plan report was prepared at the request of President Clinton before the 2000 fire season was finished; it was a direct response to the devastating fire events of that year. This report, along with its accompanying budget request, congressional direction for substantial new appropriations for fire management, and several resulting action plans and

assistance to help in restoring fire-damaged communities and watersheds, additional federal investment in forest thinning and prescribed burning near communities-at-risk (including assistance in expediting environmental reviews), and greater public involvement in fire planning decisions.⁵⁶

Congress endorsed these proposals by directing the federal agencies “to cooperatively develop a coordinated, National ten-year comprehensive strategy with the States as full partners in the planning, decision-making, and implementation of the [national fire] plan.”⁵⁷ In response, the public land agencies and the Western Governors’ Association adopted a comprehensive implementation strategy that stressed federal-state-local collaboration toward the goals of improving fire prevention and suppression, reducing hazardous fuels, and restoring fire-adapted ecosystems.⁵⁸ The net effect has been to engage state and local governments more directly in federal fire policy and a further commitment to reduce the fire risk for local communities.

Following the 2000 election, there was a discernible shift in federal fire policy as the Bush Administration succeeded the Clinton Administration. Frustrated by recurrent legal challenges to its timber cutting and salvage logging proposals, the Forest Service announced it faced a “process predicament,” by which it meant that NEPA and other environmental laws, along with cumbersome administrative appeal procedures, were forestalling these efforts.⁵⁹ In the midst of the explosive 2002 fire season, the White House responded with a presidential Healthy Forests Initiative designed to expedite hazardous fuel treatments and forest restoration (salvage logging) projects through administrative revisions to NEPA, ESA, and internal appeal processes.⁶⁰ Moreover, the President sought to enlist Congress in these efforts with related legislative reform proposals. The issue no longer focused on fire control or restoration policy, but rather on the legal overlay governing fire-related activities on the public lands. Put simply, the fire problem was recast as a litigation problem.

In the wake of another destructive fire season, Congress finally acted by passing the Healthy Forests Restoration Act of 2003 (HFRA).⁶¹ Remarkably, the HFRA represents the first significant federal legislation on

agency strategies have collectively become known as the National Fire Plan.

⁵⁶ *Id.* at 2–4, 21–27.

⁵⁷ H.R. REP. NO. 106-914, at 193–94 (2000) (Conf. Rep.).

⁵⁸ See generally U.S. DEP’T OF THE INTERIOR, U.S. DEP’T OF AGRIC., & W. GOVERNORS’ ASS’N, A COLLABORATIVE APPROACH FOR REDUCING WILDLAND FIRE RISKS TO COMMUNITIES AND THE ENVIRONMENT: TEN YEAR COMPREHENSIVE STRATEGY (2001), available at <http://www.fireplan.gov/reports/7-19-en.pdf>; U.S. DEP’T OF THE INTERIOR, U.S. DEP’T. OF AGRIC., & W. GOVERNORS’ ASS’N, A COLLABORATIVE APPROACH FOR REDUCING WILDLAND FIRE RISKS TO COMMUNITIES AND THE ENVIRONMENT: TEN YEAR COMPREHENSIVE STRATEGY IMPLEMENTATION PLAN (2002), available at <http://www.fireplan.gov/reports/11-23-en.pdf>.

⁵⁹ PROCESS PREDICAMENT, *supra* note 10, at 5.

⁶⁰ HEALTHY FORESTS INITIATIVE, *supra* note 8, at 15. Notably, the Healthy Forests Initiative did not focus solely on fire policy, but also proposed revisions to the Northwest Forest Plan in an effort to expedite regional timber projects and to ensure local communities a sustainable harvest from the affected public lands. *Id.* at 3, 21.

⁶¹ Pub. L. No. 108-148, 117 Stat. 1887 (2003) (codified at 16 U.S.C. §§ 2103b, 6501–6591). For a more detailed analysis of the HFRA, see *infra* notes 239–84 and accompanying text.

the role and management of fire on the public lands, though its actual impact is somewhat limited. Underpinning the HFRA is the congressional judgment that a century of fire suppression has left the public forestlands overgrown and thus susceptible to catastrophic fires that threaten communities and other resources. The HFRA authorizes hazardous fuel reduction projects on federal lands in designated wildland-urban interface areas, municipal watersheds, and to protect endangered species.⁶² The act modifies NEPA compliance requirements for such projects, establishes new administrative review procedures, and seeks to expedite judicial review.⁶³ In addition, the HFRA provides grants to promote commercial biomass utilization facilities, creates a healthy forest reserve program, and addresses insect disease problems with further NEPA exclusions.⁶⁴ Combined with the President's Healthy Forests Initiative, the HFRA has not only altered the legal landscape governing fire planning and management on the public lands, but also shifted the political debate from fire as a vital ecological process to the need for active fuels management on the public lands.

C. The Terms of the Debate

Fire has been not only a constant threat on the public lands, but an agent for ecological renewal and resiliency. Indeed, the shift in contemporary federal policy to accept fire as a critical natural process is predicated on its important role in sustaining forest and grassland ecosystems.⁶⁵ Modern ecologists view ecosystems as dynamic, disequilibrium entities subject to constant change in often unpredictable ways, owing to natural disturbance processes such as fires, floods, and earthquakes.⁶⁶ As an agent for ecological change, lightning-ignited fires randomly burned the western landscape at regular intervals over the centuries, continually reshaping the forests and plains. Later, Native

⁶² Healthy Forest Restoration Act of 2003 § 102 (codified at 16 U.S.C.A. § 6512). The HFRA, however, excludes wilderness areas, wilderness study areas, and most old growth tree stands from the hazardous fuel reduction program, and imposes a 20 million acre cap on the public lands subject to such treatments. *Id.*

⁶³ *Id.* §§ 104–06 (codified at 16 U.S.C.A. § 6514–16); *see also infra* notes 258–68 and accompanying text. Notably, the HFRA requires that hazardous fuel reduction projects must be consistent with existing resource management plans, imposes monitoring requirements, and requires coordination with local community wildfire protection plans. Healthy Forests Restoration Act of 2003 §§ 102(b), (g), 103(b) (codified at 16 U.S.C.A. §§ 6512(b), (g), 6513(b)).

⁶⁴ Healthy Forests Restoration Act of 2003 § 203 (codified at 16 U.S.C.A. § 6531) (biomass facilities); *id.* § 501 (codified at 16 U.S.C.A. § 6571) (non-federal healthy forest reserve program); *id.* §§ 401–06 (codified at 16 U.S.C.A. §§ 6514–16) (insect disease research and silvicultural assessment provisions).

⁶⁵ Because most of the controversy over federal fire policy has involved the public forestlands, this article focuses on fire policy and ecology in forest rather than grassland ecosystems. For additional information about grassland ecosystems and fire, *see* PYNE, FIRE IN AMERICA, *supra* note 18, at 516–29.

⁶⁶ *See* DANIEL B. BOTKIN, DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY (1990) (demonstrating the ambiguities, variabilities, and complexities of organic systems); Symposium, *Ecology and the Law*, 69 CHI.-KENT L. REV. 847–985 (1994). *See generally* FRANK B. GOLLEY, A HISTORY OF THE ECOSYSTEM CONCEPT IN ECOLOGY (1993) (tracing the growth and development of the ecosystem concept).

American-ignited fires did the same, as frequently documented by the early white explorers and settlers.⁶⁷

The fires behaved differently depending on the forest's ecological composition and structure, which is to say different ecosystems responded differently to fire. Some forests, like the Southwest's classic Ponderosa pine stands, supported high frequency, low intensity fires that ordinarily removed the understory but did not damage mature trees. These fires rarely altered vegetative patterns or displaced resident wildlife; they typically replenished soil nutrients without causing serious erosion problems. Other forests, like the lodgepole pine forests common in the Yellowstone region, usually experienced infrequent, high intensity fires that reshaped vegetative patterns. Such fires often altered tree and plant structures, damaged soil, created erosion problems, increased streambed siltation, and destroyed wildlife habitat. Yet other forests, typified by Redwood, interior Douglas fir, and Rocky Mountain ponderosa pine trees, fell between these extremes, burning at various intervals that sometimes produced stand-replacing blazes and other times low level brush clearing burns.⁶⁸ Drought conditions and other weather patterns have also strongly influenced how individual fires behaved in these forest landscapes.⁶⁹

However, a century of aggressive federal fire suppression efforts have disturbed these fire-adapted ecosystems and altered fire behavior across the western landscape. The absence of fire has changed the composition and distribution of tree and plant species, promoted the build up of woody debris (fuel loading), facilitated the spread of exotic species, and displaced some native species.⁷⁰ Contemporary forests are consequently older, denser, and less healthy, and thus prone to larger and more intense fires than was historically true. Rather than burning the understory in Ponderosa pine forests, for example, fires are now regularly "crowning" and consuming entire tree stands, not only disrupting historical ecological patterns and damaging valuable resources but also endangering nearby communities and creating complex, long-term restoration problems. By recent estimates, more than 39 million acres of national forest lands face an unnaturally high fire danger and over 22,000 communities confront heightened fire risks.⁷¹ To

⁶⁷ See *supra* note 11 and accompanying text.

⁶⁸ GREGORY H. APLET & BO WILMER, *THE WILDLAND FIRE CHALLENGE: FOCUS ON RELIABLE DATA, COMMUNITY PROTECTION, AND ECOLOGICAL RESTORATION* 3 (2003). See generally ARNO & ALLISON-BUNNELL, *supra* note 28, at 65–88 (discussing and comparing various fire regimes).

⁶⁹ Heavy spring rains, for example, can prompt local brush and grasses to grow thicker, which means more dry and combustible material is available later to be ignited during summer and fall fire seasons. See JAMES K. AGEE, *FIRE ECOLOGY OF PACIFIC NORTHWEST FORESTS* 42–47 (1993) (discussing moisture level difference in fire fuels).

⁷⁰ Other questionable forest management practices, namely excessive clear-cut logging and roadbuilding, have helped worsen these fuels and erosion problems. C. I. MILLAR, UNIV. CAL. DAVIS CTRS. FOR WATER AND WILDLAND RES., *1 SIERRA NEVADA ECOSYSTEM PROJECT: FINAL REPORT TO CONGRESS* 62 (1996).

⁷¹ See GAO *WESTERN NATIONAL FORESTS*, *supra* note 51, at 1, 4 ("It appears that the increasing number of large, intense, uncontrollable, and catastrophically destructive wildfires is the most extensive and serious national forest health-related problem in the interior West. . . . In 1995, the agency estimated that 39 million acres . . . are now at high risk of large, uncontrollable, catastrophic wildfires."); Urban Wildland Interface Communities Within the Vicinity of Federal

illustrate the problem, more than a quarter of the Boise National Forest was consumed by wildfire from 1986 to 1995.⁷² It is, in the judgment of many scientists, an unprecedented forest health crisis.

The socio-economic dimensions of the current fire situation are enormous especially in light of their related political implications. Annual congressional wildland fire management appropriations have grown steadily, from \$1.5 billion per year in 2000 to \$2.5 billion requested for fiscal year 2005.⁷³ With more homeowners building in the wildland urban interface zone, private insurance costs have risen as has the pressure to suppress most wildfires. Larger and hotter fires have taken a heavier toll in human lives too, especially in the firefighter ranks where the number of annual deaths has been a cause of growing concern. Because Congress has historically funded federal firefighting efforts off-budget on an as-needed basis, the public land agencies have developed an extensive firefighting infrastructure that draws heavily upon private sector contractors. According to knowledgeable observers, the Forest Service may soon become the "Forest Fire Service,"⁷⁴ with a new "fire industrial complex" emerging as a parallel economy in the West that rivals the region's flagging timber industry.⁷⁵ The upshot is an array of political pressures supporting an aggressive fire suppression policy,⁷⁶ out of both economic self-interest and self-protection. Yet the Catch-22 effect is inescapable: more suppression means more combustible fuels, which means larger and more intense fires and thus, even greater danger and destruction.

The policy dilemma, therefore, is how to address the current forest health issue and the role of fire in the ecosystem. Two options represent the extremes: either continue to suppress all fires under the discredited notion that an uncharred forest is both healthy and safe, or permit wildfires to burn under the dubious assumption that fire will always benefit forest ecosystems. The problem with the all-out suppression policy is that it has

Lands That Are at High Risk from Wildfire, 66 Fed. Reg. 751, 752 (Jan. 4, 2001) (describing the significant and increasing risk of fire faced by many communities and providing a list of roughly 4,000 of those communities threatened with loss by wildfire); Urban Wildland Interface Communities Within the Vicinity of Federal Lands That Are at High Risk from Wildfire, 66 Fed. Reg. 43,383, 43,384 (Aug. 17, 2001) (updating the previous list of communities at risk from wildfire and increasing the number of listed communities to over 22,000). *But see* APLET & WILMER, *supra* note 68, at 14–19 (describing the funding incentives that likely led many states to submit exaggerated lists of at risk communities and noting that many communities which had burned previously were not included on the list while many communities with a low likelihood of destruction by fire were included).

⁷² Jason Greenlee, *Are We At An Impasse with Forest Health*, 4(1) WILDFIRE 14, 15 (Mar. 1995) (citing Tom Knudson, *Feeding the Flames*, SACRAMENTO BEE, Nov. 27, 1994, at A1).

⁷³ See GAO WILDLAND FIRE MANAGEMENT, *supra* note 1, at 7–8, tbl. 1; CAROLYN ALKIRE, THE FEDERAL WILDLAND FIRE BUDGET: LET'S PREPARE, NOT JUST REACT 8 (2004). These figures include federal fire suppression funds as well as fire management funds for hazardous fuel reduction projects and the like.

⁷⁴ DOUGLAS GANTENBEIN, A SEASON OF FIRE: FOUR MONTHS ON THE FIRELINES IN THE AMERICAN WEST 18 (2003).

⁷⁵ ARNO & ALLISON-BUNNELL, *supra* note 28, at 135, 173.

⁷⁶ See GAO WESTERN NATIONAL FORESTS, *supra* note 51, at 5 (calculating that the annual average cost for fighting fire grew from \$134 million to \$335 million between fiscal years 1986 to 1994).

not worked. After a century of fire suppression, the forests are denser and more fire prone, as evidenced by the spate of recent catastrophic fire seasons and their destructive legacies.⁷⁷ Besides, contemporary fire suppression strategies can have undesirable consequences: new access roads cut into untouched areas, fire retardant chemicals broadcast over the landscape, firefighter lives put at unnecessary risk, and extraordinary budgetary pressures.⁷⁸ The problem with an unconstrained natural fire policy is that, under current conditions, it will not reliably mimic historic fire regimes and thus, portends more catastrophic fires in today's fuel-loaded forests.⁷⁹ In some remote locations and under certain forest conditions, nature can be entrusted to take its course with wildfire, but generally not where competing human concerns and important resource values indicate otherwise. Over the long term, these all-or-nothing approaches will not reliably restore ecologically healthy forests or safeguard adjacent communities.

Thus, the real policy debate is over how and where to use prescribed fire and selective cutting to reduce fuel loads, ensure human safety, and restore forest ecosystems. Prescribed fire advocates view fire as a natural agent of ecological change that offers manifold environmental benefits, including a less disturbed landscape, fewer erosion problems, and improved wildlife habitat. Besides better emulating historic forest conditions, prescribed fire is relatively inexpensive to implement (costing \$30 to \$400 per acre),⁸⁰ and it minimizes intensive human intrusions into the natural environment. While willing to countenance limited tree thinning near at-risk communities, prescribed fire advocates fear more widespread cutting could portend a resumption of large-scale timber harvesting in inappropriate locations.⁸¹ In short, a prescribed fire management strategy not only holds great promise for ecological restoration, but also recognizes the vital role that natural processes play in sustaining public land ecosystems.

Prescribed fires, however, have not stemmed deteriorating forest conditions, and have left forests, communities, and homeowners at increased risk from catastrophic fire. Many scientists believe it is not possible to rely solely on prescribed fire to restore historical fire regimes because the fuel loads are so high in many locations that the resulting fires

⁷⁷ See *supra* notes 47–51 and accompanying text for descriptions of the 2000, 2002, and 2003 fire seasons.

⁷⁸ See Jerry Sorensen et al., *Collateral Damage: The Hidden Cost of Fighting the Nation's Wildfires*, FOREST MAGAZINE, Fall 2003, at 32–39 (describing the economic and ecological consequences of fighting fires); ARNO & ALLISON-BUNNELL, *supra* note 28, at 98 (describing how bulldozed firelines damage soil and watersheds by causing erosion).

⁷⁹ See ARNO & ALLISON-BUNNELL, *supra* note 28, at 123–26, 150–55 (describing how logging has exacerbated the fuels problem and that prescribed fires should be cautiously used to deal with the problem); 2001 FEDERAL FIRE POLICY REVIEW AND UPDATE, *supra* note 52, at 7–8 (describing how human activities have altered natural fire regimes).

⁸⁰ ARNO & ALLISON-BUNNELL, *supra* note 28, at 131; see also APLET & WILMER, *supra* note 68, at 32 (putting prescribed burning costs at \$100–\$500 per acre); Adam Burke, *Keepers of the Flame*, HIGH COUNTRY NEWS, Nov. 8, 2004, at 12 (estimating prescribed burning costs at \$100–200 per acre).

⁸¹ For a discussion of the relationship between fire management and the historic timber program, see *infra* notes 402–09 and accompanying text.

would be more intense and destructive than historically was the case.⁸² Because such fires may not be easily contained, they pose a real danger to adjacent communities and homeowners. After the 2000 Cerro Grande fire in New Mexico escaped prescription and overran Los Alamos, these fears became very real and have created major political obstacles to the use of prescribed fire near human settlements. Despite efforts to soften Smokey Bear's "every fire is a bad fire" message, many citizens remain quite fire averse, and also object to the smoke pollution that inevitably accompanies prescribed burning.⁸³ In fact, the environmental compliance requirements for prescribed fire—ranging from NEPA documentation to state clean air permits to endangered species consultations—can be expensive and time consuming, as can the preparation of necessary fire management plans.

Sensitive to these concerns, agency officials are cautious when igniting prescribed fires. They have adopted a conservative approach that ensures sufficient firefighting resources are readily available to combat an escaped fire. But this inevitably adds further expense to this management technique—costs that must come from congressionally appropriated funds. Moreover, prescribed fires are suitable only at certain times during the year, when forest and weather conditions are such that the resulting blazes can be controlled, which limits its effectiveness as a management tool. And though controlled burns are used to clear forest understory and brush to reduce the fire hazard, this technique ordinarily does not remove overabundant mature trees that contribute to the forest density and fire danger problems. In light of these limitations, prescribed burning represents only part of the solution to currently askew forest conditions.⁸⁴

The other part of the fire management equation, according to most scientists, is selective tree thinning designed to restore more natural forest conditions and to curtail wildfire dangers. Advocates of mechanical thinning assert that it is necessary to reduce fuel loads, including the brush, ladder fuels, and excessive trees that are choking many forests due to past fire suppression practices. Convinced that prescribed fire cannot safely be reintroduced in today's overgrown forests, they view extensive thinning as

⁸² See RUSSELL T. GRAHAM ET AL., SCIENCE BASIS FOR CHANGING FOREST STRUCTURE TO MODIFY WILDFIRE BEHAVIOR AND SEVERITY 26–27 (2004) (suggesting that mechanical thinning should precede prescribed fires “[i]n forests that have not experienced fire for many decades”); ARNO & ALLISON-BUNNELL, *supra* note 28, at 123–36 (observing that “[a]fter thinning and removal, prescribed fire can be effectively applied to help maintain low to moderate wildfire hazard into the future”).

⁸³ See Ann Bond, *Wildland Fire Use: Too Hot to Handle?*, FOREST MAGAZINE, Summer 2004, at 32, 34 (describing community concern even in the face of relatively low risk environmentally beneficial fires); WILDLAND FIRE LEADERSHIP COUNCIL, INTERAGENCY STRATEGY FOR THE IMPLEMENTATION OF FEDERAL WILDLAND FIRE MANAGEMENT POLICY 39 (2003) [hereinafter INTERAGENCY FIRE MANAGEMENT STRATEGY] (“The increasing number of people living in the wildland/urban interface has eroded public tolerance for some treatments.”).

⁸⁴ On the potential problems with prescribed fires or controlled burning, see ARNO & ALLISON-BUNNELL, *supra* note 28, at 150; GAO CERRO GRANDE FIRE, *supra* note 47, at 1–14. *But see* Stephen J. Pyne, *The Perils of Prescribed Fire: A Reconsideration*, 41 NAT. RESOURCES J. 1, 1–6 (2001) (arguing that the way prescribed fires have been conducted, rather than the fires themselves, has caused problems).

the only pragmatic option for restoring a more fire-tolerant environment.⁸⁵ Forest thinning (or hazardous fuels reduction) can take several forms: creating defensible fuel zones (or greenbelts) near communities, establishing fuel breaks in more distant locations, and undertaking full-scale restoration forestry. These strategies, according to proponents, are appropriate both in the wildland urban interface zone and in more remote areas to protect important resource values, such as endangered species habitat or critical domestic water sources, from catastrophic wildfires.

By its nature, mechanical thinning is labor intensive and thus expensive. The average cost is estimated at \$500 to \$1500 per acre,⁸⁶ and treatments must generally be repeated at regular intervals to limit re-growth. Thinning projects also require compliance with NEPA and other environmental laws, which can trigger administrative appeals and delays. Extensive federal subsidies are ordinarily required not only for the thinning projects themselves, but also to help develop commercial biomass facilities to utilize the small diameter trees and brush that are removed.⁸⁷ By including some larger, old growth trees in thinning projects, agency officials can sometimes convert a marginal project into an economically viable one that may help underwrite restoration costs, though these projects can be environmentally controversial.⁸⁸ Congressionally sanctioned stewardship contracts offer some savings opportunities by enabling the agencies to combine timber harvesting and restoration activities into one comprehensive project (or contract) designed to meet a variety of land management objectives.⁸⁹

⁸⁵ See Wallace Covington et al., *Ecosystem Restoration and Management: Scientific Principles and Concepts*, in 2 *ECOLOGICAL STEWARDSHIP: A COMMON REFERENCE FOR ECOSYSTEM MANAGEMENT* 603–06 (Robert C. Szaro et al. eds., 1999) (describing “encouraging” results from the experimental “combination of thinning and burning” a high-fuel forest); Wallace W. Covington & M.M. Moore, *Postsettlement Changes in Natural Fire Regimes and Forest Structure: Ecological Restoration of Old-Growth Ponderosa Pine Forests*, in *ASSESSING FOREST ECOSYSTEM HEALTH IN THE INLAND WEST* 154 (R. Neil Sampson & David L. Adams eds., 1994) (advocating the thinning and periodic burning of a high-fuel forest). See generally STEPHEN F. ARNO & CARL E. FIEDLER, *MIMICKING NATURE’S FIRE: RESTORING FIRE-PRONE FORESTS IN THE WEST* (2005) (arguing that, for some forests, thinning along with prescribed fire more closely replicates natural fire regimes).

⁸⁶ APLET & WILMER, *supra* note 68, at 32. The General Accounting Office estimates that the combination of thinning and prescribed burning costs \$320 per acre in the interior West. They also estimate that an annual appropriation of \$725 million is needed to treat the 39 million acres at high risk of uncontrollable wildfire by the year 2015. GAO WESTERN NATIONAL FORESTS, *supra* note 51, at 11.

⁸⁷ See April Reese, *Wood Product Businesses Find Opportunity in “Trash Trees”*, LAND LETTER, June 23, 2005, available at <http://www.eenews.net/Landletter/2005/06/23/#2> (describing the success of a small business that has a contract to thin trees, which it turns into animal bedding).

⁸⁸ April Reese, *Appeal of Thinning Project Near Grand Canyon Rejected*, LAND LETTER, Nov. 10, 2005, available at <http://www.eenews.net/Landletter/2005/11/10/#8>.

⁸⁹ To view the parameters of these contracts, see 16 U.S.C. § 2104 (2000); Fiscal Year 1999 Omnibus Appropriations Act, Pub. L. No. 105-237, § 347, 112 Stat. 1998 (1998); Consolidated Budget Appropriation Resolution, Pub. L. No. 108-7, § 323, 117 Stat. 11,275 (2003). On stewardship contracting, see U.S. GEN. ACCOUNTING OFFICE, *FEDERAL LAND MANAGEMENT: ADDITIONAL GUIDANCE ON COMMUNITY INVOLVEMENT COULD ENHANCE EFFECTIVENESS OF STEWARDSHIP CONTRACTING* (2004) (examining stewardship contracting programs and

Not surprisingly, forest thinning proposals have not been universally well received, particularly within the environmental community. Having long battled to curtail commercial timber harvesting on the national forests, many environmental groups fear that hazardous fuel reduction cutting is really another version of timber harvesting thinly disguised in fashionable ecological restoration and fire control garb. They object to mechanical incursions into the forest that can mean new roads, compacted soils, erosion problems, and high grade tree removals that may not ultimately address the fire hazard. While supportive of fuel thinning near at-risk communities as a political reality,⁹⁰ they oppose mechanical interventions at more remote locations because human life and property are not at significant risk in these uninhabited areas. They also note that mechanical thinning is relatively expensive and can only be rendered affordable by including high quality timber in stewardship contracts and other such arrangements, which inevitably creates perverse self-serving incentives for the contractor.⁹¹ Moreover, considerable disagreement persists over how much woody material should be removed in restoring forest health; some advocate extensive tree removals to recreate the open forest settings of the pre-settlement era, while others see such extensive intervention as unnecessary, unsightly, and counterproductive.⁹² These disagreements, as we shall see, are entwined with other longstanding forest management issues that have fostered an atmosphere of discord and distrust among agency officials and their various constituencies.

To be sure, the strategy of choice, and level of controversy, varies according to the forest locations at issue. In the national parks, national wildlife refuges, and wilderness areas, which are legally protected from industrial activity and ordinarily situated in remote locations, there is little pressure or support for mechanical thinning.⁹³ Here the agencies have relied

suggesting heightened community involvement); U.S. Dep't of Agric., Forest Serv., Stewardship Contracting, <http://www.fs.fed.us/forestmanagement/projects/stewardship/index.shtml> (last visited Apr. 23, 2006) (providing information on stewardship contracting to communities and contractors); Natalie M. Henry, *Strapped Feds Trading Timber for Restoration Work*, LAND LETTER, May 19, 2005, available at <http://www.eenews.net/Landletter/2005/05/19/#4> (describing support for and concerns with stewardship contracting by both environmentalists and industry); DANIEL KEMMIS, THIS SOVEREIGN LAND: A NEW VISION FOR GOVERNING THE WEST 139-42 (2001) (briefly describing the origins of stewardship contracting).

⁹⁰ See, e.g., THE WILDERNESS SOCIETY, RESTORING BALANCE TO WILDLAND FIRE POLICY 7 (2003) (promoting strategies to reduce wildfire on private lands near forested areas); APLET & WILMER, *supra* note 68, at 29-32 (describing several possible restoration regimes); see also ARNO & ALLISON-BUNNELL, *supra* note 28, at 119-36 (noting an increase in support from the environmental community for the creation of fire breaks near residential developments in order to avoid future destructive fires in New Mexico and other areas); RICK BROWN, THINNING, FIRE AND FOREST RESTORATION: A SCIENCE-BASED APPROACH FOR NATIONAL FORESTS IN THE INTERIOR NORTHWEST 7-31 (2000) (describing forest conditions and appropriate restorative action).

⁹¹ See *supra* notes 86-89 and accompanying text (describing the costs associated with mechanical thinning).

⁹² See GANTENBEIN, *supra* note 74, at 243-56 (describing the tension between these two approaches).

⁹³ The same is not true, however, for wilderness areas situated near urban areas or larger communities, such as the Mount Olympus Wilderness Area outside Salt Lake City, or the Rattlesnake Wilderness Area adjacent to Missoula, Montana, where the risk calculations

primarily upon prescribed fires to address ecological restoration and fire control concerns, while simultaneously suppressing fires that threaten structures or adjacent landowners. Conversely, on multiple-use lands situated near communities, there is considerable pressure and support for thinning projects to reduce the fire danger and achieve related ecological goals. Though even here, despite the fire danger, many homeowners object to unsightly tree removals for aesthetic and environmental reasons.⁹⁴ The situation is even more ambiguous on multiple-use lands removed from wildland urban interface settings, also known as the “lands between.”⁹⁵ The immediate fire danger is less evident here, but fire control, resource conservation, and ecological restoration goals may still be important, especially if municipal watersheds or endangered species are at risk.

In addition, forest ecology dictates the strategies that are viable in particular locations. The southwestern Ponderosa pine forests that historically burned frequently at low intensities are prime candidates for restoring a more natural fire regime. But current fuel loads and tree densities are such that extensive thinning may be required before prescribed fires can be safely reintroduced.⁹⁶ Lodgepole pine forests, which historically experienced infrequent high intensity fires, are not well-suited for either mechanical thinning or prescribed burning. Thinning is expensive and will not appreciably reduce the fire danger in lodgepole forests, while tree densities and down timber make prescribed burning an extremely risky proposition. For these forests, the alternative may be timber harvesting to remove biomass and reduce the fire danger, but this strategy raises serious environmental concerns and evokes heated opposition from anti-logging groups.⁹⁷ Fire management strategies are therefore limited under present conditions, and no single strategy offers a complete panacea for current forest health problems.

Controversy does not stop with fire control policy, but extends to post-fire restoration policy too. Despite often heroic suppression efforts, fires continue to burn intensely across broad swaths of the public lands, creating another set of ecological restoration issues for these damaged landscapes.⁹⁸ The less controversial question is whether active restoration efforts are

associated with catastrophic fire argue in favor of suppression and hazardous fuel reduction efforts. See ARNO & ALLISON-BUNNELL, *supra* note 28, at 134–35 (noting that fire policy often demands suppression of fires near homesites); JOHN C. HENDEE & CHAD P. DAWSON, WILDERNESS MANAGEMENT: STEWARDSHIP AND PROTECTION OF RESOURCES AND VALUES 306 (3d ed. 2002).

⁹⁴ INTERAGENCY FIRE MANAGEMENT STRATEGY, *supra* note 83, at 39.

⁹⁵ The term “lands between” is historian Stephen Pyne’s terminology, as articulated by him at the Andrus Center’s Fire and Forest Health conference, held in Boise, Idaho, on November 18–19, 2004. See also ARNO & ALLISON-BUNNELL, *supra* note 28, at 131–34 (using the term “general forest” to refer to similar lands).

⁹⁶ See ARNO & BUNNELL, *supra* note 28, at 133, 145–50; AGEE, *supra* note 69, at 322–38.

⁹⁷ See ARNO & BUNNELL, *supra* note 28, at 143, 145–50; AGEE, *supra* note 69, at 338–50; APLET & WILMER, *supra* note 68, at 22–28.

⁹⁸ See U.S. GEN. ACCOUNTING OFFICE, WILDLAND FIRES: FOREST SERVICE’S REMOVAL OF TIMBER BURNED BY WILDLAND FIRES (2003) (detailing the Forest Service’s methodology and rationale for awarding timber contracts in burned areas); NATIONAL FIRE PLAN, *supra* note 55, at 1–4 (describing landscape restoration and community protection priorities and the funding necessary to achieve those goals).

necessary or appropriate, including reseeded, soil stabilization, watershed protection, and tree replanting projects. More controversial, though, is the salvage logging debate, which focuses on whether fire-damaged trees should be made available to timber companies.⁹⁹ Salvage logging proponents argue that dead timber serves as a breeding ground for destructive insects and other forest diseases, provides ready fuel for the next fire, and still retains commercial value that will otherwise be lost. Opponents view salvage logging as just more timber harvesting with all the attendant negative consequences: additional roads, soil compaction, erosion problems, stream siltation, habitat loss, and fragmentation. They also contend that mechanically removing fire-damaged trees does not promote ecological restoration, because nature historically left such trees in place to decompose and provide vital habitat niches and soil nutrients.

Their opposition is driven by memories of the notorious 1995 salvage logging rider debacle. In the aftermath of the 1994 fires, congressional authorization for salvage logging without the usual legal protections was treated by the timber companies and the federal agencies as a license to engage in unrestrained cutting that included live trees in many sensitive locations.¹⁰⁰ As a result, salvage logging proposals have been met with stiff resistance, as environmental groups have mounted legal challenges to delay or derail such efforts.¹⁰¹ This litigation, in turn, has fueled the controversy over whether too much regulation and judicial oversight is burdening federal fire policy on the public lands. And therein lies the paradox: A federal fire policy developed in the absence of law is now under attack for entailing too much law.

⁹⁹ See Kathie Durbin, *Unsalvageable*, HIGH COUNTRY NEWS, May 16, 2005, at 8 (discussing the opposition of many environmental organizations to salvage logging proposals in designated roadless areas and other sensitive habitats). Compare J. Sessions et al., *Hastening the Return of Complex Forests Following Fire: The Consequences of Delay*, J. OF FORESTRY, April/May 2004, at 38 (supporting post-fire logging for conifer restoration purposes) with D.C. Donato, *Post-Wildfire Logging Hinders Regeneration and Increases Fire Risk*, 311 SCIENCE 352 (2006) (concluding that "postfire logging . . . can be counterproductive to goals of forest regeneration and fuel reduction"). See generally Fink, *supra* note 9 (addressing the benefits and problems of post-fire salvage logging); U.S. FOREST SERVICE, POSTFIRE LOGGING: IS IT BENEFICIAL TO A FOREST? (Oct. 2002) (arguing that post-fire forests are the perfect setting for adaptive management and that environmental impacts can be minimized if appropriate steps are taken).

¹⁰⁰ See Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rule of Law: The 1995 Logging without Laws Rider and Its Legacy*, 27 ENVTL. L. 1035, 1048–51 (1997) (describing how the salvage rider left compliance with many environmental laws to agency discretion, including allowing the cutting of live healthy trees); KATHIE DURBIN, TREE HUGGERS: VICTORY, DEFEAT & RENEWAL IN THE NORTHWEST ANCIENT FOREST CAMPAIGN 254–89 (1996) (noting that the salvage rider exempted timber sales from applicable environmental laws and administrative appeals, and allowed the cutting of almost "any tree in the forest"). For a contrast between the view that the salvage logging rider was unnecessary and primarily a timber jobs bill and the view that the rider injected long over-due fairness and efficiency into timber management, compare Michael Axeline, *Forest Health and the Politics of Expediency*, 26 ENVTL. L. 613 (1996), with Slade Gordon & Julie Kays, *Legislative History of the Timber Salvage Amendments Enacted in the 104th Congress: A Small Victory for Timber Communities in the Pacific Northwest*, 26 ENVTL. L. 641 (1996).

¹⁰¹ For a description of the salvage logging litigation, see *infra* notes 181–91 and accompanying text.

III. THE LAW OF FIRE

The legal framework governing fire on the public lands is an amalgam of organic statutory provisions, site-specific legislative mandates, diverse environmental protection laws, federal tort claims litigation, concurrent state laws, and the recently enacted Healthy Forests Restoration Act of 2003 (HFRA). With the exception of the HFRA and a few discrete site-specific statutes, Congress has left federal fire policy ill-defined, deferring instead to the agencies to develop and implement appropriate management policies. Occasionally, Congress has used the annual budget process to second guess controversial agency decisions—something that has become routine in the wake of particularly bad fire seasons. The federal courts have also found themselves ensnarled in fire policy debates, most often through environmental litigation and federal tort claim actions; the resulting judicial decisions have placed an important additional legal gloss on federal fire policy. But until recently, the most striking fact about fire management on the public lands was the relative dearth of law on it.

A. Organic Legislative Provisions and Site-Specific Statutes

The general legislation establishing federal fire policy reflects a historic congressional commitment to safeguarding federal lands and resources from destructive wildfires. In the Organic Administration Act of 1897,¹⁰² Congress directed the Secretary of Agriculture to “make provisions for the protection against destruction by fire and depredations upon the public forests and national forests,” vesting him with broad authority to make rules and regulations “to preserve the forests . . . from destruction.”¹⁰³ This protective mandate was part of the organic legislation establishing the national forest system, in which the new forest reserves were created to secure favorable water flow conditions and to furnish a continuous timber supply.¹⁰⁴ At the time, Congress was preoccupied with protecting the new reserves from excessive logging and from runaway wildfires, which had earlier devastated the once-abundant forestlands in the upper Midwest and East.¹⁰⁵ Two early landmark Supreme Court decisions sustained the Secretary’s broad regulatory authority over the use and management of national forest lands,¹⁰⁶ and subsequent court decisions have reaffirmed this expansive

¹⁰² Act of June 4, 1897, ch. 2, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–482, 551 (2000)).

¹⁰³ 16 U.S.C. § 551 (2000).

¹⁰⁴ 16 U.S.C. § 475 (2000); see *United States v. New Mexico*, 438 U.S. 696, 705–13 (1978) (confirming that the narrow original purpose of national forests was to protect water flows and timber).

¹⁰⁵ See *West Virginia Div. of Izaak Walton League v. Butz*, 522 F.2d 945, 952 (4th Cir. 1975) (concluding that “the primary concern of Congress in passing the Organic Act was the preservation of the national forests”); *DANA & FAIRFAX*, *supra* note 13, at 61–67 (describing the three basic purposes of the act as preserving and protecting forests, securing favorable conditions for water flows, and furnishing timber).

¹⁰⁶ See *United States v. Grimaud*, 220 U.S. 506, 522 (1911) (upholding the discretion of the Secretary to forbid grazing on forest reserves without a permit); *Light v. United States*, 220 U.S. 523, 537 (1911) (holding that legislative power was not unconstitutionally delegated to the

interpretation of agency authority.¹⁰⁷ In 1960, with passage of the Multiple Use-Sustained Yield Act,¹⁰⁸ Congress further expanded the Forest Service's organic responsibilities without adding anything new about fire.¹⁰⁹ The courts have invoked these statutory provisions to sustain the exercise of federal regulatory power over fire building on adjacent non-federal lands, reasoning that a runaway fire could imperil nearby national forest resources.¹¹⁰ Thus, the spare and straightforward 1897 statutory language continues to provide the fundamental legal basis for fire management policy on the national forests.

During the Forest Service's early years, Congress regularly reaffirmed its commitment to control destructive wildfires. In the Weeks Act of 1911,¹¹¹ Congress not only empowered the Secretary of Agriculture to cooperate with states to protect forested waterways from fire, but also appropriated federal funds to encourage the states to establish effective fire protection systems.¹¹² Although adopted primarily to enable the Forest Service to reacquire cut-over eastern forest lands that often posed a serious fire hazard,¹¹³ the Weeks Act effectively acknowledged that forest fires did not respect conventional jurisdictional boundaries and thus promoted more coordinated federal-state fire protection efforts. In 1924, Congress passed the Clarke-McNary Act¹¹⁴ to strengthen the earlier federal commitment to cooperative fire protection, facilitate federal acquisition of deteriorating private forest lands, and provide private landowners with forest restoration financial assistance.¹¹⁵ Most importantly, the Clarke-McNary legislation

Secretary, thus violation of the rules promulgated by the Secretary for the protection of forest reserves is a criminal offense).

¹⁰⁷ See, e.g., *Perkins v. Bergland*, 608 F.2d 803 (9th Cir. 1979); *Wind River Multiple-Use Advocates v. Espy*, 835 F. Supp. 1362, 1372 (D. Wyo. 1993); *Oregon Natural Res. Council v. Lowe*, 836 F. Supp. 727, 733 (D. Or. 1993). See generally Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*, 18 HARV. ENVTL. L. REV. 405 (1994) (describing and criticizing the multiple-use concept as special interest legislation that is exploited by small but powerful commodity interest groups).

¹⁰⁸ Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531 (2000).

¹⁰⁹ In 1960, Congress adopted the Multiple-Use Sustained-Yield Act, which directed that the national forests were henceforth to be managed for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528 (2004); *New Mexico*, 438 U.S. at 713-15.

¹¹⁰ *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979); see also *United States v. Alford*, 274 U.S. 264, 267 (1927) (sustaining a 1910 statutory prohibition against leaving an unextinguished fire "in or near" any public forest against the argument that Congress could not regulate on private lands adjacent to public lands). See generally Peter Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001) (discussing the federal government's power over its own property and promoting a broad interpretation of the property clause).

¹¹¹ Weeks Law of 1911, Pub. L. No. 61-435, 36 Stat. 961 (1911).

¹¹² *Id.* § 2.

¹¹³ See DANA & FAIRFAX, *supra* note 13, at 112. Notably, after the devastating 1910 fires, western opposition to federal acquisition of more private lands, even in the east and south, dissipated in recognition that fire protection was needed across forest lands, wherever they may be located. STEEN, *supra* note 24, at 127-28.

¹¹⁴ Clarke-McNary Act, Pub. L. No. 68-270, 43 Stat. 653 (1924).

¹¹⁵ *Id.* ch. 348. Propelled in large measure by federal concern over private forest management practices, the Clarke-McNary legislation fomented a major debate over the propriety of

authorized substantial federal expenditures to promote federal-state-private fire control efforts, reflecting Congress's view that fire posed a serious threat to the nation's public and private timber supplies.¹¹⁶ Over the years, Congress has consistently reaffirmed and funded these cooperative, intergovernmental fire management and control programs—further proof that fire has long been regarded as a boundary-defying natural force with large-scale destructive potential.

Curiously, Congress did not originally vest the Secretary of the Interior with statutory fire control authority, even though wildfires were a serious concern across the western public domain. But in 1922, Congress finally adopted a succinct law extending federal fire protection authority beyond the national forests. That legislation, which is still the primary statutory foundation for fire management on non-Forest Service lands, states:

The Secretary of the Interior is authorized to protect and preserve, from fire, disease, or the ravages of beetles, or other insects, timber owned by the United States upon the public lands, national parks, national monuments, Indian reservations, or other lands under the jurisdiction of the Department of the Interior¹¹⁷

The bill was an apparent afterthought once Congress realized that it lacked statutory authority to appropriate fire fighting funds for Interior-administered lands.¹¹⁸ The bill also addressed a long festering local concern, namely that communities were regularly being called upon to fight fires on nearby federal lands with little assistance from the responsible agencies.¹¹⁹ Notably, in the National Parks Organic Act of 1916,¹²⁰ Congress had already instructed the newly created National Park Service to manage the parks “to conserve the scenic and natural and historic objects and wildlife therein”—an explicit mandate empowering that agency to control fires on its lands.¹²¹ These early statutory provisions, all of which are still very much in effect

additional federal regulatory control over state and private forestry (supported by past chief Gifford Pinchot) versus a more cooperative approach (supported by the Forest Service) that provided federal financial and technical assistance to state and private landowners. The latter view ultimately prevailed in Congress. See GLEN O. ROBINSON, *THE FOREST SERVICE: A STUDY IN PUBLIC LAND MANAGEMENT* 11–12 (1975); STEEN, *supra* note 24, at 176–89.

¹¹⁶ Pub. L. No. 68-270, ch. 348, §§ 1–3, 43 Stat. 653 (1924); DANA & FAIRFAX, *supra* note 13, at 126–29.

¹¹⁷ 16 U.S.C. § 594 (2000). This provision also authorizes the Secretary of the Interior to cooperate with other federal departments, the states, and private timber owners for fire protection and related purposes. *Id.*

¹¹⁸ See 62 CONG. REC. 1219 (1922) (statement of Rep. Sinnott). Representative Sinnott noted “in the last deficiency bill [42 Stat. 327, 331 (1921)], we secured an appropriation for the purposes mentioned in this bill that would have been subject to a point of order if anyone had made it” *Id.*

¹¹⁹ See 62 CONG. REC. 1220 (1922) (statement of Rep. Raker) (noting that “our [local] people have been . . . assist[ing] the Government in protecting its own lands” and “[i]t is high time that the Government was protecting its holdings on the public domain”).

¹²⁰ National Park Service Organic Act, 16 U.S.C. §§ 1–4 (2000).

¹²¹ *Id.*; see also *id.* § 3 (authorizing the Secretary of the Interior to adopt rules for the use and management of the national parks, and to cut timber if necessary to control insects or conserve the scenery or natural or historic objects, but not mentioning fire).

today, establish the basic legal foundation for fire management policies on Interior-administered lands.

The major question, of course, is whether these and other statutory mandates provide sufficient legal authority for the reversal in federal fire management policy that has occurred over the past several decades. Are the public land agencies, with the shift from a complete suppression policy to one of prescribed fire management, on firm legal footing? The “*Chevron* doctrine” is the appropriate starting point; it provides that unless Congress has spoken directly to the matter, federal agencies are entitled to interpret the organic statutes governing them.¹²² As long as the agency’s statutory interpretation is reasonable, the courts must defer to it. In addition, a related administrative law doctrine holds that if an agency makes a sharp break from its past policy, then it must provide a detailed explanation for the shift in direction.¹²³ Does the fire policy reversal satisfy these two doctrines?

The shift in federal fire policy from suppression to controlled burning began in the late 1960s and has continued to evolve. Since then, Congress has revised and expanded the organic laws governing the public land agencies.¹²⁴ The relevant legislation for the Forest Service is the Organic Administration Act of 1897, the Multiple Use-Sustained Yield Act of 1960, and the National Forest Management Act of 1976,¹²⁵ while the BLM’s guiding charter is the Federal Land Policy and Management Act of 1976.¹²⁶ The courts have consistently opined that these multiple-use laws vest both agencies with considerable discretionary management authority,¹²⁷ which should enable them to rely on these expansive statutes to justify the change in fire policy direction. The fact that these laws also charge the agencies with sustaining their land and resources for future generations,¹²⁸ in light of current scientific knowledge about the long term viability of forest and range ecosystems, further supports the new policy granting fire its historical role on the landscape. For the preservation-oriented agencies, neither the conservation language embedded in the Park Service Organic Act of 1916,¹²⁹

¹²² *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

¹²³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

¹²⁴ The early fire-specific statutory mandates that long drove federal suppression policy should not preclude an interpretation allowing some fires to burn for resource management purposes. *See* 16 U.S.C. §§ 551, 594 (2000) (instructing the Secretaries to protect and preserve the forests). Both these laws are framed in terms of protecting forests from destruction, which is exactly what the more enlightened contemporary fire policy is designed to do. *See supra* notes 102–110, 117–21 and accompanying text for a description and analysis of these early fire-specific mandates.

¹²⁵ 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476).

¹²⁶ 43 U.S.C. §§ 1701–1785 (2000).

¹²⁷ *See supra* notes 106–07 and cases cited therein.

¹²⁸ *See, e.g.*, 16 U.S.C. § 531(b) (2000) (defining “sustained yield” as “the maintenance in perpetuity . . . of the various renewable resources of the national forests without impairment of the productivity of the land”); 43 U.S.C. § 1702(c) (2000) (defining “multiple use” to mean “harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment”).

¹²⁹ 16 U.S.C. § 1 (2000) (directing the Park Service “to conserve the scenery and the natural and historic objects and the wildlife [in the national parks] for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future

nor the language in the FWS organic wildlife refuge legislation¹³⁰ mandates that the agencies suppress fire. These agencies may therefore reasonably conclude that they can best fulfill their statutory resource protection responsibilities by allowing some fires to burn and even by reintroducing fire mechanically. With the Wilderness Act of 1964, Congress expressly mandated that designated wilderness areas be managed “so as to preserve its natural conditions,”¹³¹ thus providing a clear legal basis for allowing fires to burn on these lands.

Other well accepted legal arguments buttress this conclusion. Though Congress may not have spoken directly to fire management in the contemporary legislation, Congress was well aware of the policy shift by the time of the 1988 Yellowstone fires, and implicitly ratified it in repeated agency appropriations bills, and essentially endorsed the prescribed fire policy with adoption of the 2003 healthy forests legislation. Federal fire policy is also precisely the type of technical resource management judgment that the courts have long indicated is best made by experienced professionals rather than the judiciary.¹³² Moreover, the voluminous policy statements, management plans, NEPA documents, and scientific studies supporting fire reintroduction provide a compelling explanation for this reversal in the traditional suppression approach.¹³³ Federal land managers, therefore, have both adequate authority and justification to support the shift in fire policy.

generations”); *id.* § 1a-1 (added by Congress in 1978 to reaffirm the original organic mandate); see Robin W. Winks, *The National Park Service Act of 1916: “A Contradictory Mandate”?*, 74 DENV. U. L. REV. 575 (1997) (examining how the 1916 Act should be interpreted).

¹³⁰ 16 U.S.C. § 668dd(a)(4)(A)–(C) (2000) (directing the FWS to conserve wildlife habitat, to ensure the biological integrity, diversity, and environmental health of the refuge system, and to contribute to national ecosystem conservation efforts). See generally Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457 (2002) (describing and analyzing the national wildlife refuge system legislation).

¹³¹ 16 U.S.C. § 1131(c) (2000); see also *id.* (defining “wilderness” as “an area where the earth and its community of life are untrammelled by man” and that “appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable”); *id.* § 1133(b) (mandating that each agency manage “wilderness” so as “to preserve its wilderness character”).

¹³² For support for this proposition see *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) (rejecting SUWA’s APA-based agency inaction claim in order “to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve”); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (refusing to “endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained”); *Sierra Club v. Marita*, 46 F.3d 606, 621 (7th Cir. 1995) (noting that “[t]he [Forest] Service is entitled to use its own methodology, unless it is irrational”); *Natural Res. Def. Council v. Hodel*, 624 F. Supp. 1045, 1062 (D. Nev. 1985) (stating that, “[a]fter considerable thought and deliberation, I have come to the conclusion that the [rangemaster] role plaintiffs would have me play in this controversy is an unworkable one”).

¹³³ See, e.g., Leopold et al., *supra* note 32, at 237–51 (arguing for less intrusive management of wildlife and natural processes in national parks); Recommendations of the Fire Management Policy Review Team, 53 Fed. Reg. 51,196, 51,197 (1988) (reviewing federal fire policies after the 1988 Yellowstone area fires); see also PYNE, AMERICA’S FIRES, *supra* note 27 (giving a brief account of the evolution of federal public land fire policy).

Drawing upon this statutory authority, the public land agencies have promulgated an array of regulations and policies addressing fire management on their respective lands. Most of these regulations, however, merely establish criminal and civil penalties for fire-related offenses, such as leaving a campfire unattended;¹³⁴ they do not translate federal fire policy into management prescriptions.¹³⁵ Even the Forest Service's revised NFMA planning rules,¹³⁶ despite the commitment to ecological sustainability as a guiding management principle, contain no direct references to fire policy or management.¹³⁷ That job falls instead to the agency manuals and other policy statements. The Forest Service Manual, drawing directly upon the 1995 Wildland Fire Policy, provides that "[w]ildland fire will be used to protect, maintain and enhance resources and, as nearly as possible, be allowed to function in its natural ecological role."¹³⁸ The National Park Service's Management Policies document similarly acknowledges that fire is a natural process, and admonishes that "park fire management programs [must] be designed to meet park resource management objectives while ensuring . . . public safety . . ."¹³⁹ But these agency documents have decidedly less legal significance than formally promulgated rules. Indeed, the courts have been reluctant to enforce statements or commitments made in manuals, policy statements, interpretive opinions, and other less formalized documents.¹⁴⁰

¹³⁴ See, e.g., 36 C.F.R. § 2.13 (2005) (fires in national parks); 36 C.F.R. § 261.5 (2005) (fire prohibitions in national forests).

¹³⁵ But see 36 C.F.R. § 293.2(a) (2005) (providing that "natural ecological succession will be allowed to operate freely to the extent feasible [in national forest wilderness areas]"); 36 C.F.R. § 293.3(a) (2005) (authorizing the Forest Service Chief to "prescribe measures to control fire [in wilderness areas]").

¹³⁶ On the Forest Service's revised planning rules, see generally National Forest System Land Management Planning, 70 Fed. Reg. 1023 (Jan. 5, 2005); National Forest System Land and Resource Management Planning, 67 Fed. Reg. 72,770 (Dec. 6, 2002); George Hoberg, *Science, Politics, and U.S. Forest Service Law: The Battle over the Forest Service Planning Rule*, 44 NAT. RESOURCES J. 1 (2004).

¹³⁷ The Clinton Administration's 2000 NFMA planning rules admonished Forest Service planners to maintain or restore ecosystem diversity "within the range of variability that would be expected to occur under natural disturbance regimes," 36 C.F.R. § 219.20(b)(1) (2005). In contrast, the Bush Administration's 2005 NFMA planning rule revisions merely require agency officials to "establish a framework to provide the characteristics of ecosystem diversity in the plan area." 36 C.F.R. § 219.10(b)(1), § 219.16 (2005) (defining "ecosystem diversity" to include ecosystem "composition, structure and processes"). For a brief comparison of these two different rules, see Robert B. Keiter, *Ecological Concepts, Legal Standards, and Public Land Law: An Analysis and Assessment*, 44 NAT. RESOURCES J. 943 (2004).

¹³⁸ U.S. FOREST SERV., FOREST SERVICE MANUAL § 5103.1(4) (2004). The manual also provides that "firefighter and public safety is the first priority"; that "[f]ire, as a critical natural process, will be integrated into land and resource management plans . . . on a landscape scale"; and that fire management plans are required. *Id.* § 5103.1(1), (3), (8).

¹³⁹ NATIONAL PARK SERV., MANAGEMENT POLICIES § 4.5 (2001), available at <http://www.nps.gov/refdesk/mp/chapter4.pdf>. The Management Policies document requires each park to prepare a fire management plan with an accompanying environmental assessment to consider related air and water quality concerns as well as natural and cultural resource management objectives. Fire suppression is required until the fire management plan is completed. Park officials are also directed to consider the environmental and resource impacts of potential fire suppression techniques. *Id.*

¹⁴⁰ See *Wilderness Soc'y v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006) (holding that Park Service management policies are non-binding and not judicially enforceable); McGrail & Rowley

As a result, such documents play only a limited role in defining the law of fire.

More important, from a legal perspective, are the land use plans and related environmental analyses that the agencies must prepare to define resource management goals, objectives, and standards for specific areas. Under laws like NFMA and FLPMA, each public land agency now routinely prepares and adopts interdisciplinary land use plans establishing resource management priorities and standards for individual national forests, national parks, BLM resource areas, and the like. Not only does NEPA apply to these planning processes,¹⁴¹ the agencies are also statutorily obligated to follow their plans once adopted,¹⁴² making them both legally significant and enforceable. But though the lower federal courts have regularly ruled that land management plans create legally binding commitments,¹⁴³ the Supreme Court has recently cast doubt on this conclusion. In *Norton v. Southern Utah Wilderness Alliance (SUWA)*,¹⁴⁴ the Court refused to find that managerial commitments made in BLM land-use plans created judicially enforceable legal obligations.¹⁴⁵ The Court instead found that the vagaries of congressional funding and evolving agency priorities argued against giving binding legal significance to plan language that was not clearly prescriptive.¹⁴⁶ Given the uncertain risks and costs associated with wildfire

v. Babbitt, 986 F. Supp. 1386, 1393–94 (S.D. Fla. 1997) (holding that the Fish and Wildlife Service's refuge manual is not binding); *Davis v. Latschar*, 202 F.3d 359, 366 n.4 (D.C. Cir. 2000) (finding that Park Service management policies were binding because the Park Service intended them to be binding); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) (finding the Forest Service Manual is not binding). *But see* *Found. for N. Amer. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982) (suggesting the Forest Service Manual is binding). For more on jurisprudential application of administrative documents, see generally Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

¹⁴¹ See, e.g., 16 U.S.C. § 1604(g)(1) (2004) (requiring promulgation of regulations “specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969”); 43 C.F.R. § 1601.0-6 (2004) (requiring promulgation of regulations “specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969”); National Wildlife Refuge System Planning Policy, 65 Fed. Reg. 33,892, 33,910, 33,913 (May 25, 2000) (noting the FWS has “integrated NEPA compliance requirements directly into the C[omprehensive] C[onservation] P[lanning] process,” but does not commit to preparing an EIS for all plans). *But see infra* notes 233–38 and accompanying text (explaining that the Forest Service has eliminated NEPA documentation from its planning process).

¹⁴² 16 U.S.C. § 1604(i) (2004); 43 U.S.C. § 1732(a) (2004).

¹⁴³ See *Sierra Club v. Martin*, 168 F.3d 1, 3 n.4 (11th Cir. 1999); *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1376–78 (9th Cir. 1998).

¹⁴⁴ 542 U.S. 55, 66–67 (2004).

¹⁴⁵ *Id.* at 68–71. The *SUWA* litigation involved an environmental organization's effort to force BLM to take administrative action to limit off-road vehicle use in designated wilderness study areas. Judicial review was sought under the Administrative Procedure Act, which authorizes courts “to compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1) (2000). Although the Court ruled that review was unavailable under § 706(1), it did acknowledge that judicial review would be available under § 706(2) if BLM committed to managing its lands in one manner in a resource management plan, but then took “actions inconsistent with the provisions of [that] plan.” *SUWA*, 542 U.S. at 69. The crucial legal difference was between agency action and agency inaction.

¹⁴⁶ *Id.* at 71–72.

management, the courts may henceforth be reluctant to enforce any but the most clearly stated planning commitments.

Significantly, the public land agencies have only recently begun to incorporate fire management concerns into their resource plans. Most of the first generation, NFMA-based forest plans did not address, and rarely even mentioned, wildfire or fire control.¹⁴⁷ But in its second generation forest plans,¹⁴⁸ the Forest Service has begun to routinely integrate fire management goals and standards into its plans.¹⁴⁹ The revised Boise National Forest Plan, for example, is designed not only to reduce hazardous fuels, but also to restore the forest's fire adapted ecosystems.¹⁵⁰ Furthermore, the agencies are committed to preparing Fire Management Plans that are tiered to resource management plans and establish explicit operational guidelines for managing prescribed fires and suppressing others.¹⁵¹ Where wildfire was overlooked twenty-five years ago in the original resource planning process, it is now a key consideration, which means fire-related decisions have greater legal significance.

Moreover, acknowledging that wildfire does not respect conventional boundary lines, the agencies have incorporated wildfire planning into several important regional planning initiatives. In one prominent example, the Forest Service adopted a regional Sierra Nevada Framework Plan that establishes landscape scale fire management and biodiversity conservation standards.¹⁵² Initially prepared under the auspices of the Clinton Administration to emphasize the use of prescribed fire, the Sierra Nevada Plan was revised by the Bush Administration to triple permitted timber harvesting levels as the primary strategy to reduce fire danger.¹⁵³ This

¹⁴⁷ Interview with Jack Troyer, U.S. Forest Serv., Intermountain Reg'l Forester, in Salt Lake City, Utah (Oct. 18, 2004); Interview with Michael Dudley, U.S. Forest Serv., Intermountain Region Dir. of Fire, Aviation, and Air Mgmt., in Salt Lake City, Utah (Oct. 18, 2004); Telephone interview with Kenneth Paur, U.S. Dep't of Agric. Office of the Gen. Counsel, Assistant Reg'l Attorney (Apr. 4, 2005).

¹⁴⁸ As a general matter, the Forest Service completed its first generation of NFMA-mandated forest plans during the 1980s and early 1990s; pursuant to the NFMA requirement that plans be revised at 15-year intervals, the agency began producing a second generation of plans during the late 1990s. National Forest Management Act of 1976, 16 U.S.C. § 1604(f)(5) (2000).

¹⁴⁹ See U.S. FOREST SERVICE, FOREST SERVICE MANUAL § 5103-1(3) (2005) (requiring that "fire, as a critical natural process, will be integrated into land and resource management plans and activities on a landscape scale and across agency boundaries").

¹⁵⁰ U.S. FOREST SERV., RECORD OF DECISION FOR THE BOISE NATIONAL FOREST FINAL EIS AND REVISED LAND AND RESOURCE MANAGEMENT PLAN 8, 11, 27 (2003). Other public land agencies are also routinely integrating fire-related management standards and objectives into their revised resource management plans. See, e.g., NAT'L PARK SERV., GLACIER NATIONAL PARK GENERAL MANAGEMENT PLAN 12 (1999) (noting that "Glacier uses the full range of appropriate fire management responses from aggressive suppression to management-ignited fires with very specific weather and fuels prescriptions to achieve goals and resource objectives").

¹⁵¹ INTERAGENCY FIRE MANAGEMENT STRATEGY, *supra* note 83, at 9.

¹⁵² U.S. FOREST SERV., SIERRA NEVADA FOREST PLAN AMENDMENT ENVIRONMENTAL IMPACT STATEMENT RECORD OF DECISION 3-6, 28-31 (2001). On the Sierra Nevada planning process, see KEITER, KEEPING FAITH WITH NATURE, *supra* note 2, at 274-84; Lawrence Ruth, *Conservation on the Cusp: The Reformation of National Forest Policy in the Sierra Nevada*, 18 UCLA J. ENVTL. L. & POL'Y 1 (1999).

¹⁵³ U.S. FOREST SERV., SIERRA NEVADA FOREST PLAN AMENDMENT FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT RECORD OF DECISION 9 (2004); see Dan Berman, *Boxer*,

reversal in priorities has triggered litigation from the state of California as well as environmental opponents, who have challenged the agency's new logging and related fire management prescriptions.¹⁵⁴ In another instance, the controversial Interior Columbia Basin Ecosystem Management Project (ICBEMP) identified deteriorated regional forest conditions as a major concern and then recommended a 700% increase in the use of prescribed fire as well as other active fuel reduction efforts as an antidote.¹⁵⁵ Although the ICBEMP initiative eventually failed,¹⁵⁶ it nonetheless highlighted the prominent role that fire plays in any meaningful ecosystem-scale planning effort. Because these regional plans or assessments establish large-scale ecological goals, they effectively set fire management standards across the landscape, and thus assume real significance.

Over the years, Congress has adopted site-specific or enabling legislation that contains fire management provisions applicable to designated public lands. In several instances, Congress has instructed the responsible agency to control or suppress fires to protect the resource values that justified special legislation in the first instance. The 1984 Oregon Cascades National Recreation Area legislation, for example, directs the Secretary of Agriculture to take steps "necessary to prevent and control wildfire."¹⁵⁷ More recently, Congress has acknowledged that fire plays an important ecological role in particular locations, even instructing the agencies to begin restoring fire to the landscape. One prominent example is the Steens Mountain Cooperative Management and Protection Act of 2000,¹⁵⁸ which establishes a Wildland Juniper Management Area to experiment with "active and passive management intended to restore the historic fire regime and native vegetation communities on Steens Mountain."¹⁵⁹ Another example is the Community Forest Restoration Act of 2000,¹⁶⁰ which funds a New Mexico collaborative forest restoration program both to reduce hazardous

Feinstein Speak Out Against Sierra Nevada Forest Plan, ENVIRONMENT & ENERGY DAILY, Jan. 30, 2004, available at <http://www.eenews.net/EEDaily/2004/01/30/#3>; CNN, *Citing Fire Risk, U.S. to Quadruple California Logging*, <http://www.cnn.com/2004/TECH/science/01/27/california.logging.reut/index.html>, Jan. 27, 2004 (last visited Apr. 23, 2006).

¹⁵⁴ See J.M. McCord, *State Sues over Sierra Forest Plan*, HIGH COUNTRY NEWS, Feb. 21, 2005, at 3 (quoting Tom Dressler, a spokesperson for California Attorney General Bill Lockyer, who filed suit, stating that "the Bush Administration basically junked . . . a decade worth of work").

¹⁵⁵ U.S. FOREST SERV. & BUREAU OF LAND MGMT., INTERIOR COLUMBIA BASIN SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT SUMMARY 23 (2000); see KEITER, KEEPING FAITH WITH NATURE, *supra* note 2, at 162-69.

¹⁵⁶ KEITER, KEEPING FAITH WITH NATURE, *supra* note 2, at 167-69.

¹⁵⁷ 16 U.S.C. § 4600o(e)(1) (2000); see also 16 U.S.C. § 546a-1(b)(5) (2000) (providing for the suppression of wildfires in Hiawatha National Forest); 16 U.S.C. § 4600oo-4(h) (2000) (authorizing measures to prevent devastating fire in Arizona's Las Cienegas National Conservation Area); Big Sur Wilderness Conservation Act of 2002, Pub. L. No. 107-370, 116 Stat. 3071 (codified at 16 U.S.C. § 1132) (authorizing appropriate actions necessary for fire prevention in California's Big Sur Wilderness); 16 U.S.C. § 539(i) (2000) (permitting timber harvesting and nonpermanent roads in Colorado's James Peak Protection Area).

¹⁵⁸ Steens Mountain Cooperative Management and Protection Act of 2000, 16 U.S.C. § 460nn-91 (2000).

¹⁵⁹ *Id.*

¹⁶⁰ Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393, 114 Stat. 1607.

fuels and to “reestablish fire regimes approximating those that shaped forest ecosystems prior to fire suppression.”¹⁶¹ Yet another example is the Quincy Library Group Forest Recovery Act of 1998,¹⁶² which seeks to reestablish a more fire-resilient ecosystem in three northern Sierra Nevada national forests through specified un-even aged timber harvest strategies and fuel-break construction projects.¹⁶³ In combination, these laws reveal strikingly different congressional attitudes toward fire that have evolved from active prevention to restoration of fire-prone landscapes.

More recent site-specific legislation suggests that Congress’s view toward wildfire has now taken a different turn. To expedite fuel reduction and post-fire rehabilitation efforts, Congress has begun overriding various environmental legal requirements that have long constrained agency decision processes. In 2003, as a controversial budget rider provision, Congress passed the Black Hills National Forest legislation that set aside a timber-related legal settlement agreement and authorized accelerated logging, new fuel breaks, and prescribed burning to curtail heightened fire danger linked to deteriorating forest conditions.¹⁶⁴ The legislation not only waived NEPA and NFMA compliance obligations for the authorized projects,¹⁶⁵ but also foreclosed judicial review of the implementing agency actions.¹⁶⁶ Congress subsequently employed a similar legislative strategy in the Flathead and Kootenai National Forest Rehabilitation Act of 2003,¹⁶⁷ which directed the Forest Service to promptly implement proposed post-fire salvage logging projects while limiting NEPA analysis and Clean Water Act

¹⁶¹ *Id.* § 605(b)(1)(B). The legislation also provides for the preservation of “old and large trees,” and requires “compl[iance] with all Federal and State environmental laws.” *Id.*; see April Reese, ‘Unique’ New Mexico Collaboration Program May Provide Model for Other States, LAND LETTER, May 12, 2005, available at <http://www.eenews.net/Landletter/2005/05/12/#2>.

¹⁶² Herger-Feinstein Quincy Library Group Forest Recovery Act of 1998, Pub. L. No. 105-277, §§ 401–02, 112 Stat. 2681 (codified at 16 U.S.C. § 2104 note (2000)). For additional information on the act and its implementation, see KEITER, KEEPING FAITH WITH NATURE, *supra* note 2, at 274–84.

¹⁶³ Notably, the Quincy Library Group legislation required the Forest Service to comply with NEPA- and NFMA-based biodiversity guidelines when implementing the sanctioned timber cutting projects. Herger-Feinstein Quincy Library Group Forest Recovery Act of 1998, Pub. L. No. 105-277, § 401(c)(3), 112 Stat. 2681.

¹⁶⁴ See Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Acts on the United States, Pub. L. No. 107-206, § 706, 116 Stat. 820 (2002). For background on adoption of the Black Hills rider, see *Biodiversity Associates v. Cables*, 357 F.3d 1152, 1156–58 (10th Cir. 2004).

¹⁶⁵ Pub. L. No. 107-206, § 706(j), 116 Stat. 820, 864 (2002). Significantly, although the rider waived NEPA and other legal compliance obligations for several fuel reduction projects, it also imposed explicit cutting limitations as well as wildlife and environmental protection standards at several sites. See *id.* §§ 706(c)(3), (d)(3), (f), (g). Acknowledging potential wildland urban interface problems, the rider admonished state and local officials to consider a moratorium on new building permits and to begin developing fire-sensitive zoning and building standards. *Id.* § 706(b)(7); see *infra* notes 331–68 and accompanying text for further discussion of private land interface issues.

¹⁶⁶ In *Biodiversity Associates v. Cables*, 357 F.3d 1152, 1156 (10th Cir. 2004), the Tenth Circuit Court of Appeals rejected a constitutional separation of powers challenge to the judicial review limitation provision.

¹⁶⁷ Pub. L. No. 108-108, § 401, 117 Stat. 1241, 1319 (2003). As was the case with the Black Hills legislation, the Flathead-Kootenai Act was added as a rider to a budget appropriations bill.

review requirements.¹⁶⁸ With these newer site-specific incursions on the environmental laws and judicial review, Congress seems to have cast federal fire policy as primarily a legal rather than ecological problem.

As a legal matter, these site-specific legislative enactments prevail over more general organic statutory provisions governing public lands.¹⁶⁹ They effectively establish a localized federal fire policy for the designated lands, one that is now being designed to minimize environmental compliance requirements. While this may afford Congress an opportunity to experiment with different legal approaches to fire without burdening the agencies with an untested new policy, it also could undermine the otherwise uniform legal standards that apply to the public lands. And that, as we shall see, is just what the Bush Administration's Healthy Forests Initiative is designed to do.

B. Environmental Law and the Healthy Forests Initiative

Public land fire policy has been heavily influenced by federal environmental laws, and the escalating volume of litigation enforcing them, during the past several decades. With the passage of NEPA, the ESA, and related laws, Congress imposed explicit substantive and procedural obligations on the public land agencies whenever they contemplated removing trees, whether to reduce potential hazardous fuel loads, ignite prescribed fires, or salvage fire-damaged timber. Long wary of the Forest Service's well-documented penchant for harvesting commercial timber,¹⁷⁰ environmental organizations have mounted an effective litigation campaign to dampen the agency's enthusiasm, targeting both fire-related and other timber projects that were perceived as threatening environmental values. As the setbacks mounted for the Forest Service in the aftermath of the devastating post-2000 fire seasons, the Bush Administration responded by announcing a Healthy Forests Initiative—a series of sweeping administrative revisions to the laws governing fire-related projects on the public lands.¹⁷¹ As a result, the legal landscape governing federal fire management policy has

¹⁶⁸ More specifically, the legislation limited the Forest Service to analyzing only the proposed alternative in its EIS or environmental assessment documents, and it waived compliance with the Clean Water Act's total maximum daily load requirements. *Id.* §401(b)(2), (4).

¹⁶⁹ *See, e.g.*, 16 U.S.C. § 1c (2004); *Sierra Club-Black Hills Group v. United States Forest Serv.*, 259 F.3d 1281, 1286–89 (10th Cir. 2001) (discussing the relationship between the National Forest Management Act, a general statute, and the Norbeck Act, a site-specific statute governing the management of the Norbeck Preserve); *see also* Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship to Pollution Control Law*, 74 *DENV. U. L. REV.* 779, 782 (1997) (describing the congressional trend toward tailoring legislation to specific national parks).

¹⁷⁰ *See* RICHARD W. BEHAN, *PLUNDERED PROMISE: CAPITALISM, POLITICS, AND THE PUBLIC LANDS* 148–58 (2001) (describing the 1960s controversy over the management of the Bitterroot National Forest); PAUL W. HIRT, *A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR II*, at 245–51 (1996) (detailing the controversy over clear-cutting in the 1960s); DAVID A. CLARY, *TIMBER AND THE FOREST SERVICE* 183–88 (1986) (describing the Forest Service's history of clear-cutting).

¹⁷¹ *See* HEALTHY FORESTS INITIATIVE, *supra* note 8; *see also infra* notes 201–32 and accompanying text for a detailed description and analysis of the Healthy Forests Initiative.

been transformed in the name of greater efficiency and improved fire control.

During the 1970s, Congress adopted an array of environmental laws that imposed significant legal constraints on the public land agencies. The National Environmental Policy Act of 1970 (NEPA) requires federal agencies to prepare a detailed environmental analysis—ordinarily either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS)—and to provide opportunities for public involvement before taking any action significantly affecting the human environment.¹⁷² The Endangered Species Act of 1973 (ESA) not only prohibits the “taking” of any federally protected species,¹⁷³ but also obligates federal agencies to consult with the FWS to ensure that their actions will not jeopardize these species.¹⁷⁴ The National Forest Management Act of 1976 (NFMA) saddled the Forest Service with detailed planning requirements, including biodiversity conservation, plan conformance, and monitoring obligations.¹⁷⁵ Taken together, these laws provided grist for litigation over federal public land priorities and policies; in turn, the federal courts proved willing to enforce the new substantive and procedural constraints against agency officials who ignored important countervailing environmental values.¹⁷⁶ The ultimate power of these statutes was revealed when the federal judiciary invoked them to enjoin logging across the Pacific Northwest’s expansive federal forests to protect the reclusive northern spotted owl and the region’s unique old growth forests.¹⁷⁷

¹⁷² 42 U.S.C. § 4332(2)(C) (2004); see *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–51 (1989) (explaining the NEPA process); see also 40 C.F.R. § 1502 (Environmental Impact Statement), and *id.* § 1508.9 (Environmental Assessment) (2004).

¹⁷³ 16 U.S.C. § 1538(a)(1) (2004); see Federico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109, 109 (1991).

¹⁷⁴ 16 U.S.C. § 1536(a)(2) (2000). For cases introducing the consultation requirements of the ESA, see generally *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

¹⁷⁵ 16 U.S.C. § 1604 (2004); see Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1 (1985).

¹⁷⁶ See generally, *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) (requiring the Department of the Interior to prepare an environmental impact statement before issuing oil and gas leases on lands within two national forests); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985) (finding that the National Forest Management Act does not forbid construction of a road, cost of which would exceed the value of the timber that the road would access, but holding that the Forest Service must prepare an environmental impact statement and a biological assessment to determine the road’s impact); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (holding Fish and Wildlife Service was required to consider consequences of all stages of oil and gas activity on forests in connection with the issuance of leases).

¹⁷⁷ See *Seattle Audubon Soc’y v. Moseley*, 798 F. Supp. 1473, 1476 (W.D. Wash. 1992) (holding that the Forest Service’s timber sale program violated NEPA), *aff’d sub nom*, *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699 (9th Cir. 1993); *Portland Audubon Soc’y v. Lujan*, 795 F. Supp. 1489, 1510 (D. Or. 1992) (finding that the BLM’s timber sale program violated NEPA requirements), *aff’d sub nom*, *Portland Audubon Soc’y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993); see also KEITER, *KEEPING FAITH WITH NATURE*, *supra* note 2, at 80–105; Alyson C. Flournoy, *Beyond the “Spotted Owl Problem”: Learning from the Old-Growth Controversy*, 17 HARV. ENVTL. L. REV. 261, 294–99 (1993) (discussing the northern spotted owl and logging controversy); Victor M. Sher, *Travels with Strix: The Spotted Owl’s Journey through the Federal Courts*, 14 PUB. LAND L. REV. 41, 45–58 (1993) (providing an overview of spotted owl litigation).

Meanwhile, environmental organizations and others were availing themselves of well-established administrative review opportunities, regularly appealing forest planning, timber harvesting, and road building decisions.¹⁷⁸ When the Forest Service sought to exempt project-level decisions from administrative appeal, Congress responded with the Appeals Reform Act of 1992,¹⁷⁹ which confirmed the important role that public comment and administrative review played in agency decision processes.¹⁸⁰ The fact that the new environmental laws proved enforceable in both administrative and judicial forums superimposed a new layer of accountability on federal agency officials long-accustomed to exercising near *carte blanche* discretionary authority.

These same environmental laws have helped shape contemporary federal fire management policies, often to the consternation of the responsible agencies. Obligated to integrate environmental concerns into their fire-related decision processes, the federal public land agencies have faced an imposing cluster of NFMA prescriptions, NEPA analyses, and ESA consultation requirements. In fact, statutory compliance issues are omnipresent—at the forest and fire planning stages as well as the project level, whether the matter involves fire suppression strategy, hazardous fuel reduction by thinning or prescribed burning, or a post-fire salvage timber sale proposal. Should forest plans be revised in the wake of a devastating fire event that changes on-the-ground conditions? Must an EIS document accompany an individual forest's fire plan, even when prescribed ignition or thinning project decisions will be made later? Are ESA-mandated Section 7 consultations required at the fire planning stage? Do NEPA or ESA requirements attach to fire suppression policy decisions, including the aerial broadcast spraying of fire-retardant chemicals? At the project level, what degree of NEPA analysis or ESA consultation is required? May the agencies tier project-level decisions to earlier planning decisions? Can these analyses be completed in a timely enough manner to remove fire-damaged timber in salvage operations before it loses commercial value? Many of these issues have surfaced, sometimes repeatedly, in the extensive environmental litigation over federal fire management decisions during the past decade.

Most fire-related environmental litigation has focused on project level decisions, principally those involving post-fire salvage logging proposals.¹⁸¹ The resulting court decisions have addressed a plethora of basic NEPA claims, including improper tiering, inadequate cumulative effects analysis,

¹⁷⁸ See generally Bradley C. Bobertz & Robert L. Fischman, *Administrative Appeal Reform: The Case of the Forest Service*, 64 U. COLO. L. REV. 371 (1993) (providing a history and overview of Forest Service administrative appeals).

¹⁷⁹ Pub. L. No. 102-381, § 322, 106 Stat. 1419 (codified at 16 U.S.C. § 1612 note (1999)). See GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW 7:15 (2003).

For background information on the Forest Service's administrative appeals process and problems, see Bobertz and Fischman, *supra* note 178, at 375.

¹⁸⁰ For cases discussing the purpose behind the Appeals Reform Act of 1992, see *Wilderness Soc'y v. Rey*, 180 F. Supp. 2d 1141, 1147 (D. Mont. 2002) (discussing the purpose behind the Appeals Reform Act of 1992); *Idaho Sporting Cong. v. United States Forest Serv.*, 843 F. Supp. 1373, 1375 (D. Idaho 1993).

¹⁸¹ See Fink, *supra* note 9, at 193.

failure to consider relevant scientific evidence, and insufficient analysis of alternatives.¹⁸² In *Blue Mountains Biodiversity Project v. Blackwood*,¹⁸³ the Ninth Circuit Court of Appeals ruled that the Forest Service could not tier its salvage project decisions to the current forest plan's programmatic EIS.¹⁸⁴ The agency also could not disaggregate its salvage harvest proposals into separate logging projects and then prepare separate EAs on each project, because NEPA required a comprehensive EIS assessing the cumulative effects of the overall salvage effort.¹⁸⁵ Other decisions have found recurrent NEPA cumulative effects analysis violations, holding that agency officials must assess the collective environmental impacts of multiple salvage projects along with other nearby activities that could affect the landscape.¹⁸⁶ The same analysis has been applied to require consideration of the pre-salvage impacts of fire fighting activities, such as bulldozed fire lines and dispersed chemical retardants.¹⁸⁷ Several courts have enjoined salvage projects when the agencies failed to disclose or analyze pertinent scientific information, most notably the so-called Beschta report,¹⁸⁸ an independent

¹⁸² Several cases have also raised NFMA-based claims, which have met with mixed success. See *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1302–04 (9th Cir. 2003) (rejecting NFMA claim that salvage sale project violated regional plan tree diameter standards, but accepting claim that project violated regional species viability standards); *Oregon Natural Res. Council Fund v. Goodman*, 382 F. Supp. 2d 1201, 1204 (D. Or. 2004) (finding no NFMA violation based on viable population analysis or snag retention standards); *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 990–93 (N.D. Cal. 2002) (finding that salvage sale EIS violated NFMA forest plan soil porosity standards).

¹⁸³ 161 F.3d 1208 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999).

¹⁸⁴ *Id.* at 1214 (explaining that the earlier forest plan EIS “does not, and could not, evaluate the impacts of this catastrophic fire, or the additional environmental impacts that large scale logging of severely burned areas could bring”). See also *League of Wilderness Defenders v. Marquis-Brong*, 259 F. Supp. 2d 1115, 1121–23 (D. Or. 2003) (finding that tiering of an EA and EIS was not adequate and that a supplemental EIS was required). But see *Idaho Sporting Cong. v. United States Forest Serv.*, 31 F. Supp. 2d 1236, 1241–42 (D. Idaho 1996) (concluding that post-fire changes in forest conditions did not require the Forest Service to prepare a supplemental EIS for the forest plan before undertaking salvage logging projects).

¹⁸⁵ *Blackwood*, 161 F.3d at 1214–16. Noting that the five challenged salvage logging sales “would yield 40–55 million board feet logged from the same watershed, require approximately 20 miles of road construction, and involve tractor-skid logging on steep slopes,” the court concluded that the project passed the NEPA threshold of “significance” and would therefore require preparation of a comprehensive EIS, not less rigorous EAs based on a finding of no significant impact; see also *Fink*, *supra* note 9, at 196–98.

¹⁸⁶ See *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 981–90 (N.D. Cal. 2002) (enjoining postfire salvage logging pending completion of an EIA addressing cumulative environmental impacts); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Forsgren*, 184 F. Supp. 2d 1058, 1069–70 (D. Ore. 2002) (discussing how cumulative environmental effects must be factored into an EIS); *Marquis-Brong*, 259 F. Supp. 2d at 1123–25 (holding that NEPA requires an EIS that considers post-fire cumulative environmental impacts for logging of post-fire areas). See also *Blackwood*, 161 F.3d at 1213 (noting that failure to consider the Beschta report “lends weight to [the] claim that the Forest Service did not take the requisite ‘hard look’ at the environmental consequences of post-fire logging”); *Earth Island Institute v. United States Forest Serv.*, 351 F.3d 1291, 1306–08 (9th Cir. 2003) (finding that the agency had not adequately analyzed cumulative impacts within the individual EISs).

¹⁸⁷ *Marquis-Brong*, 259 F. Supp. 2d at 1124; *Forsgren*, 184 F. Supp. 2d at 1069–70; *Bosworth*, 199 F. Supp. 2d at 985–87.

¹⁸⁸ *Marquis-Brong*, 259 F. Supp. 2d at 1126; *Forsgren*, 184 F. Supp.2d at 1066–68; *Bosworth*,

scientific study that questioned the efficacy of logging severely burned areas.¹⁸⁹ The courts have also found NEPA violations when agency officials did not consider an adequate range of post-fire treatment alternatives, particularly the failure to include a “no-logging, rehabilitation only” alternative in the environmental analysis.¹⁹⁰ To remedy these NEPA violations, the courts have regularly granted injunctive relief, notwithstanding the argument that delay may render the projects economically infeasible and could place nearby communities at an increased risk from future fires.¹⁹¹

Thus far, comparatively little fire-related litigation has involved challenges to pre-fire hazardous fuel reduction projects or suppression policy decisions. In the few reported cases involving challenges solely to hazardous fuel reduction project proposals, the courts have usually sustained agency decisions against NEPA, NFMA, and other claims, finding that the proposals have been adequately analyzed and documented.¹⁹² But when the agencies have sought to justify post-fire salvage logging projects on hazardous fuel removal or disease prevention grounds, the courts have not been as receptive.¹⁹³ In the *Bosworth* litigation, for example, the court found that the Forest Service failed to examine the cumulative, long-term environmental effects of maintaining indefinitely proposed fuel management zones.¹⁹⁴ When the agencies undertake prescribed burning projects to

199 F. Supp. 2d at 979–81; *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Zielinski*, 187 F. Supp. 2d 1263, 1270–71 (D. Or. 2002). *But see* *Earth Island Inst.*, 351 F.3d at 1300–02 (rejecting an improper scientific methodology claim).

¹⁸⁹ Robert L. Beschta et al., *Wildfire and Salvage Logging: Recommendations for Ecologically Sound Post-Fire Salvage Management and Other Post-Fire Treatments on Federal Lands in the West* (1995), <http://www.saveamericasforests.org/congress/Fire/Beschta-report.htm> (last visited Apr. 23, 2006). The Beschta Report was prepared by a group of university and agency scientists and, as described by the Ninth Circuit Court of Appeals, it “recommends minimal intrusion into severely burned areas and no salvage logging in sensitive areas including severely burned areas and erosive sites.” *Blackwood*, 161 F.3d at 1213. *See also* Fink, *supra* note 9, at 207–09 (describing the Forest Service’s controversial treatment of the Beschta Report in NEPA analyses of post-fire logging proposals).

¹⁹⁰ *Marquis-Brong*, 259 F. Supp. 2d at 1124; *Zielinski*, 187 F. Supp. 2d at 1272; *see also* *Klamath Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, No. Civ. 03-3006-CO, 2004 WL 1289704, at *18 (D. Or. Jan. 12, 2004) (finding BLM’s EA for the Pickett Snake Project invalid because it did not consider a reasonable range of alternatives, including deferred logging). *But see* *Oregon Natural Res. Council Fund v. Goodman*, 382 F. Supp. 2d 1201, 1205 (D. Or. 2004) (finding consideration of a no action alternative sufficient).

¹⁹¹ *See, e.g., Bosworth*, 199 F. Supp. 2d at 992–93; *Forsgren*, 184 F. Supp. 2d at 1070–71; *Zielinski*, 187 F. Supp. 2d at 1272. *But see* *Goodman*, 382 F. Supp. 2d at 1206 (denying preliminary injunctive relief in part for economic hardship reasons).

¹⁹² *See, e.g., League of Wilderness Defenders v. United States Forest Serv.*, No. CV 03-1357-PA, 2004 WL 1068788, at *5 (D. Or. May 12, 2004); *Blue Mountains Biodiversity Project v. Pence*, 22 F. Supp. 2d 1136, 1145 (D. Or. 1998). *But see* *Klamath Siskiyou Wildlands Ctr. v. BLM*, 2004 WL 1289704, at *19 (finding violations of FLPMA and NEPA); *Idaho Conservation League v. Bennett*, No. CV 04-447-S-MHW, 2005 WL 1041396, at *14 (D. Idaho Apr. 29, 2005) (finding insufficient NEPA analysis of a stewardship contract permitting harvest of ten million board feet of timber from Forest Service and BLM lands).

¹⁹³ *See, e.g., Bosworth*, 199 F. Supp. 2d at 984–86; *Forsgren*, 184 F. Supp. 2d at 1070; *Zielinski*, 187 F. Supp. 2d at 1272.

¹⁹⁴ *Bosworth*, 199 F. Supp. 2d at 984–86. More specifically, the Forest Service observed that

remove potentially hazardous fuel, at least one court has found that proper NEPA documentation must accompany such decisions.¹⁹⁵ And when drafting fire management plans for individual forests, the Forest Service must prepare NEPA documents analyzing new fire suppression policies not previously disclosed or analyzed in the forest planning process.¹⁹⁶ The lesson is clear: NEPA and other legal challenges may lie at any juncture in the fire management process, including the initial planning or fuel removal project stages.

Frustrated by the growing number of administrative appeals and court decisions imposing time-intensive environmental analysis obligations on its managers, the Forest Service concluded in 2002 that it faced a “process predicament” of near-crisis proportions.¹⁹⁷ Rather than deploying its limited resources in the field on needed projects, the agency viewed itself as entangled in procedural knots, endlessly amending forest plans, fine tuning NEPA documents, and undertaking unnecessary ESA consultations—all in an effort to “bullet proof” its resource management decisions. The Forest Service pointedly linked these “process” problems to its forest health and fire control agenda, arguing that inordinate delays prevented it from addressing an impending ecological crisis and from safeguarding at-risk communities from catastrophic fires.¹⁹⁸ The Western Governors’ Association likewise identified procedural roadblocks as a troublesome impediment to mounting an effective response to forest health and fire-related concerns.¹⁹⁹ At the same time, Congress launched an investigation into whether administrative appeals were unnecessarily delaying forest health-related projects.²⁰⁰ The devastating 2002 fire season provided the necessary political

it would be necessary to remove brush and canopy cover in proposed fuel breaks at 2–10 year intervals, but did not state whether it would be using salvage logging, brush removal, herbicide spraying, or other techniques to accomplish this, and did not analyze the environmental impacts that might accompany these strategies.

¹⁹⁵ *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998) (rejecting use of a NEPA categorical exclusion and requiring preparation of NEPA documents before the Forest Service undertakes prescribed burning in a designated research natural area).

¹⁹⁶ *California v. United States Forest Serv.*, No. C 04-02588 CRB, 2005 WL 1630020, at *10 (N.D. Cal. July 11, 2005); *Environmental Prot. Info. Ctr. v. United States Forest Serv.*, No. C-02-2708 JCS, 2003 WL 22283969, at *13 (N.D. Cal. Sept. 5, 2003). *But cf. Idaho Sporting Cong. v. United States Forest Serv.*, 31 F. Supp. 2d 1236, 1243 (D. Idaho 1996) (refusing to require post-fire supplemental NEPA documentation for a forest plan, even though on-the-ground conditions had changed significantly since the plan was originally prepared).

¹⁹⁷ See PROCESS PREDICAMENT, *supra* note 10, at 7.

¹⁹⁸ *Id.* at 35–38; HEALTHY FORESTS INITIATIVE, *supra* note 8, at 14.

¹⁹⁹ See e.g., WESTERN GOVERNORS’ ASS’N, POLICY RESOLUTION 03-18: IMPROVING FOREST AND RANGELAND ECOSYSTEM HEALTH IN THE WEST (2003); WESTERN GOVERNORS’ ASS’N, POLICY RESOLUTION 02-10: FUTURE MANAGEMENT OF THE NATIONAL FOREST AND PUBLIC LANDS (2002); *National Fire Plan: Hearing Before the Subcommittee on Public Lands & Forests of the Senate Committee on Energy & Natural Resources*, 107th Cong. 39 (2001) (statement of James E. Hubbard, State Forester of Colo., on behalf of the Western Governors Ass’n), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:77952.pdf.

²⁰⁰ U.S. GEN. ACCOUNTABILITY OFFICE, FOREST SERV.: SCOPE AND METHODOLOGY USED TO DETERMINE NUMBER OF APPEALS AND LEGAL CHALLENGES TO FISCAL YEAR 2001 FUEL REDUCTION PROJECTS (2002); U.S. GEN. ACCOUNTABILITY OFFICE, FOREST SERV.: INFORMATION ON APPEALS AND LITIGATION INVOLVING FUELS REDUCTION ACTIVITIES (2003).

impetus for the Bush Administration to adopt major NEPA, ESA, and administrative appeal reforms—all in the name of expediting fire-related fuel reduction and salvage logging projects.

The result of these administrative appeal reforms is known as the Healthy Forests Initiative,²⁰¹ which has reshaped the environmental documentation and administrative review opportunities for fire-related management decisions on the multiple-use public lands. To reduce NEPA compliance concerns, the Healthy Forests Initiative authorizes the use of categorical exclusions to eliminate environmental analysis obligations for certain project-level decisions.²⁰² Prescribed fire fuel reduction projects that are less than 4500 acres in size can be categorically excluded from any NEPA analysis; mechanical thinning fuel removal projects can be excluded if they cover less than 1000 acres; and post-fire rehabilitation (or salvage) projects less than 4200 acres in size are also excludable.²⁰³ Some limitations apply, however: hazardous fuel reduction projects are prohibited in wilderness areas;²⁰⁴ they must be consistent with relevant resource management plans; they can not entail permanent new road construction or herbicide use; and they must involve collaborative planning.²⁰⁵ Adoption of these new categorical exclusions through rulemaking does not require an EIS or other NEPA compliance document,²⁰⁶ though the individual timber cutting exclusions, either overall or as applied, may have a significant effect on the environment and thus require NEPA compliance.²⁰⁷ When the categorical exclusions are unavailable for individual projects, agency officials are directed to utilize a new CEQ-sanctioned EA preparation process that is designed to reduce analysis and paperwork requirements.²⁰⁸

²⁰¹ See HEALTHY FORESTS INITIATIVE, *supra* note 8; HEALTHY FORESTS INTERIM FIELD GUIDE, *supra* note 8, at 4–14; Healthy Forests Initiative Administrative Actions, http://www.healthyforests.gov/initiative/admin_actions.html (last visited Apr. 22, 2006). See generally JACQUELINE VAUGHN & HANNA J. CORTNER, GEORGE W. BUSH'S HEALTHY FORESTS: REFRAMING THE ENVIRONMENTAL DEBATE (2005); Jesse B. Davis, *The Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management*, 34 ENVTL. L. 1209 (2004).

²⁰² Dept. of Agriculture, Forest Serv., and Dept. of the Interior, National Environmental Policy Act Determination Needed for Fire Management Activities; Categorical Exclusions; Notice, 68 Fed. Reg. 33,814 (June 5, 2003). According to the Council of Environmental Quality's NEPA regulations, federal agencies may employ "categorical exclusions" for "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect by a Federal agency . . . and for which, therefore, neither an environmental assessment nor an [EIS] is required." 40 C.F.R. § 1508.4 (2004).

²⁰³ 68 Fed. Reg. at 33,824.

²⁰⁴ *Id.* The policy also excludes the use of NEPA categorical exclusions for hazardous fuel reduction projects that might "impair the suitability of wilderness study areas for wilderness designation." *Id.*

²⁰⁵ Post-fire rehabilitation projects are subject to different limitations: Such projects must be consistent with the relevant land or resource management plan, cannot include the use of herbicides or the construction of new roads, and must be completed within three years. *Id.*

²⁰⁶ *Heartwood, Inc. v. United States Forest Serv.*, 230 F.3d 947, 955 (7th Cir. 2000).

²⁰⁷ *Heartwood, Inc. v. United States Forest Serv.*, 73 F. Supp. 2d 962, 974–77 (S.D. Ill. 1999); *cf. Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998) (invalidating the Forest Service's use of a categorical exclusion for a prescribed burn to remove brush); see also Fink, *supra* note 9, at 204.

²⁰⁸ See HEALTHY FORESTS INTERIM FIELD GUIDE, *supra* note 8, at 9; Council on Env'tl. Quality,

The net effect is a determined effort to minimize NEPA environmental analysis obligations and thus eliminate NEPA-based administrative appeals as well as judicial review of fire-related project decisions.

The Healthy Forests Initiative also identified ESA consultation requirements as another recurrent bottleneck. Section 7 of the ESA requires federal agencies to consult formally with the FWS whenever a proposed action might “jeopardize the continued existence of any [federally listed species] or result in the destruction or adverse modification of habitat of such species.”²⁰⁹ By regulation, the action agency was directed to consult informally with the FWS to seek a “not likely to adversely affect” determination,²¹⁰ which would obviate the need for a more formal Section 7 consultation and thus enable the proposed activity to proceed expeditiously.²¹¹ The Forest Service, however, has long chafed under these multi-layered consultation requirements and sought greater flexibility to make its own threshold biological determinations.²¹² In response, the Bush Administration revised the governing ESA regulations to enable the public land agencies to make their own “adverse effect” determinations and thus circumvent this informal consultation requirement.²¹³ In altering longstanding ESA consultation procedures and vesting the Forest Service with additional management authority, the revisions curtail the level of regulatory oversight for endangered species, which should help expedite forest thinning efforts but may come at the expense of other resource values.

Further, the Healthy Forests Initiative has reduced administrative appeal opportunities on the grounds that such challenges were slowing federal fire control efforts. Acting under the Appeals Reform Act of 1992 (ARA),²¹⁴ the Forest Service issued revised regulations limiting who may

Guidance for Environmental Assessments of Forest Health Projects (Dec. 9, 2002) (on file with author).

²⁰⁹ Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536(a)(2) (2000). For two early cases illuminating the power of the Endangered Species Act and the breadth of the consultation requirement, see *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

²¹⁰ 50 C.F.R. § 402.13(a) (2004).

²¹¹ *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995) (describing the circumstances necessary to trigger formal consultation requirements).

²¹² See PROCESS PREDICAMENT, *supra* note 10, at 17–18 (describing tendency of regulatory agencies to oppose actions with short-term risks but potentially beneficial long-term ecological consequences); Jack Ward Thomas, *Stability and Predictability in Federal Forest Management: Some Thoughts from the Chief*, 17 PUB. LAND & RESOURCES L. REV. 9, 13, 18–19 (1996) (asserting that regulatory agencies tend to second guess more qualified land management agencies).

²¹³ 50 C.F.R. pt. 402 (2005); Dep’t of the Interior Fish and Wildlife Serv. and Dep’t of Commerce, Nat’l Oceanic and Atmospheric Admin., Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. 68,254 (Dec. 8, 2003). To claim this self-consultation authority for themselves, the agencies must enter into an alternative conservation agreement with the FWS and initiate a training program for their own biologists. 50 C.F.R. § 402.33 (2005).

²¹⁴ Forest Service Decision Making and Appeals Reform Act of 1992, Pub. L. No. 102-381, 106 Stat. 1419 (1992) (codified at 16 U.S.C. § 1612 note (1999)); see *supra* notes 178–80 and accompanying text.

appeal project decisions to those who submit “substantive written or oral comments” on the proposal.²¹⁵ The new regulations also alter the Forest Service’s “stay” policy pending appeal, allowing it to implement immediately any project decision that involves an “emergency situation,” which is defined broadly to include concerns over human safety, natural resource, or loss of economic value concerns.²¹⁶ And the regulations prohibit administrative review of NEPA categorical exclusions,²¹⁷ which were simultaneously expanded to cover an array of fire project-related decisions.²¹⁸ In addition, the regulations eliminate administrative appeal opportunities entirely when either the Secretary of Agriculture or the Under Secretary issues a final project decision,²¹⁹ despite an earlier federal court ruling that a similar bypass effort violated the ARA.²²⁰ At the same time, the BLM adopted similar revisions to its administrative appeal rules, both narrowing standing requirements and rendering pre- and post-fire management decisions immediately effective, contrary to its traditional automatic stay policy.²²¹ By limiting potential administrative remedies, however, these reforms may actually increase the federal judiciary’s role in ensuring compliance with the remaining environmental laws.

Indeed, the courts have been confronted with an array of cases challenging the validity of the Bush Administration’s Healthy Forests Initiative reforms. In *Earth Island Institute v. Pengilly*,²²² a California federal district court ruled that several provisions in the revised administrative appeal rules violate the ARA and enjoined their implementation.²²³ Most notably, the court found that the Forest Service could not use its new NEPA categorical exclusions to exempt project decisions from public comment

²¹⁵ 36 C.F.R. § 215.12(a); see Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. 33,581, 33,582 (June 4, 2003) (to be codified at 36 C.F.R. pt. 215) (revising the notice, comment, and appeals procedures for projects and activities on Forest Service lands); see also 36 C.F.R. § 215.14(b) (2004) (setting forth content requirements for an appeal).

²¹⁶ 36 C.F.R. § 215.10 (2004). An “emergency situation” is defined as involving “relieving hazards threatening human health and safety or natural resources on [national forest] or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision is delayed.” 36 C.F.R. § 215.2 (2004). The regulation empowers the Forest Service Chief or Associate Chief to declare an emergency situation, and these officials may also delegate this power to the Deputy Chief or Regional Foresters.

²¹⁷ 36 C.F.R. §§ 215.11, 215.12(f) (2004).

²¹⁸ See *supra* notes 202–07 and accompanying text.

²¹⁹ 36 C.F.R. § 215.20 (2004).

²²⁰ See *Wilderness Soc’y v. Rey*, 180 F. Supp. 2d 1141, 1150 (D. Mont. 2002) (holding that “the Forest Service, acting through the Undersecretary of the Department of Agriculture, [does not] have the authority to circumvent an act of Congress that requires administrative appeals of Forest Service decisions about proposed projects on the National Forest.”).

²²¹ 43 C.F.R. § 4.410(b) (standing requirements), § 5003.1 (new “stay” provisions) (2004); see Special Rules Subject to Public Land Hearings and Appeals, 67 Fed. Reg. 77,011 (Dec. 16, 2002).

²²² 376 F. Supp. 2d 994 (E.D. Cal. 2005).

²²³ Other lawsuits challenging the new administrative appeal rules as violating the Appeals Reform Act include *Wilderness Soc’y v. Rey*, No. CV 03-119-M-DWM (D. Mont., July 29, 2003), and *Forest Guardians v. United States Forest Serv.*, No. CIV-00-490 (D.N.M. April 14, 2003).

and administrative appeal,²²⁴ effectively requiring the agency to prepare an EIS or EA on most prescribed burning, thinning, and salvage logging projects. Several courts have rejected challenges to the “emergency situation” exception in the revised administrative appeal regulations,²²⁵ finding it consistent with the ARA and determining NEPA compliance was not required during the rulemaking process.²²⁶ Other courts have ruled that the Forest Service, before promulgating its new NEPA categorical exclusion rule for salvage logging projects, was not required to prepare an EIS or to undertake any other NEPA analysis.²²⁷ Another yet undecided case challenges the ESA section 7 informal, self-consultation reforms, contending that they violate unambiguous congressional intent and are not justified by the administrative record.²²⁸ With the *Earth Island* decision on appeal, it remains to be seen whether the Healthy Forests Initiative reforms will survive intact and how the courts will handle the second generation of “as-applied” challenges involving specific, fire-related project decisions.

Additional fire-related litigation persists. Two high profile cases—perhaps best described as action-forcing litigation—have sought to compel the public land agencies to reconsider basic fire management policies. In one case involving fire suppression strategy, the Forest Service Employees for Environmental Ethics (FSEEE) sued the agency for failing to undertake a

²²⁴ *Pengilly*, 376 F. Supp. 2d at 1004–05. In addition, the court ruled that the Forest Service could not avoid the ARA administrative appeals process by having the Secretary or Undersecretary of Agriculture sign project decisions, *id.* at 1005–06, nor could the Forest Service Chief delegate to the Deputy Chief or Regional Foresters the authority to determine whether an “emergency situation” existed to allow the agency to skirt the appeals process. *Id.* at 1009. For information about the decision and its aftermath, see E & E Publishing, LLC, *Forest Service Forced to Review Timber Projects that Bypassed NEPA*, LAND LETTER, Sept. 29, 2005, available at <http://www.eenews.net/Landletter/2005/09/29/#12>; *Court Provides a Little Relief for Minor, Not Major CEs*, PUB. LANDS NEWS, Oct. 28, 2005, at 5.

²²⁵ An “emergency situation” is defined as “a situation on National Forest System (NFS) lands for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed.” 36 C.F.R. § 215.2 (2005). Environmental groups objected unsuccessfully to the “loss of economic value” provision, fearing that the Forest Service could interpret and use it to convert salvage projects into commercial timber sales. See, e.g., *Pengilly*, 376 F. Supp. at 1008.

²²⁶ *Pengilly*, 376 F. Supp. 2d at 1008–11; *League of Wilderness Defenders v. United States Forest Serv.*, 2004 WL 2642705 (D. Or. Nov. 19, 2004); *Siskiyou Reg'l Educ. Project v. Goodman*, 2004 WL 1737738 at * 2–4 (D. Or. Aug. 3, 2004); *Oregon Natural Res. Council Fund v. Goodman*, 382 F. Supp. 2d 1201 (D. Or. 2004); see *supra* note 216 and accompanying text for additional discussion of the “emergency situation” exception.

²²⁷ See, e.g., *Sierra Club v. Bosworth*, 2005 WL 2281074 (E.D. Cal. Sept. 16, 2005); *Forest Serv. Employees for Env'tl. Ethics v. United States Forest Serv.*, 2004 WL 2847906 (D. Or. Dec. 9, 2004); *League of Wilderness Defenders v. Smith*, 2004 WL 2847877 (D. Or. 2004); see also *Colorado Wild v. United States Forest Serv.*, 435 F.3d 1204 (10th Cir. 2006) (upholding the Forest Service's 250 acre salvage logging project categorical exclusion). But see *Wildlaw v. United States Forest Serv.*, Case No. CV-03-W-1082-N (M.D. Alaska Filed June 30, 2003) (pending case arguing that the Forest Service was obligated to undertake NEPA analysis on the new NEPA categorical exclusions, which include 1000 acre thinning and salvage projects, and on the new administrative appeal rules, which exempt all categorically excluded projects from review).

²²⁸ *Defenders of Wildlife v. Norton*, 89 App'x 273 (D.D.C. 2004).

NEPA analysis and ESA consultation on its practice of indiscriminately spraying chemical fire retardants across the landscape to contain wildfires.²²⁹ A Montana federal district court has agreed with FSEEE and ordered compliance with both statutes,²³⁰ which should lead to an open public review of federal suppression fire policy—something that has not occurred before at the national level despite significant policy changes over the past few decades.

In another case involving the Black Hills National Forest, the Governor of South Dakota has secured a court order to expedite the harvesting of dead trees to reduce the fire danger. The court found the Forest Service in violation of “a clear [organic act] duty to protect the [forest] ‘against destruction by fire and depredations upon the public forests and national forests.’”²³¹ But after the Supreme Court’s recent *SUWA* ruling,²³² the court probably lacks jurisdiction to compel such agency action, given the open-ended nature of the statutory language. Thus, despite the Bush Administration’s efforts to reduce fire-related litigation, assorted fire policy and management issues continue to bedevil the agencies and to generate new litigation.

²²⁹ Complaint, *Forest Serv. Employees for Env'tl. Ethics v. United States Forest Serv.*, No. CV 03-165-M-DWM (D. Mont. Oct. 14, 2003). The complaint, alleging that the use of chemical retardants in fighting forest fires has significant environmental impacts and could jeopardize ESA-listed species, asserted that the Forest Service should prepare a nation-wide EIS to ensure that the agency had analyzed the impact of these retardants, considered alternative fire fighting strategies, and allowed the public to participate in the decision process. *See generally* Sorensen et al., *supra* note 78 at 38–39 (describing the ecological consequences of fire retardant use near streams and rivers).

²³⁰ *Forest Serv. Employees for Env'tl. Ethics v. United States Forest Serv.*, 397 F. Supp. 2d 1241 (D. Mont. 2005). The court rejected the Forest Service’s “no agency action” argument, finding that the Forest Service had several times begun to prepare a NEPA analysis and that the FWS had urged it to initiate an ESA consultation. *Id.* at 1248–52. The court also found it would be impractical for the agency to undertake NEPA or ESA consultations on each fire incident, which meant that legal compliance must occur at the national programmatic level. Further, the court concluded that “the decision not to involve NEPA appears to be political decision.” *Id.* at 1255. For relief, the court left the question of whether to prepare an EIS or EA to the agency, and ordered it to initiate an ESA consultation. The court did not enjoin the use of chemical retardants pending compliance. *Id.* at 1257.

²³¹ *Rounds v. United States Forest Serv.*, 301 F. Supp. 2d 1287 (D. Wyo. 2004) (citing 16 U.S.C. § 551 (2000)); *see supra* notes 102–10 and accompanying text (discussing this Organic Administration Act provision). However, the D.C. Circuit rejected earlier litigation seeking to increase logging in the Kootenai National Forest to protect against potentially destructive wildfires. *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1229 (D.C. Cir. 1996). The court relied upon the Forest Service’s broad discretionary management authority and local endangered species concerns. *Id.* at 1235.

²³² *SUWA*, 542 U.S. 55 (2004). In *SUWA*, the Court ruled that an environmental group could not invoke section 706(1) of the Administrative Procedure Act (APA) to compel the Bureau of Land Management to take action against off road vehicles that were allegedly damaging wilderness study area lands, finding that a general statutory “nonimpairment” standard still left the agency with considerable management discretion and that monitoring provisions in the land management plan did not create legally binding commitments. The *Rounds* court relied on the same APA provision to order the Forest Service to take remedial action on the dying trees, and section 553 of the Organic Administration Act does not appear to establish any clearer management standard than was rejected in the *SUWA* ruling.

Put simply, the Healthy Forests Initiative reforms represent a targeted assault on the basic legal framework governing forest management in the name of efficiency and safety. But that is only part of the story, which also involves the Forest Service's revision of the NFMA forest planning rules.²³³ Originally promulgated in 1979 and then twice revised,²³⁴ the NFMA planning rules not only established biodiversity and other substantive environmental standards governing forest management, but also injected rigorous NEPA analysis requirements into the planning process.²³⁵ According to the courts, the rules created enforceable legal standards and procedures that provided a basis for judicial review of agency planning and project decisions.²³⁶ The Bush Administration's newly revised planning rules, however, eliminate both substantive biodiversity standards²³⁷ and NEPA documentation requirements, substituting a new, ill-defined Environmental Management System analysis provision along with new public involvement and monitoring obligations.²³⁸ It is hard to see these reforms as anything other than an overt effort to significantly reduce judicial oversight opportunities by removing substantive legal mandates from forest management and eliminating NEPA-based procedural requirements from the planning process. While the new public involvement and monitoring provisions may interject additional transparency into forest management, they fall well short of ensuring meaningful accountability or guaranteeing that agency decision makers have weighed the relevant environmental and other values against

²³³ 36 C.F.R. §§ 219.1–219.16 (2005); National Forest System Land Management Planning, 70 Fed. Reg. 1023 (Jan. 5, 2005). See generally Hoberg, *supra* note 136 (discussing the Forest Service's planning rule revision efforts).

²³⁴ For an historical overview of the Forest Service's NFMA planning rules, see National Forest System Land and Resource Management Planning, 67 Fed. Reg. 72,770, 72,772 (Dec. 6, 2002); Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 965–68 (9th Cir. 2003).

²³⁵ See generally Wilkinson and Anderson, *supra* note 175; Charles F. Wilkinson, *A Case Study in the Intersection of Law and Science: The 1999 Report of the Committee of Scientists*, 42 ARIZ. L. REV. 307 (2000).

²³⁶ See generally, Utah Envtl. Cong. v. Bosworth, 372 F.3d 1219, 1224–25 (10th Cir. 2004); Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1067–68 (9th Cir. 2002); Sierra Club v. Martin, 168 F.3d 1 (11th Cir. 1999); Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991); Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1484 (W.D. Wash. 1992), *aff'd sub nom.* Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993).

²³⁷ Whereas the 1982 NFMA planning rules required the Forest Service "to maintain viable populations of existing native and desired non-native vertebrate species in the planning area," 36 C.F.R. § 219.19 (1999), the 2005 revision only states that the "overall goal of [ecological] sustainability is to provide a framework to contribute to sustaining native ecological systems by providing ecological conditions to support diversity of native plant and animal species in the plan area." 36 C.F.R. § 219.10(b) (2005). The courts had interpreted the original viable population rule to impose substantive limitations on the agency's timber and other management decisions. See, e.g., Utah Envtl. Cong. v. Bosworth, 372 F.3d 1219 (10th Cir. 2004); Inland Empire Pub. Lands Council, v. United States Forest Serv., 88 F.3d 754 (9th Cir. 1996). For a comparison and analysis of the rules, see Keiter, *Ecological Concepts*, *supra* note 137, at 945–52.

²³⁸ 36 C.F.R. § 219.5 (Environmental Management System), § 219.9 (public involvement), § 219.6 (monitoring). Cf. Keiter, *Ecological Concepts*, *supra* note 137 (analyzing several of the new NFMA planning rule provisions in relation to other agencies' planning standards and procedures).

one another. Put in proper perspective, the healthy forests reforms are part of a larger effort to de-legalize forest management and to return the agency to an earlier era when discretion was the coin of the realm.

C. Healthy Forests Restoration Act of 2003

The Healthy Forests Restoration Act of 2003 (HFRA)²³⁹ represents the first serious congressional effort to articulate a federal fire policy for the public lands. Adopted in the aftermath of three extraordinarily destructive fire seasons, Congress confronted mounting political pressures to reduce the risk of catastrophic fire near the ever-growing wildland-urban interface zones. The resulting HFRA brought various political factions together in compromise legislation that incorporated several Bush Administration-supported legal reforms, yet still minimized intrusions into environmentally sensitive areas and retained important legal safeguards. The statute tracks modern legislative trends with remarkably detailed provisions establishing both substantive and procedural standards governing project planning and decisions. But, though hailed as the first important federal forest legislation in several decades, the bill's actual impact is rather modest—hardly a major overhaul of the laws and principles governing forest management policy. The HFRA, nonetheless, may point the way toward further legislative changes that could significantly reshape public land policy.

Judging from the HFRA's declared purposes, Congress perceives fire primarily as a political rather than ecological matter. The statute is designed "to reduce wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative process of planning, prioritizing, and implementing hazardous fire reduction projects,"²⁴⁰ and to "protect, restore, and enhance forest ecosystem components," including endangered species, biodiversity, and carbon sequestration.²⁴¹ Significantly, the HFRA does not acknowledge that fire constitutes an important ecological process that belongs on the landscape, and only once mentions prescribed fire as an acceptable strategy for addressing wildfire risks on wildland-urban interface lands or elsewhere.²⁴² The overriding sense is that the agencies must undertake aggressive management actions to reduce the likelihood of catastrophic fires.²⁴³

²³⁹ Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887 (codified at 16 U.S.C.A. §§ 6501–6591 (West, Supp. 2004)).

²⁴⁰ *Id.* § 2(1); *see also id.* § 101(1) (codified at 16 U.S.C.A. § 6511(1)) (defining an "at risk community").

²⁴¹ *Id.* § 101(6) (codified at 16 U.S.C.A. § 6501(6)). Other statutory purposes include: improving "the commercial value of forest biomass"; protecting "watersheds and address threats to forest and rangeland health"; and addressing "the impact of insect and disease infestations . . . on forest and rangeland health." *Id.* § 2(2)–(5) (codified at 16 U.S.C.A. §§ 6501(2)–(5)).

²⁴² *Id.* § 102(f)(1)(A) (codified at 16 U.S.C.A. § 6512(f)(1)(A)) (listing prescribed fire among the strategies that may be used to modify fire behavior).

²⁴³ This point is further confirmed by the HFRA's utilization of three existing federal fire condition class categories to prioritize federal lands for fuel reduction purposes based upon the risk of a catastrophic fire. *Id.* §§ 102(a)(2)–(3) (codified at 16 U.S.C.A. §§ 6512(a)(2)–(3)).

The HFRA's primary wildfire control strategy is the hazardous fuel reduction project. The statute affirmatively directs the agencies to implement hazardous fuel reduction projects,²⁴⁴ which will generally involve tree and brush removal. The HFRA prioritizes hazardous fuel projects on high-risk public lands in wildland-urban interface areas, proximate to municipal water supplies, or threatened by diseases, insects, or other natural fire risks, and endangered species habitat areas.²⁴⁵ In fact, at least fifty percent of the available funds must be allocated to wildland-urban interface projects.²⁴⁶ It excludes wilderness areas, wilderness study areas, and other protected federal lands,²⁴⁷ while limiting tree thinning in old growth stands by requiring the agencies to "fully maintain, or contribute toward the restoration of, the structure and composition of old growth stands."²⁴⁸ The statute further admonishes the agencies to design projects that "focus[] largely on small diameter trees" and "maximize[] the retention of large trees."²⁴⁹ It also limits the agencies to implementing hazardous fuel reduction projects on no more than twenty-million acres of public land.²⁵⁰ To enlist the private sector in these efforts, the statute creates a biomass grant program to help develop commercial facilities to utilize the removed forest materials.²⁵¹

Congress incorporated two increasingly important public land management principles into the statute—collaborative planning and monitoring, both of which add transparency to agency decision making processes. The HFRA instructs the agencies to "consider [hazardous fuel reduction project] recommendations . . . made by at-risk communities [with]

Condition class 3, for example, refers to federal lands where the fire regimes have been "significantly altered from historical ranges" and where there is "a high risk of losing key ecosystem components from fire." *Id.* § 101(5) (codified at 16 U.S.C.A. § 6511(5)).

²⁴⁴ *Id.* § 102(a) (codified at 16 U.S.C.A. § 6512(a)). This provision also provides that hazardous fuel reduction projects must be consistent with the Implementation Plan provided for in U.S. DEP'T OF THE INTERIOR, U.S. DEP'T OF AGRIC. & W. GOVERNORS' ASS'N, A COLLABORATIVE APPROACH FOR REDUCING WILDLAND FIRE RISKS TO COMMUNITIES AND THE ENVIRONMENT: TEN YEAR COMPREHENSIVE STRATEGY IMPLEMENTATION PLAN (2002), *available at* <http://www.fireplan.gov/reports/11-23-en.pdf>, thus linking HFRA projects to existing fire management and planning efforts; *see also supra* note 58 and accompanying text.

²⁴⁵ Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, § 102(a)(1)–(5), 117 Stat. 188 (codified at 16 U.S.C.A. 6512(a)(1)–(5) (West Supp. 2004)); *see also id.* at § 103(a) (codified at 16 U.S.C.A. § 6513(a)) (prioritizing "projects that provide for the protection of at-risk communities or watersheds or that implement community wildfire protection plans").

²⁴⁶ *Id.* § 103(d)(1)(A) (codified at 16 U.S.C.A. § 6513(d)(1)(a)).

²⁴⁷ *Id.* § 102(d) (codified at 16 U.S.C.A. § 6512(d)) (prohibiting hazardous fuel reduction projects from "a component of the National Wilderness Preservation System; [f]ederal land on which the removal of vegetation is prohibited or restricted . . . or a Wilderness Study Area").

²⁴⁸ *Id.* § 102(e)(2) (codified at 16 U.S.C.A. § 6512(e)(2)). The ultimate statutory goal for hazardous fuel reduction projects in forests with old growth conditions is to achieve pre-suppression old growth conditions, while "retaining the large trees contributing to old growth structure." *Id.*

²⁴⁹ *Id.* § 102(f)(1) (codified at 16 U.S.C.A. § 6512(f)(1)). But large tree protection efforts may not be allowed to undermine the statute's overall wildfire control goals. *Id.* § 102(f)(2).

²⁵⁰ *Id.* § 102(c) (codified at 16 U.S.C.A. § 6512(c)).

²⁵¹ *Id.* § 203 (codified at 16 U.S.C.A. § 6531). The available federal grant funds are intended to offset the costs involved in purchasing the necessary biomass for the facility. *Id.* § 203(a) (codified at 16 U.S.C.A. § 6531(a)).

community wildfire protection plans,²⁵² and also exempts community wildfire planning processes from sometimes onerous Federal Advisory Committee Act and NEPA requirements.²⁵³ Consistent with contemporary adaptive management notions, the statute establishes a detailed monitoring program, both to evaluate progress and, where necessary, to redesign fuel reduction projects.²⁵⁴ Like the nonbinding collaborative planning provisions, Congress chose not to establish prescriptive, legally enforceable monitoring requirements,²⁵⁵ plainly preferring a more flexible planning and monitoring format. Yet Congress also provided that hazardous fuel projects “shall be conducted consistent with the [relevant] resource management plan,” thus placing these projects in the larger agency planning context.²⁵⁶

Drawing upon controversial earlier statutory strategies used to facilitate logging on public lands,²⁵⁷ the HFRA significantly reduces legal compliance requirements and administrative appeal opportunities to expedite hazardous fuel reduction projects. Clearly convinced by complaints of legal paralysis, Congress altered NEPA environmental analysis requirements by reducing the number of alternatives agency planners must consider when preparing the requisite EIS or EA for a hazardous fuel reduction project. In general, agencies must only consider three alternatives (the proposed action, no action, and one alternative),²⁵⁸ but that is reduced to only two alternatives for projects in the priority wildland-urban interface

²⁵² *Id.* § 103(b)(1) (codified at 16 U.S.C.A. § 6513(b)(1)).

²⁵³ *Id.* § 103(b)(2)–(c) (codified at 16 U.S.C.A. §§ 6513(b)(2)–(c)). The Federal Advisory Committee Act (FACA) imposes rigorous notice, open meeting, reporting, and other procedural requirements on federal agencies whenever they consult with non-federal individuals or entities; violation of these requirements opens the agency to litigation and a potential injunction against utilizing any new information that has been gained. Fed. Advisory Comm. Act, 5 U.S.C. app. 2, §§ 1–10 (2000). See generally Allyson Barker et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. LAND RESOURCES & ENVTL. L. 67 (2003) (analyzing the legal authority of and limitations on collaborative groups in public land decision making); Sheila Lynch, *The Federal Advisory Committee Act: An Obstacle to Ecosystem Management by Federal Agencies?*, 71 WASH. L. REV. 431, 431 (1996) (presenting “an analytic framework for determining when FACA applies and recommend[ing] strategies for overcoming this perceived obstacle to ecosystem management”).

²⁵⁴ Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, § 102(g), 117 Stat. 188 (codified at 16 U.S.C.A. § 6512(g) (West Supp. 2004)). Adaptive management seeks to accommodate the experimental or contingent nature of natural resource management decision making through formal monitoring, reevaluation and adjustment processes that enable managers to readjust decisions to reflect changes in scientific knowledge as well as evolving public concerns. On the concept of adaptive management, see generally Bernard E. Bormann et al., *Adaptive Management*, in 2 ECOLOGICAL STEWARDSHIP: A COMMON REFERENCE FOR ECOSYSTEM MANAGEMENT 505 (Robert C. Szaro et al., eds., 1999); Gene Lessard, *An Adaptive Approach to Planning and Decision-Making*, 40 LANDSCAPE & URB. PLAN. 81 (1998).

²⁵⁵ Though the agencies are required to monitor the results of representative projects and to issue a five year report, few other specific requirements are attached to the monitoring provision, and multi-party monitoring is mandated only when “significant interest is expressed.” Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, § 102(g)(1), (5), 117 Stat. 188 (codified at 16 U.S.C.A. §§ 6512(g)(1), (5) (West Supp. 2004)).

²⁵⁶ *Id.* § 102(b) (codified at 16 U.S.C.A. § 6512(b)).

²⁵⁷ See *supra* notes 164–68 and accompanying text.

²⁵⁸ Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, § 104(c), 117 Stat. 188 (codified at 16 U.S.C.A. § 6514(c) (West Supp. 2004)).

zone.²⁵⁹ At the same time, Congress reaffirmed the role of public involvement in the NEPA process, incorporating specific notice, hearing, comment, and collaboration provisions into the statute.²⁶⁰ But to limit appeal opportunities, the HFRA establishes a “predecisional administrative review process” that “serves as the sole means” for seeking administrative review of national forest hazardous fuel reduction projects.²⁶¹ This process must occur before a final project approval decision is issued, and only persons who have participated in the public comment process may seek review.²⁶²

In the same vein, Congress also sought to reduce judicial review opportunities. To limit access to the courts, the HFRA contains an exhaustion provision requiring prior engagement in the administrative review process and another provision precluding new issues from being raised in court for the first time.²⁶³ Evidently believing that local federal courts will be more sympathetic to hazardous fuel reduction project proposals, venue for judicial review is limited to district courts where the project is located.²⁶⁴ Rejecting a House provision that would have required federal courts to decide HFRA cases in 100 days,²⁶⁵ Congress “encourages [federal courts] to expedite [these proceedings] to the maximum extent practicable.”²⁶⁶ Preliminary injunctions and appellate stays are limited to sixty days, though renewals may be issued.²⁶⁷ Moreover, the HFRA instructs federal courts, when weighing equitable injunctive claims, to “balance the impact to the ecosystem likely affected by the project of [t]he short- and long-term effects of undertaking the agency action[,] against the short- and long-term effects of not undertaking the agency action.”²⁶⁸ Notably, these judicial review provisions are limited to procedural admonishments, with

²⁵⁹ *Id.* § 104(d) (codified at 16 U.S.C.A. § 6514(d)). Moreover, if the hazardous fuel reduction project is located within 1.5 miles of an at-risk community, agency officials are only required to consider one alternative (the proposed action), *id.* § 104(d)(2) (codified at 16 U.S.C.A. § 6514(d)(2)); but if the at-risk community has developed a community wildfire protection plan, then agency officials must also consider that plan’s recommendations as an alternative. *Id.* § 104(d)(3) (codified at 16 U.S.C.A. § 6514(d)(3)).

²⁶⁰ *Id.* §§ 104(e)–(g) (codified at 16 U.S.C.A. §§ 6514(e)–(g)).

²⁶¹ *Id.* § 105(a) (codified at 16 U.S.C.A. § 6515(a)). Under this provision, the Forest Service was required to develop interim final regulations establishing the review process. These regulations are now found at 36 C.F.R. § 218.1–.15 (2004).

²⁶² Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, § 105(a)(2)–(3), 117 Stat. 188 (codified at 16 U.S.C.A. § 6515(a)(2)–(3) (West Supp. 2004)).

²⁶³ *Id.* § 105(c)(2) (codified at 16 U.S.C.A. § 6515(c)(2)). However, the HFRA also contains a futility exception that allows for judicial review absent engagement in the pre-decisional administrative review process when such involvement would be futile. *Id.* § 105(c)(3)(A) (codified at 16 U.S.C.A. § 6515(c)(3)(A)).

²⁶⁴ *Id.* § 106(a) (codified at 16 U.S.C.A. § 6516(a)).

²⁶⁵ See H.R. 1904, 108th Cong. § 106(c) (2003). Compare Healthy Forests Restoration Act of 2003, H.R. REP. NO. 108-386, at 14 (2003) (Conf. Rep.) (adopting the Senate version that did not contain a hard decision deadline in order to avoid constitutional separation of powers concerns).

²⁶⁶ Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, § 106(b), 117 Stat. 188 (codified at 16 U.S.C.A. § 6516(b) (West Supp. 2004)).

²⁶⁷ *Id.* §§ 106(c)(1), (2) (codified at 16 U.S.C.A. §§ 6516(c)(1),(2)).

²⁶⁸ *Id.* § 106(c)(3) (codified at 16 U.S.C.A. § 6516(c)(3)); see HEALTHY FORESTS INTERIM FIELD GUIDE, *supra* note 8, at 30–32 (outlining short- and long-term effects information that might be useful to courts in making this determination).

Congress careful not to intrude into the substantive judicial review responsibilities of the federal courts.

Closely related to the HFRA's hazardous fuel reduction provisions, Congress also established an expedited insect and disease control program to curtail forest damage from these natural forces. Finding that more than twenty-one million acres in western forests are at risk of insect damage, and thus heightened fire danger,²⁶⁹ Congress created an accelerated research program utilizing "applied silvicultural assessments," which encompass timber harvesting, thinning, and prescribed burning strategies to remove damaged trees.²⁷⁰ Much like the HFRA's hazardous fuel provisions, the applied silvicultural assessment program excludes wilderness areas and other protected federal lands,²⁷¹ but otherwise enables agency officials to categorically exclude from NEPA analysis requirements any such projects covering less than 1,000 acres.²⁷² Statutory peer review and public comment provisions afford some oversight of this program,²⁷³ and ESA consultation obligations also appear intact despite the statutory categorical exclusion language. But as with the HFRA's hazardous fuel provisions, these salvage-related provisions are principally designed to lift the yoke of legal accountability.

The HFRA may legitimately be seen as taking federal forest management policy toward restoration, but its revisions to legal requirements have potentially troubling implications. With its emphasis on restoration, Congress has reaffirmed that forest management entails more than commodity production and that ecological considerations must be factored into the management equation. The HFRA not only exempts various preserved lands from hazardous fuel projects, but it also contains detailed new prescriptive limitations on cutting ecologically important old growth components. But to achieve its restoration objectives, the HFRA plainly contemplates active forest management through hazardous fuel projects and applied silvicultural assessments—provisions that could accelerate timber cutting levels and rekindle smoldering antagonisms between the agencies and environmental groups. In addition, the HFRA revises NEPA compliance obligations and reduces administrative appeal avenues, thus eliminating important legal oversight opportunities in the name of decision making efficiency. The HFRA's more ecologically sensitive and prescriptive restoration provisions, in short, are counterbalanced by a renewed congressional commitment to timber cutting and to minimizing the law's role in this process.

On the surface, the HFRA's legal reforms effect only modest changes in the law governing hazardous fuel projects and other forest restoration

²⁶⁹ Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, § 401(a), 117 Stat. 188 (codified at 16 U.S.C.A. § 6551(a) (West Supp. 2004)).

²⁷⁰ *Id.* §§ 403–04 (codified at 16 U.S.C.A. §§ 6553, 6554).

²⁷¹ *Id.* § 404(b) (codified at 16 U.S.C.A. § 6554(b)). In addition, pesticide treatments are prohibited in municipal watershed areas. *Id.*

²⁷² *Id.* § 404(d) (codified at 16 U.S.C.A. § 6554(d)). For a discussion of the Healthy Forest Initiative's categorical exclusions, see *supra* notes 202–08 and accompanying text.

²⁷³ Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, § 404(b)(3)–(c), 177 Stat. 188 (codified at 16 U.S.C.A. § 6516(c)(3)).

activities. Granted, important NEPA alternatives analysis requirements are modified,²⁷⁴ but other NEPA obligations remain intact, including cumulative effects analysis requirements,²⁷⁵ full disclosure of pertinent scientific information,²⁷⁶ and various public involvement obligations.²⁷⁷ Congress also made no changes to ESA compliance requirements, which means the public land agencies must consult with the FWS whenever a hazardous fuel project may affect a listed species.²⁷⁸ And the NFMA's biodiversity conservation provision likewise applies to hazardous fuel project decisions,²⁷⁹ imposing additional species protection obligations on Forest Service officials. Other NFMA constraints, such as soil porosity and steep slope requirements, should also apply to project decisions by virtue of the binding nature of forest plans.²⁸⁰ Moreover, neither the administrative appeal nor judicial review provisions alter the substantive legal standards governing forest management, though they do expedite and limit legal challenge opportunities, which could effectively insulate some agency decisions from scrutiny.

The HFRA must also be understood in the broader context of the Bush Administration's NFMA planning rule revisions and other administrative reforms. As noted, when the Forest Service revised its planning regulations, it minimized the agency's biodiversity conservation legal obligations by

²⁷⁴ 40 C.F.R. § 1502.14 (2005). For a discussion of the important role of NEPA alternatives analysis, see the Ninth Circuit Court of Appeals' opinions in *Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988), and *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228–30 (9th Cir. 1988).

²⁷⁵ 40 C.F.R. § 1508.7, .25(c) (2005). See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214–16 (9th Cir. 1998) (discussing failure to adequately address cumulative effects); *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1378–80 (9th Cir. 1998) (discussing requirements of cumulative impact analysis); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990) (discussing failure to address cumulative impact of past, present, and future logging projects over entire area). The NEPA cumulative effects analysis requirements will require agency officials to address nearby HFRA-sanctioned projects too.

²⁷⁶ 40 C.F.R. § 1502.24 (2005); see *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (discussing the lack of scientific support for conclusions in an EA); *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 979–82 (N.D. Cal. 2002) (discussing NEPA's requirement that the EIS itself reference pertinent scientific sources).

²⁷⁷ See *Healthy Forests Restoration Act of 2003* § 104(e)–(g) (providing for public notice, public, collaboration and public comment on hazardous fuel reduction project proposals); see also 40 C.F.R. § 1506.6 (2005) (requiring public involvement in NEPA procedures). On implementation of the HFRA and the important role of public participation in project planning, see Kathie Durbin, *The War on Wildfire*, HIGH COUNTRY NEWS, Apr. 17, 2006, at 8.

²⁷⁸ 16 U.S.C. § 1536(a)(2) (2000). But see *supra* notes 209–13 and accompanying text (describing the Bush administration's modification of the ESA's section 7 informal consultation requirements).

²⁷⁹ *Healthy Forests Restoration Act of 2003*, H.R. REP. NO. 108-386, at 36 (2003) (stating that “[t]he Managers expect, in carrying out authorized fuel reduction projects under the expedited processes provided by the Act, the Secretary not to neglect obligations under the provisions of . . . the Forest and Rangeland Renewable Resources Planning Act of 1976 (16 U.S.C. 1604 (g)(3)(B)),” which is NFMA's biodiversity provision).

²⁸⁰ 16 U.S.C. § 1604(i); see also *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 990–92 (N.D. Cal. 2002). But see *SUWA*, 542 U.S. 55, 71–72 (2004) (holding that agencies cannot be compelled to follow commitments made in resource management plans).

eliminating the preexisting viable population maintenance requirements.²⁸¹ The overall impact of this and other planning rule revisions was to reduce environmentally-oriented prescriptive standards, and thus provide agency officials with greater management flexibility by eliminating judicial review opportunities. The related Healthy Forests Initiative reforms altered the ESA's section 7 consultation requirements, giving action agencies greater control over threshold jeopardy assessments,²⁸² which the agencies can now apply to HFRA projects. And though forest managers cannot avail themselves of the new NEPA categorical exclusions for HFRA projects,²⁸³ they can use the new environmental assessment process to avoid preparing full-blown EISs whenever possible.²⁸⁴ Thus, though the HFRA made only modest changes to existing environmental laws, the Bush Administration's recent reforms have done major surgery on these laws, which will undoubtedly further streamline HFRA-sanctioned fuel reduction efforts.

D. Tort Liability, Compensation, and Fire Policy

The potential threat of governmental liability cannot be ignored in understanding federal fire policy.²⁸⁵ Under the Federal Tort Claims Act (FTCA),²⁸⁶ the United States is liable for the negligent acts of its employees to the same extent a private individual would be liable under state law.²⁸⁷ In 1957, in *Rayonier, Inc. v. United States*,²⁸⁸ the Supreme Court held that the

²⁸¹ See *supra* notes 233–37 and accompanying text.

²⁸² See *supra* notes 209–13 and accompanying text.

²⁸³ Healthy Forests Restoration Act of 2003 (to be codified at 16 U.S.C. § 6512(a)(1)); see also *supra* notes 202–08 and accompanying text.

²⁸⁴ HEALTHY FORESTS INTERIM FIELD GUIDE, *supra* note 8, at 9.

²⁸⁵ Although the risk of governmental liability lurks over an array of federal resource management decisions, including those involving recreation, wildlife, and park management, the courts have rarely granted relief in such cases. See, e.g., *Parker Land & Cattle Co. v. United States*, 796 F. Supp. 477 (D. Wyo. 1992) (finding no federal duty to warn of wildlife disease problems); *Johnson v. United States Dep't of Interior*, 949 F.2d 332 (10th Cir. 1991) (rejecting FTCA wrongful death claim for delayed mountain rescue effort); *Zumwalt v. United States*, 928 F.2d 951 (10th Cir. 1991) (dismissing FTCA case claiming negligent maintenance of a hiking path); *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988) (rejecting claim that federal government is liable for wildlife-related private property); *Martin v. United States*, 546 F.2d 1355 (10th Cir. 1976), *cert. denied*, 432 U.S. 906 (1977) (dismissing FTCA wrongful death case for failure to warn of dangerous grizzly bears). See generally GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 10:01–.07 (2003) (providing an in-depth discussion of the Federal Torts Claims Act).

²⁸⁶ Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671–2680 (2000).

²⁸⁷ 28 U.S.C. § 1346(b) (2000). This provision authorizes suits against the United States for damages

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, 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.

Id.; see also *id.* § 2674 (providing that “[t]he United States shall be liable . . . [for tort claims] in the same manner and to the same extent as a private individual under like circumstances”).

²⁸⁸ 352 U.S. 315 (1957). In *Rayonier*, pursuant to a contractual agreement with the state of

federal government would be liable under the FTCA to a neighboring landowner for negligently failing to extinguish a wildfire that originated on public lands and then spread onto adjoining property if private persons or corporations were subject to liability under state law.²⁸⁹ But since then, the federal courts have rarely sustained fire-related tort claims, invoking the FTCA's discretionary function exception to insulate federal fire management decisions from judicial review.²⁹⁰ Likewise, the courts have consistently dismissed Fifth Amendment takings claims for property damage predicated on federal mismanagement of wildfires.²⁹¹ Congress has been more responsive, however, employing private bills as well as fire-specific legislation to compensate private landowners injured by fires originating on federal lands. Moreover, the insurance industry continues to make property casualty insurance available to private landowners, even those residing in high-risk wildland-urban interface zones.

For the most part, the FTCA's discretionary function doctrine has served as a shield to deflect fire-related tort claims and thus insulate agency fire policy and management decisions from judicial scrutiny. Under the FTCA, the federal government is not liable for its employees' negligent actions if the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused."²⁹² The underlying principle is that "the Government should [not] be subject to liability arising from acts of a governmental nature or function."²⁹³ In its seminal decision in *Dalehite v.*

Washington, the Forest Service endeavored to extinguish several fires started by sparks from a passing railroad train that were burning on public lands. *Id.* at 316. After bringing the blazes under control, the agency left only a few employees to guard the still-smoldering fire, which "blew up" six weeks later into a major conflagration that destroyed some of the plaintiff's property. *Id.* The Court concluded that the United States was negligent for not fully suppressing the original fire, without addressing whether the FTCA's discretionary function exception might apply in this case. *Id.* at 318.

²⁸⁹ *Id.* at 321.

²⁹⁰ 28 U.S.C. § 2680(a) (2000); see *infra* notes 294–309 and accompanying text for a discussion of the case law.

²⁹¹ See *infra* notes 310–14 and accompanying text.

²⁹² The exception states that:

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

28 U.S.C. § 2680(a). See generally Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 366 (1995).

²⁹³ *Dalehite v. United States*, 346 U.S. 15, 27–28 (1953); see also H.R. REP. NO. 2800, 71st Cong., 3rd Sess., at 13 (1931) (listing exceptions to independent establishments and agencies that had been found subject to liability for acts of their employees); S. REP. NO. 77-1196 at 7 (1942) (exempting from liability claims based on performance of a discretionary function); H.R. REP. NO. 79-1287, at 5 (1945) (establishing an exception based on federal discretion to exclude damages suits against the government "growing out of an authorized activity"); 86 CONG. REC. 12,021–22 (1940) (rejecting right to sue the government under tort claim involving which a

United States,²⁹⁴ the Supreme Court read the discretionary function exception broadly: “[It] includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion.”²⁹⁵ More recently, the Court explained that “Congress wished to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”²⁹⁶ The discretionary function defense (which curiously was not asserted in the early *Rayonier* litigation)²⁹⁷ has enabled the public land agencies to reshape federal fire management policy to allow some naturally caused fires to burn and to set prescribed fires with little fear of judicial intervention via a tort suit.

Two recent cases illustrate how the courts have construed the FTCA’s discretionary function exception to insulate federal fire management decisions from potential tort liability. In *Miller v. United States*,²⁹⁸ a neighboring landowner sued the United States for property damages, alleging that the Forest Service negligently failed to extinguish a lightning-ignited blaze on its lands that merged with other fires and burned onto adjacent privately owned lands.²⁹⁹ To determine if the discretionary function doctrine applied, the Ninth Circuit Court of Appeals first inquired whether the agency’s fire suppression decisions were discretionary or mandatory in nature, as measured against federal statutory, regulatory, or policy standards that prescribe a particular course of action.³⁰⁰ In the court’s view, neither the

government function).

²⁹⁴ 346 U.S. 15 (1953).

²⁹⁵ *Id.* at 35–36. The Court then continued:

It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

Id.

²⁹⁶ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 814 (1984). The Court continued: “[b]y fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took ‘steps to protect the Government from liability that would seriously handicap efficient government operations.’” *Id.* (citations omitted).

²⁹⁷ In *Rayonier*, the government instead sought unsuccessfully to escape liability by characterizing its fire management actions as a “uniquely governmental function” that had no private sector counterpart. *Rayonier, Inc. v. United States*, 352 U.S. 315, 319–20 (1957). The Court was not persuaded, ruling that the FTCA did not distinguish between governmental and proprietary actions. *Id.* Moreover, it was unwilling to read exemptions into the FTCA beyond those that Congress had provided. *Id.* (citing *Indian Towing Co. v. United States*, 350 U.S. 61 (1955)).

²⁹⁸ 163 F.3d 591 (9th Cir. 1998).

²⁹⁹ After a thunderstorm sparked multiple fires in the Ochoco National Forest, Forest Service officials discovered they had inadequate fire fighting resources available. *Id.* at 592–93. They were forced to prioritize between the various fires, which allowed the Bald Butte fire to “escape” and merge with other nearby fires. *Id.* The combined blazes crossed onto the plaintiff’s property three days later. *Id.*

³⁰⁰ *Id.* at 594.

forest plan, federal regulations, state law, nor internal agency policies created a mandatory fire suppression duty; rather, each of these legal sources or official documents left room for judgment when the agency confronted a multiple fire situation.³⁰¹ The court then addressed whether the Forest Service's fire fighting decisions were grounded in social, economic, or political concerns, concluding that such decisions "involved a balancing of considerations, including cost, public safety, fire fighter safety, and resource damage."³⁰²

In *McDougal v. United States*,³⁰³ an Oregon federal court also rejected a damage claim that arose when a lightning-ignited fire, which was initially allowed to burn unchecked in a national forest wilderness area, suddenly "blew up," escaped the area, and ultimately scorched 216 acres on an adjacent ranch. Applying the discretionary function doctrine, the court examined the Wilderness Act,³⁰⁴ the Forest Service manual, the relevant fire management plan, and an accompanying environmental assessment in a vain search for a "specific mandatory statute, regulation, or policy [that] required [agency officials] to do or not do something."³⁰⁵ None of these materials, according to the court, obligated the agency to reduce hazardous fuels before allowing the fire to burn or to re-characterize this prescribed fire as a "wildfire" if it exceeded its predicted daily growth. Other federal courts have likewise refused to subject complex forest fire management or suppression decisions to judicial scrutiny through the medium of potential tort liability.³⁰⁶

When the federal government engages in controlled burning, however, the courts have proved more willing to impose tort liability if the fire exceeds its prescribed limits. In *Anderson v. United States*,³⁰⁷ the Ninth Circuit found the Forest Service was negligent when it intentionally set a controlled burn, then lost control of it, and thus destroyed a nearby residential neighborhood. Relying upon the *Rayonier* precedent and relevant California statutory law,³⁰⁸ the court ruled that the agency, just like a private

³⁰¹ *Id.* at 594–95.

³⁰² *Id.* at 595.

³⁰³ 195 F. Supp. 2d 1229 (D. Or. 2002).

³⁰⁴ Wilderness Act, 16 U.S.C. §§ 1131–1136 (2000).

³⁰⁵ *Id.* § 1236.

³⁰⁶ *See, e.g.*, *Parsons v. United States*, 811 F. Supp. 1411 (E.D. Cal. 1992) (involving Forest Service prioritization decisions for fighting multiple lightning-ignited fires and an agency-initiated backfire that burned on plaintiff's property); *Defrees v. United States*, 738 F. Supp. 380 (D. Or. 1990) (involving Forest Service decisions on fighting multiple lightning-caused fires and to not requisition nearby private firefighting equipment); *Coe v. United States*, 502 F. Supp. 881 (D. Or. 1980) (involving BLM oversight of an informal campsite from which a fire spread onto plaintiff's adjoining property).

³⁰⁷ 55 F.3d 1379 (9th Cir. 1995). The Forest Service and the California Department of Forestry had jointly set a series of prescribed fires to burn chaparral in the Cleveland National Forest; however, they lost control of the controlled burn after eight days, which allowed it to spread into a nearby residential area. *Id.* at 1380.

³⁰⁸ Two California statutory provisions bore on the claim. One provided that "any person who . . . allows a fire kindled or attended by him to escape to, the property of another . . . is liable to the owner of such property for any damages to the property caused by the fire." CAL. HEALTH & SAFETY CODE § 13007 (West 1984). The other read: "[A]ny person who allows any fire burning upon his property to escape to the property of another . . . without exercising due diligence to control such fire, is liable to the owner of the property for the damages to such

party, could be held liable for negligently setting or controlling fires on its land. Neither the fact that the Forest Service had acquired the necessary burning permit nor the argument that it was engaged in a uniquely public function shielded it from liability. Nor was the court persuaded that liability might deter federal agencies from entering into mutual fire control or prescribed burning agreements, even though counterpart state agencies might be insulated from potential liability.³⁰⁹ As in *Rayonier*, the court did not consider whether the discretionary function doctrine might insulate such controlled burning decisions from potential liability. The lesson is evident: Federal controlled burning projects that go awry will trigger more rigorous judicial scrutiny than other fire management decisions involving naturally ignited blazes.

In some instances, injured landowners have advanced constitutional takings claims as an alternative theory of federal liability, but to no avail. In *Teegarden v. United States*,³¹⁰ a ranch owner asserted that the Forest Service had taken his property when it decided to concentrate its limited suppression resources on safeguarding valuable timber and a summer home community, thus allowing a fast moving forest fire to burn across his land. The Court of Federal Claims disagreed, however, because the government had no intent to take his property and its actions did not cause his property loss.³¹¹ The court instead concluded that the Forest Service had appropriately prioritized areas to be protected from the flames, and that the fire, “a random event induced more by extraordinary natural phenomena than by Government interference,” was responsible for the plaintiff’s loss, not the agency.³¹² Similarly, in *Thune v. United States*,³¹³ the claims court rejected an outfitter’s takings claim when a federal controlled burn escaped containment and destroyed his nearby equipment. The court found not only a lack of the requisite intent but also that the claim should have been brought as a tort action.³¹⁴ Takings doctrine, therefore, does not represent a viable theory for recovering property damages attributable to federal fire policy and management decisions.

property caused by the fire.” *Id.* § 13008. See *Anderson*, 55 F.3d at 1381 (discussing these California statutes). For a more detailed discussion on the role of state law in federal fire policy, see also *infra* notes 331–68 and accompanying text.

³⁰⁹ 55 F.3d at 1383–84. Interestingly, the court acknowledged that California state agencies, like the Department of Forestry, may be shielded from liability under California law as a public entity involved in fire fighting activities. *Id.* at 1384.

³¹⁰ 42 Fed. Cl. 252 (1998).

³¹¹ *Id.* at 257. The court explained that to establish a Fifth Amendment takings claim, the property owner

must demonstrate: (1) that there was an intent on the part of the Government to take the owner’s property, (2) that the taking was authorized, and (3) that the taking was the direct, natural, and probable consequence of the Government’s action. An accidental or negligent impairment of the value of private property is not a taking, but, at most, a tort.

Id. at 256 (internal citation omitted).

³¹² *Id.* at 257 (citing *Berenholz v. United States*, 1 Cl. Ct. 620, 626 (1982)).

³¹³ 41 Fed. Cl. 49 (1998).

³¹⁴ *Id.* at 54.

Yet the limited reach of federal tort and takings doctrines does not leave injured landowners without potential remedies. Besides private insurance, they have occasionally turned to Congress for relief from fire-related damages, either through a private bill or more general legislation.³¹⁵ Before 1946, when the FTCA first waived federal sovereign immunity, negligence claims against the United States were routinely addressed in private bills, but they have since become quite rare.³¹⁶ In recent years, only two private bills—both arising from the 1988 Yellowstone fires—have been adopted for fire-related claims. One waived a mandated filing deadline, and the other paid \$4,850 on a claim.³¹⁷ In two high profile instances though, Congress has passed general legislation enabling individual compensation claims to proceed where federally prescribed fires escaped and did extensive property damage. Following the 1988 Yellowstone conflagration, Congress directed the Forest Service “to negotiate, compromise, and reach a determination on certain claims” arising from four enumerated prescribed fires that burned out of control.³¹⁸ And after Los Alamos, New Mexico, was nearly leveled in 2000 by an escaped Park Service-initiated prescribed burn, Congress passed the Cerro Grande Fire Assistance Act,³¹⁹ which established a special compensation fund and procedure for victims of that fire.³²⁰ In

³¹⁵ A private bill is designed “for the benefit of one or several specified persons, [while] a public bill relates to public matters and deals with individuals only by classes.” WILLIAM HOLMES BROWN & CHARLES W. JOHNSON, *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE* 168 (2003). Congress employs private bills to afford justice to individuals in extraordinary circumstances when a legal claim may not be available, and sometimes in an effort to meet what it perceives to be a moral obligation on the federal government’s part. *Id.* at 178–79. *See generally* Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966) (outlining the system for enacting private bills in Congress).

³¹⁶ *See* CONG. QUARTERLY, INC., *GUIDE TO CONGRESS* 526 (5th ed. 2000) (noting, for example, that 1103 private bills were enacted in 1948–49 during the 81st Congress, but only 10 were enacted in 1995–96 during the 105th Congress).

³¹⁷ Private L. No. 102-16, 106 Stat. 5155 (1992) (waiving the filing deadline); Private L. No. 104-2, 110 Stat. 4286 (1996) (authorizing payment).

³¹⁸ Pub. L. No. 101-302, 104 Stat. 213, 230–31 (1990). Notably, the legislation only covered the four prescribed fires that “blew up” into wildfires; it contained no compensation provision for damages attributable to the other Yellowstone fires that were originally classified as wildfires. Compensation was allowed notwithstanding the argument that the damaging fires were linked to the federal prescribed burn policy and thus arguably immunized under the FTCA discretionary function doctrine. Congress also added that the “the Secretary of the Treasury shall make no payments for claims which are determined by the Forest Service or the Department of Justice to be invalid under current law”—a provision designed to limit compensation to legitimate claims. *Id.* There were 92 legitimate claims at a cost of \$7.8 million. *See* 136 CONG. REC. S6994–95 (May 24, 1990) (debating claims settlement); *id.* at S5329–31 (Apr. 30, 1990) (offering the text of the claims settlement amendment for debate).

³¹⁹ Pub. L. No. 106-246 § 101, 114 Stat. 511, 583–590 (2000).

³²⁰ Acknowledging federal responsibility for this controlled burn disaster, Congress established a compensation fund and then directed the Federal Emergency Management Agency to oversee a procedure whereby Los Alamos residents could submit a fire damage claim for expedited administrative review, or else proceed to litigate the claim under the FTCA. The bill allowed full recovery for all property losses, personal injuries, economic and business losses, and incidental expenses, including remediation expenditures to protect against mudslides, flooding, and the like. It also encouraged insurance companies to settle with their policy holders, by entitling them to use the same administrative process to recover their claims expenditures through subrogation rights. Initial estimates put total damage costs at \$300

short, when extraordinary circumstances have generated enough political pressure, Congress has utilized its legislative powers to enable property owners damaged by federally prescribed fires to pursue compensation claims against the government.

Of course, most landowners rely upon their own private insurance to cover fire-related damages. As more people move into fire-prone wildland-urban interface zones, insurance companies have seen an upsurge in the number of fire casualty claims, often for higher valued losses.³²¹ Yet even after the catastrophic 1991 Oakland Hills fire and the 2002 southern California conflagration, wildfire claims constitute less than three percent of the insurance industry's overall natural disaster claims.³²² Faced with the very real threat of escalating wildfire losses, the industry has responded with multiple strategies: homeowner fire-proofing education and inspection programs; rate increases and policy cancellations in high risk areas; upgraded risk assessments using new satellite imagery technology, computerized fire hazard maps, and the like; and public relations initiatives encouraging the responsible agencies to alter their forest management practices.³²³ Wholesale policy cancellations and steep rate increases, along with the prospect of fire risk-based redlining, have generated intense criticism from homeowners and elected officials alike, and even triggered

million. See 146 CONG. REC. S5255-62 (June 15, 2000) (introducing the Cerro Grande Fire Assistance Act); H.R. REP. NO. 106-710, 175-78 (2000) (detailing the conferees' agreement); see also Federal Emergency Management Agency, Disaster Assistance; Cerro Grande Fire, 66 Fed. Reg. 15,948 (Mar. 21, 2001) (codified at 44 C.F.R. pt. 295) (establishing final rules implementing the Cerro Grande Fire Assistance Act).

³²¹ Paul Kovacs, *Wildfires and Insurance*, ICLR RESEARCH PAPER SERIES, No. 11, Jan. 2001, at 4, available at <http://dels.nas.edu/dr/docs/kovacs.pdf> (noting that from 1970-1990, eight major fires resulted in claim payments ranging from \$10 to \$100 million, but that from 1990-1993, four major California fires generated claim payments totaling \$3 billion); see also Glenn McGillivray, *Slow Burn*, CANADIAN UNDERWRITER, Sept. 2003, at 26 (discussing the upward trend in insurance claim amounts as more people move into fire-prone areas).

³²² Kovacs, *supra* note 321, at 4. Kovacs states that fire claims account for only 1% of the catastrophic loss claims filed in the United States. *Id.* at 3. In contrast, tornadoes and hurricanes each account for over 30% of these claims, while winter storms and earthquakes account for over 10% of the claims. Insurance Journal, *Southern California Wildfires Ravage Hundreds of Homes, Property* (Nov. 3, 2003), <http://www.insurancejournal.com/magazines/west/2003/11/03/features/33797.htm> (last visited Apr. 23, 2006) (estimating that claims from the 2002 southern California fires will reach \$1 billion, while claims from the 1994 Northridge earthquake totaled \$12.5 billion).

³²³ See Kovacs, *supra* note 321, at 6-7; Dean Calbreath, *Twice Burned: Fire Victims Are Finding Companies Canceling, or Declining to Renew, Their Homeowners Insurance*, SAN DIEGO UNION-TRIB., Oct. 24, 2004, at H1 (discussing cancellation of insurance policies); Louis Sahagun, *Inspections a Surprise to Homeowners*, LOS ANGELES TIMES, Sept. 25, 2004, at B1 (discussing risk assessments conducted by satellite); Leslie Berestein, *At Mercy of Insurance Companies? Some Wildfire Claimants Told Premiums Will Rise*, SAN DIEGO UNION-TRIB., Nov. 30, 2003, at H1 (discussing rising premiums); Leslie Berestein, *Owners in High Risk Areas Face Uncertainty About Insurance*, SAN DIEGO UNION-TRIB., Nov. 22, 2003, at A1 (discussing the difficulty of obtaining insurance in fire-prone areas); Carolyn Carlson, *State Farm Requiring Cleanup*, ALBUQUERQUE J., May 29, 2003, at A1 (discussing property maintenance requirements for insured individuals in fire areas); Kristi Arellano, *Fire Insurance: Some Companies Stop Issuing New Policies in Threatened Areas*, DENVER POST, June 13, 2002, at A11 (discussing cancellation of insurance policies).

investigations and legislative proposals.³²⁴ Whether the industry's education efforts and revamped financial incentives will succeed in altering private landowner behavior in the volatile wildland-urban interface zone remains to be seen. But as long as private insurance coverage is readily available, people will continue living and building next to public lands. This means that the responsible agencies will be under even more intense pressure to control the fire danger on their lands.

Other liability-related programs and proposals could also influence federal fire policies and management decisions in the wildland-urban interface zone. To reduce wildfire risks and better fire-proof communities, Congress has funded several federal-state cooperative initiatives designed to improve local zoning laws and building codes.³²⁵ The Federal Emergency Management Agency (FEMA), besides offering immediate financial assistance to the victims of major natural disasters,³²⁶ also offers hazard mitigation grants to help communities reduce future natural disaster risks.³²⁷ Under one recent congressional proposal, the federal government would be liable for the resulting property damage whenever a wildfire originating on multiple-use forest lands spread onto adjacent private lands notwithstanding the various FTCA limitations.³²⁸ And one prominent state official has suggested creating a federal natural disaster relief fund that goes beyond the federal flood insurance program to guarantee federal assistance to victims of large-scale fire events, regardless of the cause of the fire or the location of damaged property.³²⁹ The underlying question, of course, is whether the

³²⁴ Elliot Spagat, Associated Press, State Fields Widespread Wildfire Insurance Complaints, Oct. 24, 2004, <http://v6.dailybulletin.com/Stories/0,1413,203%257E24821%257E2490303,00.html#> (last visited Apr. 23, 2006); Tom McGhee, *Bill to Tackle Wildfire-Leery Insurers*, THE DENVER POST, July 3, 2002, at C2. On the other hand, one insurance company, asserting official negligence in responding to a wildfire, has threatened to sue a local firefighting agency to recover its underwriting losses. But a statutory firefighting exemption will almost certainly block such a suit. Allstate Wants State Money for Fire Claims, Inland Valley News, July 24, 2004, <http://v6.dailybulletin.com/Stories/0,1413,203%257E24821%257E2292856,00.html> (last visited Apr. 22, 2006).

³²⁵ See, e.g., Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393, § 302(b)(5), 114 Stat. 1607, 1623 (2000). See *infra* notes 355-68 and accompanying text for further discussion of local zoning and building standards as related to federal fire policy.

³²⁶ FEMA financial assistance is only available for losses not covered by private insurance or other public assistance programs. But the Small Business Administration, which is part of FEMA, also offers low-interest loans to homeowners, businesses, and others to help rebuild disaster-damaged properties. See Press Release, Fed. Emergency Mgmt. Agency, Six Months Later: More Than \$317 Million Approved for Southern California Wildfire Recovery (May 7, 2004), available at <http://www.fema.gov/news/newsrelease.fema?id=12175>.

³²⁷ The FEMA hazardous mitigation grant program provides federal funds to states and communities for collaborative planning efforts designed to assess hazards potentially threatening the community, and to eliminate or minimize the identified hazards. See generally FEMA, Hazard Mitigation Grant Program, www.fema.gov/government/grant/hmgp/ (last visited Apr. 23, 2006).

³²⁸ Enhanced Safety from Wildfire Act of 2003, S. 1315, 108th Cong. (2003); Enhanced Safety from Wildfire Act of 2003, H.R. 2551, 108th Cong. (2003).

³²⁹ George Watson, *Insurance Firms on Hot Seat over Fire Risk*, INLAND VALLEY DAILY BULLETIN, June 27, 2004. The proposal is for a national natural disaster insurance program that would be available across the country and spread the risk of any catastrophic natural disaster.

federal government should assume *carte blanche* liability in such situations, or whether federal assistance should be contingent upon local jurisdictions and homeowners meeting strict zoning, siting and construction standards designed to minimize wildfire risks.

The economic implications that could flow from a legal or political liability determination based upon federal fire policies or decisions are substantial, and could ultimately prompt further policy changes. As a legal matter, the threat of fiscal liability for fire-related damages has not proven a major impediment to federal prescribed fire policies. The modern courts have not imposed tort or takings liability on the public land agencies for their fire management decisions, save for one instance when agency officials negligently allowed a controlled burn to escape and destroy a residential neighborhood.³³⁰ But as a political matter, liability concerns are quite real. Congress has intervened with site-specific legislation following the exceptional Yellowstone and Cerro Grande fires, predicated its intervention on perceived negligence in applying federal prescribed fire policies. Although Congress did not halt the evolving prescribed fire policy in either instance, it did compel the agencies to tighten fire management standards after the Yellowstone blaze, as well as controlled burn standards after the Cerro Grande fire. Related reform efforts are beginning to percolate within the insurance industry and local governments, but whether there is sufficient market pressure or political will at the local level to prompt meaningful changes in real estate development practices or private landowner behavior remains to be seen. If not, the spotlight may return to Congress and the agencies to ensure a fire proof environment, or at least adequate compensation as an alternative. And this could provoke further changes in federal fire law and policy.

E. Federalism: State Law and Federal Fire Policy

Because wildfires do not respect jurisdictional boundaries, both federal and state law are germane to fire management policy. Basic federalism principles apply, creating a pastiche of laws and policies governing wildfire on the public lands. Although concurrent jurisdiction is the norm on much of the public domain, federal preemption doctrine sets the relevant legal standard when federal and state policy diverges. In the Clean Air Act, however, Congress has ceded significant jurisdictional authority over air

Under the National Flood Insurance Program, federally-backed flood insurance can only be purchased by homeowners in communities that adopt and enforce ordinances designed to reduce future flood losses; *see also* Martin M. Randall, *Coastal Development Run Amuck: A Policy of Retreat May Be the Only Hope*, 18 J. ENVTL. L. & LITIG. 145, 148-56 (2003). *See generally* FEMA, National Flood Insurance Program, <http://www.fema.gov/government/grant/hmgp> (last visited Apr. 23, 2006). To the extent that these local ordinances must meet rigorous federal disaster-protection standards, then the federal flood insurance program may represent an effective conditional spending model that could be used for fire management purposes to encourage responsible community zoning, siting, and construction practices in volatile wildland-urban interface zones.

³³⁰ Anderson v. United States, 55 F.3d 1379 (9th Cir. 1995); *see also supra* notes 307-09 and accompanying text.

quality to the states, giving them an important regulatory role in federal fire and smoke management decisions. State criminal and tort laws are relevant too, but seem to have had only a modest impact on federal fire policy. And the states, with clear authority over privately owned lands adjacent to federally managed lands, are responsible for zoning and building code standards in the critical wildland-urban interface zone. Not surprisingly, given the physical dangers and political pitfalls involved with fire management, most potential jurisdictional conflicts have been avoided through a concerted intergovernmental coordination effort.

As in so many public land issues, the key legal question is whether federal or state law governs fire policy and management. The basic principle is clear: Under the Constitution's supremacy clause,³³¹ federal law will prevail in the event of conflict between it and state law. For most public lands (except those where exclusive jurisdiction prevails),³³² the Supreme Court's *California Coastal Commission v. Granite Rock Company*³³³ ruling endorses the notion of concurrent or shared jurisdictional authority. This means the federal agencies have final authority over land-use decisions, but the states may impose reasonable environmental standards through permits and otherwise.³³⁴ Because contemporary fire management basically involves land-use planning, with fires being ignited or allowed to burn on some designated lands and not on others, the federal agencies should have final authority over such matters. The states, though, may still propose or even impose environmental requirements designed to protect air or water quality.³³⁵ But under the *Granite Rock* framework, the states can only regulate, not prohibit, federal fire management activities, absent a contrary congressional expression.

Potential conflicts between federal and state fire policy lurk, nonetheless. The federal agencies adhere to a prescribed fire policy that allows some naturally occurring fires to burn, but several states have statutes requiring that such fires be extinguished.³³⁶ On the public lands, a state extinguishment policy must plainly give way to the contrary federal prescribed fire policy. Such legal disparities, however, can make it difficult to formulate a coherent regional fire policy shaped to fit the landscape rather than legal boundaries. State law usually grants the governor or another official the authority to order closures when the fire danger is high

³³¹ U.S. CONST., art. VI, cl. 2.

³³² Exclusive federal jurisdiction attaches in only a few locations on the public lands, principally in some of the national parks where Congress mandated exclusive jurisdiction in the enabling legislation. Less than five percent of the public lands are subject to exclusive federal jurisdiction. See COGGINS & GLICKSMAN, *supra* note 179, at §§ 3:6–3:9.

³³³ *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987) (sustaining California's ability to impose environmental standards on a mining project slated for national forest lands).

³³⁴ Although the states can impose environmental requirements on federal lands, they cannot prohibit proposed activities contrary to federal land management policy. *Id.* at 593–94.

³³⁵ Indeed, Congress has given the states express authority to regulate air quality on federal lands. See *infra* notes 345–51 and accompanying text.

³³⁶ For examples of state statutes which declare any uncontrolled fire a public nuisance, see IDAHO CODE ANN. § 38-107 (2002); OR. REV. STAT. § 477.064 (2003); UTAH CODE ANN. 65A-8-4 (2004).

and also to order landowners to abate fire hazards on their property.³³⁷ Would the public land agencies be bound by such an order? In a recent fit of frustration following the Cerro Grande fire, the New Mexico legislature enacted a law authorizing local communities to enter federal forest lands to cut trees and remove hazardous fuels whenever the Forest Service ignored a request to do so.³³⁸ Notwithstanding the powerful state public health and safety interests behind these laws, the supremacy clause suggests that the federal public land agencies would not be bound by these contrary state law mandates.

The reality, in most instances, is that potential federal-state conflicts over fire management and policy are tempered as much by political as legal considerations. Most such conflicts are addressed and resolved cooperatively through coordinated planning processes as well as various intergovernmental institutional arrangements and agreements. In fact, federal laws like NFMA, FLPMA, and NEPA direct the public land agencies to coordinate their planning and management decisions with state, local, and tribal officials,³³⁹ though this does not mean federal subservience to local policies or desires.³⁴⁰ Likewise state law generally promotes cooperation with federal officials over fire policy and control matters.³⁴¹ Further,

³³⁷ See, e.g., NEV. REV. STAT. § 475.210 (2001) (authorizing governor to close lands due to extreme fire hazard); WASH. REV. CODE § 76.04.305 (1994) (granting the forestry department closure power due to extreme fire danger); OR. REV. STAT. § 477.059 (2003) (mandating landowners to take fire hazard abatement steps in the urban forestland interface zone); WASH. REV. CODE § 76.04.660 (1994 & Supp. 2005) (requiring the abatement of fire hazards).

³³⁸ See N.M. STAT. ANN. § 4-36-11 (Michie Supp. 2002) (asserting state authority to create a fire management plan); S.U. Mahesh, *Forest Thinning Permitted: Johnson Signs Law Giving Counties Control over Federal Lands*, ALBUQUERQUE J., Mar. 14, 2001, at A8.

³³⁹ See, e.g., National Forest Management Act of 1976, 16 U.S.C. § 1604(a) (2000); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712(c)(9) (2000); National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (2000); see also Robert Keiter, *Beyond the Boundary Line*, 65 U. COLO. L. REV. 293, 315–26 (1994) (addressing statutory interagency coordination requirements for ecosystem management purposes).

³⁴⁰ See *United States v. Nye County, Nevada*, 920 F. Supp. 1108, 1118 (D. Nev. 1996) (holding that the federal government retains jurisdiction to enact legislation for the public lands pursuant to the Property Clause, which overrides conflicting state laws); *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997) (asserting that the United States, as sovereign owner of the federal lands, may administer them as it sees fit); *Boundary Backpackers v. Boundary County*, 913 P.2d 1141, 1146–48 (Idaho 1996) (finding unconstitutional those county ordinances dealing with public lands that conflicted with federal law). See generally Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Making*, 30 IDAHO L. REV. 525 (1993); Patrick A. Austin, *Law West of the Pecos: The Growth of the Wise Use Movement and the Challenge to Federal Public Land Use Policy*, 30 LOY. L.A. L. REV. 275 (1996).

³⁴¹ See, e.g., NEV. REV. STAT. § 472.050 (2003) (“The state forester . . . with the approval of the director of the state department of conservation . . . may represent the State . . . in negotiating and entering into agreements with the Federal Government for the purpose of securing cooperation in forest management and the protection of the forest . . . areas of Nevada from fire . . .”); CAL. PUB. RES. CODE § 4475.1 (West 2001) (“The director, with the approval of the Director of General Services, may enter into a master agreement with federal land management agencies to conduct joint prescribed burning operations on wild lands and federal lands where these operations serve the public interest and are beneficial to the state.”); WASH. REV. CODE § 76.04.135 (1994) (“For the purpose of promoting and facilitating cooperation between fire protection agencies and to more adequately protect life, property, and the natural resources of the state, the department may enter into a contract or agreement with a municipality, county,

Congress has occasionally funded specific collaborative fire management initiatives, such as the New Mexico “collaborative forest restoration program.”³⁴² As a result, federal, state, and local officials regularly enter joint cooperation agreements dividing up fire suppression, controlled burning, monitoring, and other such obligations among themselves.³⁴³ These agreements can sometimes extend across an entire region and even beyond national borders.³⁴⁴

The states, however, have legal primacy in smoke management and related air quality matters. Under the Clean Air Act,³⁴⁵ the states are responsible for implementing and enforcing federal air quality standards, which is ordinarily done through state implementation plans.³⁴⁶ Because Congress has waived federal sovereign immunity,³⁴⁷ the public land agencies are subject to state regulation. The act demands stringent protection for Class 1 airsheds that encompass most national parks and wilderness areas.³⁴⁸ In the case of fire, the principal air quality concerns are visibility and public health. These concerns are addressed through federal standards governing particulate matter emissions, and then enforced through state smoke management plans. The primary regulatory vehicle is a state-issued permit that is required for each fire, whether it is naturally ignited or a controlled burn.³⁴⁹ The permit generally authorizes a particular type and level of burning that the state can then order abated if particulate emission standards are exceeded.³⁵⁰ To address state air quality requirements and to

state, or federal agency”); OR. REV. STAT. § 477.406 (2005) (“The forester . . . may enter into a contract . . . with a federal or state agency, political subdivision, corporation, responsible organization or responsible landowner or group of landowners for the prevention and suppression of fire on forestland . . . to prevent and suppress fire”).

³⁴² See *supra* notes 160–61, and accompanying text.

³⁴³ See, e.g., MONTANA COOPERATIVE FIRE PROTECTION AGREEMENT (2005), available at http://www.fs.fed.us/r1/fire/nrcg/ops_plans_index.html (detailing an agreement between the Montana Dep’t of Natural Res., the BLM, the NPS, the Bureau of Indian Affairs, the U.S. Fish and Wildlife Serv., and the U.S. Forest Serv.).

³⁴⁴ See, e.g., Northwest Wildland Fire Protection Agreement, OR. REV. STAT. § 477.200 (2005).

³⁴⁵ 42 U.S.C. §§ 7401–7642 (2000).

³⁴⁶ *Id.* § 7410; see COGGINS & GLICKSMAN, *supra* note 179, at § 11:7 (Once the EPA establishes National Ambient Air Quality Standards (NAAQS) for a particular pollutant, “each state is responsible for formulating . . . a ‘state implementation plan’ (SIP) to achieve, maintain, and enforce the NAAQS within all of the state’s air quality control regions.”).

³⁴⁷ 42 U.S.C. § 7418(a) (2000). *Cf.* *Hancock v. Train*, 426 U.S. 167, 198 (1976) (holding that federal agencies were immune from state air quality permitting requirements). *Hancock* precipitated a 1977 congressional amendment to the Clean Air Act waiving federal immunity.

³⁴⁸ 42 U.S.C. §§ 7472(a), 7491 (2000); see COGGINS & GLICKSMAN, *supra* note 179, at § 11:20 (“The least amount of degradation is permitted in areas designated as ‘Class I.’”).

³⁴⁹ 42 U.S.C. § 7661 (2000); see, e.g., UTAH DIV. OF AIR QUALITY, ADMIN. CODE R307-204 (2006) (smoke management emission standards). See generally COGGINS AND GLICKSMAN, *supra* note 179, at § 11:8; Laura Sweedo, *Where There Is Fire, There Is Smoke: Prescribed Burning in Idaho’s Forests*, 8 DICK. J. ENVTL. L. & POL’Y 121 (1999).

³⁵⁰ See UTAH ADMIN. CODE r.307.204.4 (1) (2006) (“If . . . the executive secretary determines that a prescribed fire [or] wildland fire used for resource benefits . . . is degrading air quality to levels that could violate the National Ambient Air Quality Standards or burn plan conditions, the land manager shall promptly stop igniting additional prescribed fires.”); UTAH DIV. OF AIR QUALITY, UTAH SMOKE MANAGEMENT PLAN IX (A)(1) (2000), available at <http://www.utahsmp.net/2level/2-3Utahsmp.htm> (implementing those provisions of the code).

allay local concerns, the federal agencies ordinarily prepare a seasonal burning schedule and then make individual controlled burn project decisions using NEPA analysis and related public involvement processes.³⁵¹ Or when federal officials decide to allow a lightning-ignited blaze to burn for resource management purposes, they usually request permission from state authorities and then monitor smoke emissions to ensure compliance with air quality standards. For the most part, these decisions are made and implemented in a collaborative fashion.

State criminal and tort law both potentially apply to public land fires, but neither has had a significant impact on federal fire policy. Except where exclusive jurisdiction prevails, both federal and state criminal law governs individual conduct on the public lands. Most fire-related criminal offenses occurring on public lands are prosecuted under federal law, though this would not preclude a parallel state prosecution. Federal criminal jurisdiction over fire, moreover, can extend beyond the boundary line to enable the United States to protect its lands from fire damage.³⁵² On one occasion, a local district attorney irritated by an escaped federal fire threatened to prosecute agency employees under state law for mismanagement of the blaze.³⁵³ The employees were clearly protected by sovereign immunity, and they could remove any action to the more friendly confines of a federal court. Under the Federal Tort Claims Act (FTCA), as we have seen, state rather than federal law establishes the relevant negligence standards governing fire management and control decisions.³⁵⁴ Not only are all FTCA cases heard in the federal courts, but the discretionary function doctrine will shield federal officials from most such claims. In short, state criminal and tort law serves mostly to supplement rather than modify federal law for fire policy purposes.

State law typically governs land-use and building practices on non-federal lands, including those located in the wildland-urban interface zone. Under the constitutional property power, however, federal authority might be extended beyond the boundary line to regulate local zoning, building, or landscaping standards.³⁵⁵ But Congress, acutely aware of local political sensitivities, has only rarely asserted federal regulatory control outside the boundary line. It has instead ordinarily offered federal financial, technical, and other incentives to states and communities in an effort to promote cooperation and advance national interests. This plainly holds true in the

³⁵¹ See UTAH ADMIN. CODE r.307.204.5 (2006) (requiring the submission of a burn schedule detailing location, acres to be burned, and ignition method for proscribed fires over 50 acres in size); UTAH DIV. OF AIR QUALITY, UTAH SMOKE MANAGEMENT PLAN VI (2000) (requiring land managers who burn more than 50 acres per year to submit a burn schedule).

³⁵² *United States v. Alford*, 274 U.S. 264, 267 (1927); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979). *But cf.* *United States v. Grant*, 318 F. Supp. 2d 1042, 1046 (D. Mont. 2004) (dismissing federal criminal charges on jurisdictional grounds for fire started on state lands because the statute did not expressly extend to non-federal lands).

³⁵³ Telephone interview with Ken Paur, Regional Attorney, Department of Agriculture Office of General Counsel (Apr. 4, 2005).

³⁵⁴ See *supra* notes 286–309 and accompanying text.

³⁵⁵ On the scope of federal authority under the Article IV property clause, see Appel, *supra* note 110.

case of fire: the Secure Rural Schools and Community Self-Determination Act of 2000,³⁵⁶ for example, makes federal funds available for homeowner education in fire-sensitive ecosystems and for county planning efforts “to reduce or mitigate the impact of development on adjacent Federal lands and to increase the protection of people and property from wildfires.”³⁵⁷ Moreover, to improve non-federal forest management practices, Congress incorporated several incentive-based programs into the Healthy Forests Restoration Act of 2003, including a tribal watershed forestry assistance program³⁵⁸ and a new healthy forests reserve program.³⁵⁹ Except for the lack of political will, nothing precludes Congress from conditioning federal fire-related or disaster assistance funds on the states or counties establishing rigorous zoning, construction, and site preparation standards for their vulnerable lands.

Even without federal incentives, several states have adopted their own individual laws addressing wildfire management and wildland-urban interface concerns. Though most state laws are focused on wildfire suppression, some states expressly incorporate prescribed natural fires and controlled burning into their forest management policies.³⁶⁰ The state of Washington, for example, acknowledges “the natural role of fire in forest ecosystems,” declaring “it in the public interest to use fire under controlled conditions to prevent wildfires by maintaining healthy forests and eliminating sources of fuel.”³⁶¹ Unable to ignore growing wildland-urban interface problems, some states have adopted specific statutes delineating governmental authority and landowner responsibilities on interface lands, including fire-related zoning, construction, and landscaping requirements.³⁶²

³⁵⁶ Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393, 114 Stat. 1607.

³⁵⁷ *Id.* § 302(a)(5)(B).

³⁵⁸ Finding that forests provide essential ecological services, Congress created a tribal watershed forestry assistance program that makes federal financial and technical assistance available to improve forestry and watershed management. Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148 § 301(a)(3), 302, 117 Stat. 1887 (codified at 16 U.S.C.A. §§ 6541(a)(3), 6542).

³⁵⁹ This new federal healthy forests reserve program is designed to promote endangered species recovery, improve biodiversity, and enhance carbon sequestration on privately owned lands. *Id.* § 501(a). Private forest lands enrolled in the reserve program, through conservation easements or otherwise, are eligible for direct federal grants that may be used to implement cooperative restoration plans that are jointly developed between agency officials and the landowner. *Id.* § 503(a). As an added incentive, when enrolled private lands confer “a net conservation benefit” on federally-protected species, the landowner can claim “safe harbor” protection from various ESA strictures. *Id.* § 506(a).

³⁶⁰ *See, e.g.*, OR. REV. STAT. § 477.552(1) (2005) (Oregon state policy is “to improve the management of prescribed burning as forest management and protection practice.”); COLO. REV. STAT. § 24-33-203 (2005) (authorizing state forester to permit prescribed burning); NEV. REV. STAT. §§ 527.122–128 (2003) (authorizing controlled fires); CAL. PUB. RES. CODE § 4475.1 (West 2005) (authorizing state-issued prescribed burning contracts for fuel reduction and forest improvement purposes); *see also* FLA. STAT. ANN. § 259.032(e)(2) (West 2006) (requiring that management plans for state-owned lands provide for the use of prescribed fire).

³⁶¹ WASH. REV. CODE § 76.04.167(3) (2004).

³⁶² *See, e.g.*, ARIZ. REV. STAT. §§ 9-806, 11-861(1) (2004) (authorizing adoption of urban wildland interface code), 41-2148 (creating an urban wildland fire safety committee); CAL. GOV'T CODE §§ 51175–89 (2004) (providing measures to identify high fire risk areas within the state,

The Oregon Forestland-Urban Interface Fire Protection Act of 1997,³⁶³ for instance, creates a fire hazard-based land classification and certification scheme for the interface zone, authorizes new rules setting construction and property maintenance standards, and renders non-compliant landowners liable for resultant fire suppression costs.³⁶⁴ Some of these laws now contemplate the same comprehensive fire and building code standards that have long existed in urban areas, which is remarkable given the historic rural resistance to zoning and other land-use restrictions. But opposition to such regulatory efforts still persists, and not every western state has yet integrated wildland fire management and related landowner responsibilities into its laws.

California has played a lead role in state legislation governing wildfire. In 1978, recognizing its growing fuels accumulation problem and the potential benefits of controlled fire use, California adopted the Wildland Fire Protection and Resources Management Act,³⁶⁵ establishing a model prescribed burning program as part of the state's forest management policy. The state also has long maintained property access, fuel break, and fuel removal standards for private lands.³⁶⁶ During the early 1990s, seeking to further mitigate the wildfire danger and related suppression expenses, the state established mandatory property maintenance and residential construction standards for privately owned lands situated in "very high fire hazard severity zones."³⁶⁷ It is troubling, therefore, that California has recently considered consolidating jurisdiction over fire in a new state disaster agency,³⁶⁸ which would effectively remove all fire management responsibilities from the state's natural resource agencies. This could set an unwelcome precedent at a time when we have come to regard wildfire as an important ecological process and part of natural resources policy. The ill-advised message of this reform proposal is that fire should be treated as a

and to mitigate those risks); COLO. REV. STAT. ANN. § 24-65.1-202(2)(B)(II) (West 2004) (providing for a model wildfire hazard area control regulation); NEV. REV. STAT. § 472.100 (2003) (mandating fire proof roofing materials). See generally Jeff Adler, *Western States Weigh Wildfire Safeguards: Rigid Building Codes Have Spared Homes*, WASH. POST, Aug. 13, 2002, at A3 (describing the success of the building codes in limiting fire damage in Malibu).

³⁶³ OR. REV. STAT. §§ 477.015-.061 (2005).

³⁶⁴ *Id.* §§ 477.025-.057 (land classification system); § 477.059 (rules and liability). The state forestry board is directed to promulgate rules governing structures, accumulated fuels, and other fire hazards for the various urban interface land classifications. Moreover, land owners are required to "take actions, measures, or efforts to minimize or mitigate a fire hazard or risk" on their property. *Id.* § 477.059(1).

³⁶⁵ CAL. PUB. RES. CODE §§ 4461-4473 (West 2001).

³⁶⁶ *Id.* §§ 4290-99.

³⁶⁷ CAL. GOV'T. CODE §§ 51175-89 (2004).

³⁶⁸ See Stuart Leavenworth, *New Disaster Agency Proposed*, SACRAMENTO BEE, Aug. 8, 2004, at A1, available at 2004 WLNR 17444789 (describing the state panel's decision to recommend a new disaster agency combining flood management, fire suppression, and emergency services); Testimony, Jay Watson, Director, Wilderness Society Wildland Fire Program before California Performance Review Commission (Sept. 17, 2004), available at <http://www.wilderness.org/Library/Documents/upload/Testimony-Watson-WildlandFire-CalPerformanceRevComm-20040917.pdf> (opposing the restructuring of fire suppression services and in particular its consolidation into a new comprehensive emergency services agency).

destructive force and aggressively contained, which would undermine the more enlightened view of fire that is gaining more widespread acceptance.

IV. PUTTING FIRE, FORESTS, AND LAW IN PERSPECTIVE

Is a discernible new law of fire on the horizon? Whereas the legal regime governing public lands originally focused on extinguishing wildfire to protect valuable resources, the agencies are now integrating fire as an ecological process into resource management policy. Thus far that integration has occurred mainly through the medium of the existing land-use planning and environmental protection laws. This has, in turn, provoked a torrent of procedural gridlock complaints. Recent reforms designed to revise this legal framework have produced a discernible backlash, raising questions about the role of law in federal fire policy. Those questions can only be answered by recognizing that the fire law and policy debate is linked inextricably to other contested issues, including timber management policy, wilderness designation, regional planning, and legal accountability. Only from this broader perspective can we begin to contemplate the shape that a distinct law of fire may take as part of public land policy.

A. Fire Law and Policy Revisited

Few would dispute that wildfire occupies a central role on the public lands today or that fire-related policy has become a resource management priority. Yet the governing law actually says very little about wildfire. To be sure, Congress has responded to recent catastrophic wildfire events with the patchwork Healthy Forests Restoration Act of 2003,³⁶⁹ while also continuing to pour federal dollars into agency fire budgets. The Bush Administration, through its Healthy Forests Initiative reforms, has used its executive authority to alter longstanding environmental analysis requirements and administrative appeal regulations in an effort to expedite hazardous fuel removals.³⁷⁰ The primary rationale for these initiatives, curiously, was the agencies' lament that too much law prevented them from responding to the growing wildfire threat in a timely manner. But, though now relieved of these legal burdens, the agencies still have precious little statutory guidance on wildfire policy, and even less accountability for their fire management decisions.

Throughout much of the twentieth century, the law simply ignored fire as a resource management issue. The primary congressional statement on wildfire came early in the form of two general statutory provisions admonishing the public land agencies to control wildfire,³⁷¹ supplemented by occasional site-specific statutory guidance. The resulting policy was straightforward and narrow: because fire was a destructive force, the agencies were responsible for suppressing all wildfires as quickly as

³⁶⁹ See *supra* notes 239–84 and accompanying text.

³⁷⁰ See *supra* notes 201–28 and accompanying text.

³⁷¹ 16 U.S.C. §§ 551, 594 (2000); see *supra* notes 102–10, 117–21 and accompanying text.

possible.³⁷² Federal policy not only separated wildfire from the landscape, but also from natural resource policy. This reality was manifest in the growth of a distinct federal firefighting infrastructure focused solely on extinguishing errant blazes.³⁷³ There was no evident concern over the environmental consequences that flowed from this total suppression policy.

Since the 1970s, once the agencies began re-conceiving the role of fire, federal fire policy has evolved in the shadow of the law. The primary legal influence on this evolution has not been any specific law addressing wildfire, but rather the panoply of organic mandates, resource planning provisions, and environmental protection statutes that constitute the general legal framework governing the public lands. Under the National Parks Organic Act³⁷⁴ and the Wilderness Act,³⁷⁵ the agencies found sufficient congressional guidance to enable them to reintroduce fire to these landscapes and to allow wildfires to burn in remote locations.³⁷⁶ Elsewhere on the public domain, in the absence of any statutory prohibition, the multiple-use agencies have relied upon their considerable discretionary management authority to acknowledge the ecological importance of fire and to integrate it into their planning efforts. Wildfire management decisions have thus become entwined with related NFMA, NEPA, ESA, and administrative appeal requirements, subjecting agency officials to an array of legal obligations at both the planning and project levels.

Lacking clear congressional guidance, the public land agencies have approached fire policy from two quite different perspectives in recent years. During the Clinton Administration, the agencies universally acknowledged fire as an important ecological process, endorsed the use of prescribed fires, and began integrating fire management decisions into the land-use planning process. This science-driven approach to fire policy was reflected in the 1995 Federal Wildland Fire Management Review and reinforced in the 2001 update.³⁷⁷ It is perhaps best exemplified in the 2000 Sierra Nevada Framework Plan. Not only did the plan accord prescribed fire a major role in restoring the region's forests (while significantly curtailing timber cutting activities), but it was developed through an ecologically-driven regional planning effort conducted according to existing NFMA and NEPA legal requirements.³⁷⁸ Under the Bush Administration, however, the agencies have treated fire primarily as a political and legal problem, citing the need to curtail catastrophic wildfire events and to better safeguard wildland-urban interface areas. Confronted with several disastrous fire events and the prospect of a looming forest health crisis, the principal emphasis has been on mechanically reducing the hazardous fuel build-up, expediting post-fire

³⁷² See *supra* notes 13–29 and accompanying text.

³⁷³ See *supra* notes 26–29 and accompanying text.

³⁷⁴ National Park Service Organic Act, 16 U.S.C. §§ 1–14(a) (2000).

³⁷⁵ Wilderness Act, 16 U.S.C. §§ 1131–1136 (2000).

³⁷⁶ See *supra* notes 32–35, 129–31 and accompanying text.

³⁷⁷ For a description and analysis of these documents, see *supra* notes 43–48, 52–54 and accompanying text.

³⁷⁸ The Sierra Nevada national forest planning effort is described and analyzed at *supra* notes 152–54 and accompanying text.

salvage logging operations, and reducing perceived procedural hurdles.³⁷⁹ This shift in emphasis is reflected in the Forest Service's revised Sierra Nevada Framework Plan, which has dramatically escalated timber cutting levels and reduced the use of prescribed burning for fire management purposes.³⁸⁰ It is also reflected in the manifold "healthy forest" legal reforms.

The result is a federal fire policy that lacks universal consensus. There is general agreement over the need to restore fire-adapted forest ecosystems, reduce hazardous fuel levels, and safeguard wildland-urban interface communities. There is also widespread recognition that wildfire should be addressed at the landscape or regional scale for natural resource planning purposes. And the prevailing consensus holds that prescribed fires are generally appropriate in national parks, wilderness areas, and other remote locations, but not welcome in the wildland-urban interface zone due to current fuel load conditions. That consensus, however, breaks down over the role of fire on the "lands between," principally multiple-use lands distant from the interface zone where diverse timber, watershed, wildlife, and other resource values may be at stake. And the same holds true for hazardous fuel reduction projects in the interface zone, where disagreement persists on the appropriate magnitude and intensity of mechanical thinning efforts. Controversy persists too over the role of salvage logging in restoring forest health and the environmental consequences attached to various fire suppression strategies. But even with these reservations, the emphasis is decidedly more on active fuels management to reduce the fire danger, and less on the salutary benefits of fire-restored ecosystems.

The law governing fire lacks both clarity and consistency, and thus has done little to clarify the overall policy agenda. In fact, recent congressional and Bush Administration legal reforms send mixed signals regarding federal fire policy and its relationship to the laws governing resource planning and decision making. For its part, Congress has not only limited the HFRA's scope and application,³⁸¹ but it has adopted other site-specific bills that further obscure the role of fire on the federal landscape. The Steens Mountain bill provides for reintroducing fire on specified federal lands,³⁸² while the Quincy, Black Hills, and Flathead-Kootenai bills emphasize fuel reduction strategies to control wildfire.³⁸³ To protect environmental values, the HFRA contains explicit old growth cutting limitations as well as various legal compliance provisions,³⁸⁴ but then expedites hazardous fuel reduction

³⁷⁹ See *supra* notes 197–232 and accompanying text.

³⁸⁰ See *supra* note 153 and accompanying text.

³⁸¹ The HFRA applies only to national forest and BLM multiple-use lands, not to national parks, wilderness areas, wilderness study areas, or other protected federal lands. And HFRA-sanctioned fuel treatments are limited to no more than 20 million acres of public land. See *supra* notes 247–50 and accompanying text for a discussion of these statutory limitations.

³⁸² See *supra* notes 158–59 and accompanying text. Similarly, the New Mexico-focused Community Forest Restoration Act of 2000 provides for reintroducing fire on the public lands, while providing for hazardous fuel reduction projects too. See *supra* notes 160–61 and accompanying text.

³⁸³ See *supra* notes 164–68 and accompanying text.

³⁸⁴ See *supra* notes 248–50, 256 and accompanying text. Notably, the HFRA requires that authorized fuel treatment projects must comply with NEPA (other than alternatives analysis)

efforts by reducing NEPA analysis requirements, establishing a new pre-decision review process, and encouraging prompt judicial review.³⁸⁵ The Quincy bill insists upon full compliance with the environmental laws, while the Black Hills and Flathead-Kootenai legislation not only alters NEPA legal requirements but also contains judicial review limitations.³⁸⁶ Further, Congress has yet to articulate or adopt an integrated fire management policy that extends to non-federal lands, thus leaving a discernible policy gap between public and private lands.³⁸⁷ For its part, the Bush Administration's reform initiatives have exempted fire-related project level decisions (including salvage logging proposals) from the very environmental laws that Congress endorsed in the HFRA.³⁸⁸ Its NFMA reforms have eliminated NEPA compliance and other environmental standards from the forest planning process,³⁸⁹ where threshold fire management decisions are ordinarily made. Although both the HFRA and the Bush Administration's reforms contain important public involvement, collaborative planning, and monitoring provisions,³⁹⁰ these procedural requirements do not ensure that environmental considerations will be integrated into final fire project decisions. As a result, the healthy forest legal reforms risk re-erecting the historical barrier between wildfire and resource management policy, and fail to address the full geographic dimensions of the wildfire dilemma.

As troubling, the public land agencies are no longer directly accountable for their fire-related management decisions. The principal legal accountability mechanisms—the NFMA planning standards, NEPA environmental analysis requirements, ESA consultation mandates, and related administrative and judicial review opportunities—have all been modified in the name of managerial efficiency. At the planning level, the Forest Service's revised NFMA rules have eliminated NEPA compliance from planning level decisions and jettisoned key biodiversity and other

and must be consistent with "other applicable laws." Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148 § 104, 117 Stat. 1887 (codified at 16 U.S.C.A. § 6514(a)).

³⁸⁵ See *supra* notes 257–68 and accompanying text for a discussion of these various HFRA legal reforms.

³⁸⁶ The Black Hills legislation waived both NEPA and NFMA compliance requirements, and also precluded any judicial review of the implementation decisions, while the Flathead-Kootenai legislation limited NEPA analysis and Clean Water Act compliance requirements. See *supra* notes 162–68 and accompanying text.

³⁸⁷ See *supra* notes 331–68 and accompanying text.

³⁸⁸ Although the HFRA requires full compliance with NEPA (other than its revised alternative analysis requirement), the Bush Administration's healthy forest reforms invoke the NEPA categorical exclusion to eliminate any environmental analysis obligations for prescribed burn projects under 4500 acres, mechanical thinning projects under 1000 acres, and salvage logging projects under 4200 acres. See *supra* notes 201–08 and accompanying text. And though the HFRA contemplates full compliance with the ESA, the Bush Administration's reforms have eliminated important section 7 interagency consultation obligations. See *supra* notes 209–13 and accompanying text.

³⁸⁹ See *supra* notes 233–38 and accompanying text. Notably, the HFRA contemplated compliance with the NFMA's biodiversity requirements, but the Bush Administration's planning rule revisions have rendered this regulation largely unenforceable. See *supra* note 237 and accompanying text.

³⁹⁰ See *supra* notes 252–55 and accompanying text.

management standards,³⁹¹ thus effectively insulating most fire-related and other forest planning decisions from judicial review.³⁹² At the project level, under the HFRA and the Healthy Forests Initiative reforms, NEPA and NFMA compliance obligations have been significantly curtailed too. Add on the recent ESA consultation reforms and revised administrative appeal regulations, and the agencies face few explicit legal constraints when making important fire-related management decisions, as well as little likelihood of administrative or judicial intervention.³⁹³ Though the public involvement and collaborative planning requirements promote transparency and thus offer some oversight opportunity, the agencies can ultimately ignore the public's recommendations or proposals with near impunity.

The other laws that shape federal fire policy provide little additional policy guidance or accountability opportunities. When Congress has weighed in with its incident-specific compensatory legislation, it has revealed a noticeable discomfort with fire as a resource management tool.³⁹⁴ The FTCA does not directly address wildland fire policy, while FTCA federal court rulings—given the expansive discretionary function doctrine—have generally deferred to the agencies over fire management decisions involving naturally ignited fires.³⁹⁵ The one exception is the *Anderson* ruling that imposed liability for an escaped controlled burn, which suggests the courts will scrutinize carefully agency decisions involving where and when to ignite blazes for resource management purposes.³⁹⁶ State law has had relatively little direct impact on federal fire policy and management decisions,³⁹⁷ with the notable exception of smoke control where air pollution standards limit

³⁹¹ See *supra* notes 233–38 and accompanying text for a discussion of the 2005 NFMA planning rule revisions; see also *infra* notes 437–38 and accompanying text.

³⁹² At the intermediate planning level, agency fire management plans are often tiered to forest plans and identify potential fuel treatment areas. Asserting that these fire management plans do not contemplate ground-disturbing activity, the agencies have contended they are not subject to NEPA compliance. The courts, however, have disagreed with this position. See *People of California v. United States Forest Serv.*, No. C-04-02588 CRB, 2005 WL 1630020 (N.D. Cal. Jul. 11, 2005) (finding that the U.S. Forest Service violated NEPA by failing to conduct NEPA analysis before issuing a forest plan); *Env'tl. Protection Information Ctr. v. United States Forest Serv.*, No. C-02-2708 JCS, 2003 WL 22283969 (N.D. Cal. Sept. 5, 2003) (holding that the Forest Service violated NEPA by failing to prepare an EA or EIS before issuing a forest management plan); see *supra* notes 195–96 and accompanying text.

³⁹³ *But see* *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994 (E.D. Cal. 2005) (invalidating portions of the Forest Service's administrative appeal revisions), which is discussed *supra*, notes 222–24 and accompanying text.

³⁹⁴ Congress's uneasiness with wildfire as a resource management tool is perhaps best reflected in its 2000 Cerro Grande legislation that sidestepped FTCA requirements to ensure compensation for homeowners damaged by the Los Alamos controlled burn that escaped containment. See *supra* notes 319–20 and accompanying text.

³⁹⁵ See *supra* notes 290–306 and accompanying text for a discussion of the FTCA discretionary function doctrine.

³⁹⁶ For a discussion of *Anderson v. United States*, 55 F.3d 1379 (9th Cir. 1995), see *supra* notes 307–09 and accompanying text.

³⁹⁷ Perhaps the biggest federal-state fire management problem involves coordination. Some states have laws requiring that wildfires must be extinguished, which can create obvious coordination problems when federal agencies have designated the blaze a prescribed fire and are allowing it to burn for resource management purposes. See *supra* note 336 and accompanying text.

the use of prescribed fire as a resource management tool.³⁹⁸ State fire-related land-use and zoning laws could strengthen federal-local coordination efforts in the wildland-urban interface zone, but few states actually regulate private lands for this purpose, leaving cooperative fire planning more a matter of process than substance.³⁹⁹

In sum, though the law has enabled the public land agencies to begin treating wildfire as a resource management issue, it may now serve as an obstacle to fully integrating fire into resource policy. The healthy forest reforms, by de-coupling fire management from the environmental laws, have shifted important fire-related project decisions outside conventional natural resource decision processes.⁴⁰⁰ These same reforms, in conjunction with FTCA precedents and state law, reveal a not-so-subtle bias away from prescribed burning and toward thinning as the fire management tool of choice.⁴⁰¹ Although federal and state laws endorse collaborative planning, neither sovereign has established uniform regional fire management standards, leaving fire-related land-use planning decisions to be made mostly on an ad hoc basis. Moreover, when the federal public land agencies reach fire-related management decisions, their judgments are largely insulated from meaningful administrative or judicial review, thus vesting agency officials with broad discretion in determining where and how to address the fire risk. Paradoxically, just as wildfire management has achieved recognition as an important dimension of natural resource policy, it is at risk of being systematically divorced from the legal framework that governs resource management and planning on the public lands.

B. Unraveling the Intertwined Issues

As central as the fire management debate is to public land policy, it cannot be understood in isolation. In fact, federal fire policy is entwined with several other highly contentious issues, including: the ongoing struggle over national forest timber management policy; wilderness designation and related roadless area protection efforts; new ecological management and restoration policies; the scope and use of federal authority on privately

³⁹⁸ See *supra* notes 345–51 and accompanying text.

³⁹⁹ For a description of the relatively unique and stringent Malibu building code, which does actually regulate private homeowners, see Adler, *supra* note 362. See also NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, WILDFIRE SUPPRESSION: STRATEGIES FOR CONTAINING COSTS 40–41 (2002) [hereinafter NATIONAL ACADEMY, WILDFIRE SUPPRESSION] (“FEMA is the only federal agency currently requiring non-federal organizations to prepare hazard mitigation plans, and wherever wildfire hazards are significant, these plans must include a wildfire element. Local plans can be developed by any ‘local’ government.”).

⁴⁰⁰ As we have seen, the fact that the NFMA planning rule revisions also de-couple the forest planning process from NEPA further exacerbates the problem by eliminating NEPA-based environmental analysis at both the planning and project level decision stages. See *supra* notes 233–38 and accompanying text.

⁴⁰¹ Of course, prescribed burning suffered a major political setback in the aftermath of the 2000 Cerro Grande fire. The Cerro Grande fire originated from a federal controlled burn that escaped containment and eventually destroyed part of Los Alamos, which also prompted Congress to bypass the FTCA process to ensure adequate compensation for the damaged homeowners. See *supra* notes 47, 319–20 and accompanying text.

owned lands; the role of market-based economic incentives versus outright subsidies; and the discretion-accountability question that is central to contemporary public land law. None of these issues should be ignored in the legal reform debate.

For much of the last half of the twentieth century, the Forest Service operated primarily as a timber production agency. Following World War II, the agency embarked upon a major timber liquidation binge,⁴⁰² particularly in the munificent Pacific Northwest old growth forests that harbored much valuable and readily accessible lumber. But by the early 1990s, a determined environmental community, pursuing an aggressive litigation agenda based on an assortment of NEPA, NFMA, FLPMA, and ESA claims, brought the harvesting juggernaut to a standstill. As a result, national forest timber sale volumes plummeted from twelve billion board feet (BBF) annually to less than four BBF⁴⁰³ and have remained stagnant. In response, the Forest Service announced it was changing direction to embrace a new ecosystem management policy, which meant applying a much lighter and more ecologically discerning hand to the land.⁴⁰⁴ Not everyone agreed with this new policy direction, as reflected in Congress's now-notorious 1995 salvage logging rider that briefly ramped up timber sales.⁴⁰⁵ Since then, the agency has faced steady pressures to reinvigorate its timber harvesting program, with proponents arguing that this is necessary to curb the mounting wildfire danger and to restore fire-adapted ecosystems.

Thus, when the Bush Administration unveiled its expansive Healthy Forests Initiative, longstanding opponents of the Forest Service's logging policies reacted with palpable concern. They feared the proposed new forest thinning and salvage programs represented a backdoor effort to reestablish an expansive timber harvest program that would once again place remaining old growth stands and related biodiversity values at risk.⁴⁰⁶ These concerns were further fueled by the Bush Administration's insistence, as part of the Healthy Forests Initiative, that the Forest Service be relieved from complying with existing environmental laws. Other contemporaneous forest management policy decisions—including the roadless rule revisions, the Sierra Nevada Framework Plan modifications, and the revised Northwest and Tongass forest management plans—constituted powerful additional evidence of a concerted effort to reopen national forest lands to more timber

⁴⁰² The Forest Service was joined in this timber harvesting bonanza by the Bureau of Land Management, which was charged with managing the bountiful Oregon and California timber lands. See generally Michael C. Blumm & Jonathan Lovvorn, *The Proposed Transfer of BLM Timber Lands to the State of Oregon: Environmental and Economic Questions*, 32 LAND & WATER L. REV. 354–77 (1997) (describing Congress's 1946 delegation to BLM of timber management responsibilities).

⁴⁰³ See JOHN FEDKIW, MANAGING MULTIPLE USES ON NATIONAL FORESTS, 1905–1995: A 90-YEAR LONG LEARNING EXPERIENCE AND IT ISN'T FINISHED YET 222–23 (1999); KEITER, KEEPING FAITH WITH NATURE, *supra* note 2, at 109.

⁴⁰⁴ See KEITER, KEEPING FAITH WITH NATURE, *supra* note 2, at 115–16. On ecosystem management, see *infra* notes 417–20 and accompanying text.

⁴⁰⁵ See *supra* note 100 and accompanying text.

⁴⁰⁶ See *supra* notes 98–100, 222–28 and accompanying text; see also ARNO & FIEDLER, *supra* note 85, at 11–13, 33–36 (noting that environmental advocates often argue that “restoration forestry is a ruse” for increased timber production).

harvesting.⁴⁰⁷ When the Bush Administration then released its new 2005 NFMA planning rule revisions, which eliminated NEPA compliance from planning level decisions and jettisoned key biodiversity and other management standards,⁴⁰⁸ the degree to which the agency was committed to insulating timber harvesting and related decisions from judicial review became fully apparent.

But it was the law—particularly the NFMA, NEPA, and the ESA—that provided the judiciary with the authority to enjoin old growth logging in the Pacific Northwest and laid the legal foundation for new federal ecosystem management policies.⁴⁰⁹ These environmental laws, in short, not only fostered a new sense of accountability on the part of federal land managers, but also instilled a nascent set of new priorities focused more on biodiversity protection, roadless area conservation, and the like, and less on timber harvesting and other commodity production activities. If the agency is now free to ignore environmental legal requirements, what assurance is there that it will not bow to corporate or political pressures and reinstitute an aggressive timber cutting program geared less toward fire control and more toward commodity production? The entire forest health debate illustrates just how precarious the legal framework governing the public lands can be in the face of a determined and clever political onslaught.

Throughout the latter half of the twentieth century, wilderness protection has been a central flashpoint in national forest policy. In 1964, Congress passed the Wilderness Act and thus formalized the notion of wilderness preservation on national forest and other public lands.⁴¹⁰ Since then, the nation's wilderness system has grown to over 105 million acres, with 35 million of these acres located on national forest lands.⁴¹¹ Firmly committed to preserving additional lands, wilderness advocates continue to seek more designations and have therefore actively resisted timber sales and other industrial incursions into existing roadless areas.⁴¹² During the Clinton Administration, in direct response to these concerns, the Forest Service adopted a controversial Roadless Area Conservation rule designed to

⁴⁰⁷ For further discussion of Sierra Nevada forest plan revisions, see *supra* notes 153–54 and accompanying text. For further discussion of the roadless rule, see *infra* notes 413–15 and accompanying text. For additional information on the Northwest Forest Plan revisions, see *Northwest Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175 (W.D. Wash. 2005). For additional information on the Tongass forest plan revisions, see Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. (2006) 387, 403–407.

⁴⁰⁸ See *supra* notes 233–38 and accompanying text.

⁴⁰⁹ See KEITER, KEEPING FAITH WITH NATURE, *supra* note 2, at 87–104.

⁴¹⁰ MICHAEL FROME, BATTLE FOR WILDERNESS 144–45 (rev. ed. 1997); McCloskey, *supra* note 31, at 288. Notably, the Wilderness Act of 1964 did not extend to BLM lands, which were not eligible for wilderness designation until passage of FLPMA in 1976. John D. Leshy, *Wilderness and Its Discontents—Wilderness Review Comes to the Public Lands*, 1981 ARIZ. ST. L.J. 361, 369 (1981).

⁴¹¹ FROME, *supra* note 410, at 264–65.

⁴¹² To qualify for wilderness protection, federal lands must remain in a natural condition, unaltered by such human activities as roads, mines, or timber cuts. Wilderness Act, 16 U.S.C. § 1131(c) (2000) (defining “wilderness” as “an area . . . untrammeled by man . . . retaining its primeval character and influence, without permanent improvements or human habitation . . . managed so as to preserve its natural conditions”).

safeguard nearly 60 million acres of undeveloped forest lands from road construction, logging, and other extractive activities.⁴¹³ With this legal protection, these roadless lands would remain available indefinitely for formal wilderness designation. But faced with myriad legal challenges to the rule and a new Bush Administration that disdained it,⁴¹⁴ the Forest Service eventually reversed course and revoked the roadless rule,⁴¹⁵ asserting that access is necessary to address lurking forest health and fire danger problems.⁴¹⁶ This not only raises the specter of new roads and timber cutting on these lands, but would also render them ineligible for future wilderness protection. It also explains why the environmental community, while endorsing hazardous fuel reduction efforts on wildland-urban interface lands, has resisted aggressive fuel treatments on more distant—and often roadless—forest lands, including many of those that fit within the “lands between” category.

During the 1990s, the Forest Service embraced a new ecosystem management policy for the national forests.⁴¹⁷ With its emphasis on ecological sustainability, debates raged over just what ecosystem management meant, how to implement it, and even whether such an undertaking was possible.⁴¹⁸ One principal point of contention involves the notion of management: do the national forests need more or less of it? The specific question is whether ecosystem management contemplates an active and interventionist management approach to reshape the landscape, or a

⁴¹³ 36 C.F.R. pt. 294 (2005); U.S. FOREST SERVICE, FOREST SERVICE ROADLESS AREA CONSERVATION FINAL ENVIRONMENTAL IMPACT STATEMENT (2000). See generally Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143 (2004); Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wilderness*, 34 ENVTL. L. 1015 (2004).

⁴¹⁴ See, e.g., *Wyoming v. United States Dep't of Agric.*, 277 F. Supp. 2d 1197 (D. Wyo. 2003) (enjoining the roadless rule as violative of NEPA and the Wilderness Act); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) (ruling that the roadless rule did not violate NEPA or the APA); Dan Berman, *Bush Administration Moves to Repeal Clinton-era Roadless Rule*, LAND LETTER, July 15, 2004, available at <http://www.eenews.net/Landletter/2004/07/15/#4> (reporting the Bush Administration's move to eliminate the roadless rule).

⁴¹⁵ Forest Service, Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005).

⁴¹⁶ See Special Areas: State Petitions for Inventoried Roadless Area Management, 69 Fed. Reg. 42,636, 42,637 (July 16, 2004).

⁴¹⁷ See FEDKIW, *supra* note 403, at 268, 275–84 (highlighting the Forest Service's commitment to an ecosystem approach to managing multiple uses on national forest lands); INTERAGENCY ECOSYSTEM MANAGEMENT TASK FORCE, THE ECOSYSTEM APPROACH: HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES, vol. I, Overview (1995) (outlining federal implementation of ecosystem management); Robert C. Szaro, *The Emergence of Ecosystem Management as a Tool for Meeting People's Needs and Sustaining Ecosystems*, 40 LANDSCAPE & URBAN PLAN 1 (1998) (detailing the emergence of ecosystem management in federal land-use regulation).

⁴¹⁸ Skeptics and critics of the new ecosystem management policy included ALLAN K. FITZSIMMONS, DEFENDING ILLUSIONS: FEDERAL PROTECTION OF ECOSYSTEMS (1999); Allan K. Fitzsimmons, *Why a Policy of Federal Management and Protection of Ecosystems Is a Bad Idea*, 40 LANDSCAPE & URB. PLAN. 195 (1998); Robert T. Lackey, *Seven Pillars of Ecosystem Management*, 40 LANDSCAPE & URB. PLAN. 21 (1998); Warren A. Flick & William E. King, *Ecosystem Management as American Law*, RENEWABLE RESOURCES J., Autumn 1995, at 6; Rebecca W. Thomson, *Ecosystem Management: Great Idea, But What Is It, Will It Work, and Who Will Pay?*, NAT. RESOURCES & ENV'T, Winter 1995, at 42, 70–72.

more passive, non-interventionist strategy that mostly allows nature to take its own course. Outside designated wilderness areas, the Forest Service has traditionally pursued a utilitarian agenda that has been fundamentally active and interventionist, so a less intrusive management style would represent a basic paradigm shift—one eagerly sought by the environmental community in the wake of the timber wars and related forest policy controversies.⁴¹⁹

But enter the forest health debate, which is based on the premise that a century of aggressive fire suppression has so altered forest ecosystems that an active, manipulative forest restoration policy is necessary. The paradox is striking: having long pursued ill-advised, intensive fire management and suppression policies, the Forest Service has now concluded it is necessary to intervene with nature yet again through mechanical tree thinning and other hazardous fuel reduction programs—all justified in the name of restoring a healthy ecosystem. Not surprisingly, the agency's critics question whether ecosystem management really contemplates another heavy assault on the forests, and whether fire—itself a natural process—is not the most appropriate tool to use for achieving ecologically viable forests.⁴²⁰ Put simply, ecosystem management and forest health concerns have rekindled the management versus non-management debate, albeit in the cloak of ecological restoration rather than commodity production.

The fire policy debates raise age-old jurisdictional issues over the federal government's role on private lands situated near publicly-owned lands. Rural communities have long faced fire danger from adjacent national forests, but now that risk is compounded with growing urbanization and development immediately abutting federal boundaries across the West. Not only have western cities experienced tremendous population growth and related neighborhood expansions into previously undeveloped lands,⁴²¹ but an array of "urban archipelagos" situated near scenic venues continue to attract newcomers at alarming rates, bringing yet more development adjacent to public lands.⁴²² Discounting the fact that they have chosen to live in a fire prone environment, these new residents demand and expect government protection from fire dangers lurking on adjacent public lands, frequently asserting private property rights to support their demands. At the same time, they regularly object to logging or thinning projects that detract from the aesthetic setting, and they often protest drifting smoke from prescribed burns as well as the blackened forests that are left behind.⁴²³

⁴¹⁹ On the notion of ecosystem management as a basic paradigm shift, see HANNA J. CORTNER & MARGARET A. MOOTE, *THE POLITICS OF ECOSYSTEM MANAGEMENT* 37-55 (1999).

⁴²⁰ See, e.g., APLET & WILMER, *supra* note 68, at 20-28 (describing the controversy surrounding ecosystem restoration). But see ARNO & FIEDLER, *supra* note 85, at 36-53 (promoting restoration techniques using prescribed burning and silvicultural practices).

⁴²¹ See CTR. OF THE AM. WEST, UNIV. OF COLO., *ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION* 55 (William E. Riebsame ed., 1997) (noting that the intermountain West is experiencing rapid urbanization).

⁴²² See generally, Andrew F. Egan & A.E. Luloff, *The Exurbanization of America's Forests: Research in Rural Social Science*, *J. OF FORESTRY*, Mar. 2000, at 26; James R. Rasband, *The Rise of Urban Archipelagos in the West: A New Reservation Policy?*, 31 *ENVTL. L.* 1 (2001).

⁴²³ See CARLE, *supra* note 19, at 251-53 (discussing air quality concerns over fire management practices); INTERAGENCY FIRE MANAGEMENT STRATEGY, *supra* note 83, at 39

Moreover, state and local governments have been reluctant to utilize their land-use planning and zoning powers to impose fire-related location, construction, or maintenance requirements on private landowners. But wildfires do not respect jurisdictional boundary lines, which means an effective fire management policy will require substantial cooperation among the various governments and with at-risk property owners.

What role, therefore, should the federal government play in defining and coordinating an integrated fire management policy that extends across jurisdictional lines? On the public lands, where the agencies are vested with full legal authority, the primary strategy—as reflected in the healthy forests reforms—has been to promote collaborative decision making to engage local communities in hazardous fuel reduction projects and other decisions.⁴²⁴ On adjacent private lands, the principal federal strategy has been to educate private landowners about wildfire danger, to fund community wildfire planning efforts, and to enter inter-jurisdictional, cooperative fire management agreements.⁴²⁵ These arrangements, however, are voluntary for the most part; they do not involve comprehensive, fire-related land-use standards, nor do they ensure that private landowners will individually take action to minimize wildfire risks.⁴²⁶ While the private insurance industry has begun to use its market power to encourage homeowners to better fire-proof their lots and residences,⁴²⁷ these efforts have been modest thus far. The real power rests with the federal government, which could not only exercise its expansive regulatory authority over private lands,⁴²⁸ but also wield its conditional spending powers to promote fire-conscious land-use and zoning policies in the expanding wildland-urban interface area.⁴²⁹ Though the

(discussing complaints about fire management practices by the public); Mark W. Brunson & Jessica Evans, *Badly Burned?: Effects of an Escaped Prescribed Burn on Social Acceptability of Wildland Fuels Treatments*, J. OF FORESTRY, Apr./May 2005, at 134, 135–36 (2005) (discussing citizen reaction to prescribed burning in Utah); Sweedo, *supra* note 9, at 130 (noting negative public reaction from proposals to change burning practices in Idaho).

⁴²⁴ See *supra* notes 205, 252–53 and accompanying text.

⁴²⁵ See *supra* notes 339–44 and accompanying text.

⁴²⁶ See NATIONAL ACADEMY, WILDFIRE SUPPRESSION, *supra* note 399, at 40–41 (discussing potential wildfire strategies for communities).

⁴²⁷ For a description of wildfire-related initiatives by the private insurance industry, see *supra* notes 321–24 and accompanying text.

⁴²⁸ To sustain an extra-territorial assertion of congressional authority under the Constitution's Article IV property clause for fire management purposes, the federal government would merely have to show that the regulatory provision was designed to protect the fundamental purposes of the federal lands and that it was reasonably related to those purposes. *Minnesota v. Block*, 660 F.2d 1240, 1248–51 (8th Cir. 1981). Thus, congressional regulatory provisions designed to reduce the risk of fire spreading from private to public lands or to reduce the necessity of federal firefighters diverting their attention from controlling errant blazes to protecting private property from wildfire (a significant problem today) should pass constitutional muster. See also *supra* notes 110, 356–57 and accompanying text.

⁴²⁹ For example, Congress might condition federal fire-related funding on state or local governmental entities adopting specific fire-related zoning, siting, maintenance, or construction standards. See *supra* notes 342–44, 355–59 and accompanying text. On the federal conditional spending power, see *South Dakota v. Dole*, 483 U.S. 203 (1987) (addressing constitutionality of conditioning federal highway funds on a minimum drinking age); and Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

politics surrounding federal involvement in local land-use matters are daunting, the alternative is a piecemeal and ineffective fire management policy for the wildland-urban interface—exactly where the need for an integrated policy is greatest.

Federal fire management has become an extraordinarily expensive matter laden with controversial fiscal and political overtones. Besides underwriting the costly annual federal firefighting effort,⁴³⁰ Congress is now faced with funding a massive forest restoration and fuel reduction campaign that extends across approximately 190 million acres of unhealthy federal lands.⁴³¹ The question is how to pay for these extensive forest restoration initiatives, given the immediacy and duration of the required effort. Not only do tree thinning projects fail to produce much new revenue, but fire-proofed landscapes must be maintained at regular intervals, thus adding recurrent expenses. Timber sale revenues that might be used to help cover fuel reduction or post-fire restoration costs are down dramatically. And when the agencies, to reduce costs, have included commercially valuable timber in thinning projects or stewardship contract arrangements, they have often been challenged on environmental and other grounds.⁴³² The bottom line is that federal appropriations are required to subsidize most forest thinning projects, as well as related biomass commercial ventures and the prescribed burning program. In fact, Congress has appropriated ever-increasing amounts for fuel reduction projects,⁴³³ including funds for biomass demonstration projects and community fire planning.

Critics fear, however, that these fiscal arrangements are inherently unstable and create perverse incentives that could prove more destructive of forest ecosystems than wildfires. They worry that the fuel reduction effort is unsustainable over the long term and that pressure will mount to reinstitute a commercial timber harvest program to offset these unremitting costs, even though national forest timber programs have historically cost more than they return to the federal treasury. In their view, the agencies should be promoting healthy forests by allowing more natural fires to burn in locations outside the interface zone and by doing less costly prescribed burns (rather than mechanical thinning) whenever possible.⁴³⁴ They argue that federal funds should be used only to thin overgrown forests in the wildland-urban interface zone, not in more remote locations where private property values are not at risk. They also contend that the agencies could save fire suppression funds by not fighting all fires but only those realistically threatening communities, with the savings then invested in the forest

⁴³⁰ See *supra* notes 49–50, 73–76 and accompanying text.

⁴³¹ GAO WILDLAND FIRE MANAGEMENT, *supra* note 1, at 3–4 (noting that this unhealthy conditions acreage estimate could vary from 90 to 200 million acres).

⁴³² See, e.g., Idaho Conservation League v. Bennett, No. CV 04-447-S-MHW, 2005 WL 1041396 (D. Idaho Apr. 29, 2005) (challenging Forest Service project on NEPA, FLPMA, and NMFA grounds).

⁴³³ See *supra* note 73 and accompanying text.

⁴³⁴ The key to accomplishing these objectives, in the critics' view, is carefully designed fire management plans that effectively zone fire suppression, prescribed burning, and thinning activities across the landscape, with the emphasis on the use of fire rather than thinning to restore forest health everywhere but near human communities. ALKIRE, *supra* note 73, at 20–21.

restoration effort.⁴³⁵ These arguments have a powerful logic to them in an era of tight budgets and greater ecological awareness. The fact is, with only modest adjustments, Congress could fine tune its budgetary priorities to give fire more room on the landscape, to keep thinning efforts focused on protecting at-risk communities, and to ensure these communities are taking affirmative steps to fire-proof themselves.⁴³⁶

Furthermore, the fire policy debate starkly poses the issue of agency discretion versus accountability. Two of the most important developments in public land law during the past half century are the trend toward more prescriptive legal standards to guide agency resource management decisions, and the related trend toward ensuring judicial oversight to enforce these standards.⁴³⁷ To the chagrin of agency officials who have long cherished their discretionary managerial prerogatives, Congress has consistently added more prescriptive statutory standards and procedural requirements to governing legislation, as reflected in the NFMA, ESA, NEPA, and, more recently, the National Wildlife Refuge System Improvement Act of 1997.⁴³⁸ This same trend is evident in the detailed HFRA provisions, as well as in several of the recent site-specific statutes addressing fire-related concerns. But citing the catastrophic wildfire risk, the Bush Administration's Healthy Forests Initiative reverses this trend by allowing the agencies to make and implement fire planning and fuel removal project decisions without adhering to the full panoply of environmental and other statutory requirements that have traditionally guided agency planning and decision processes. Moreover, the Forest Service's new administrative appeal regulations effectively eliminate this level of oversight, while Congress has signaled in the HFRA and elsewhere its desire to limit judicial oversight.

These reforms are particularly ill-advised, both because of the uncertain and experimental nature of new federal fire policies as well as the contested nature of the lands potentially impacted by these policies. Given the overlapping issues embedded in fire policy and management decisions, the move toward reducing agency accountability can only create additional anxiety over the motives underlying any specific fuel reduction, salvage logging, or other forest management decision. Alternative accountability mechanisms—such as public involvement or adaptive management

⁴³⁵ Further, the critics believe that local federal fire suppression funding should be contingent on states and communities developing fire management programs based on similar priorities. *Id.* at 19–20.

⁴³⁶ As noted, the HFRA already incorporates some of these funding priority features, which suggests that these proposals are not politically impossible and could be achieved with only modest changes to current funding strategies. *See supra* notes 244–53 and accompanying text.

⁴³⁷ COGGINS & GLICKSMAN, *supra* note 179, §§ 1:17–22; KEITER, KEEPING FAITH WITH NATURE, *supra* note 2, at 33–35. The genesis for these reforms was the fact that public land officials regularly made crucial resource management decisions solely on the basis of their own managerial discretion, leaving disapproving constituencies without any real recourse to challenge agency priorities or strategies on scientific or other grounds. In the case of the Forest Service, the agency's historically cozy relationship with the timber industry illustrated the problem and highlighted the need for meaningful oversight. *See supra* note 170 and sources cited therein.

⁴³⁸ Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified at 16 U.S.C. §§ 668dd, 668ee (2000)). *See generally* Fischman, *Wildlife Refuge System*, *supra* note 130.

requirements—do not ensure that environmental and other values will be weighed against the wildfire risk concerns driving these reforms, particularly outside the wildland-urban interface zone. Put simply, the lack of accountability risks returning natural resource policy to an era of unbounded discretion that does not bode well for sensitively integrating fire into the larger natural resource policy agenda.

C. A Law of Fire Aborning: Toward Greater Integration and Accountability

The law of fire is in its infancy. It is still hard to identify a discrete law of fire distinct from forestry law or the general planning and environmental laws governing the public lands. While the absence of a clear legal mandate may have provided the agencies with sufficient latitude to restructure federal fire policy, recent legal reforms now threaten to undermine this progressive development. The issues involved in managing fire on the landscape are both complex and contentious: Fire is dangerous and cannot be allowed to burn everywhere; landscape scale planning is complicated and controversial; fire's ecological benefits are not easily balanced against competing economic, social, and political concerns; fire-related risk, uncertainty, and liability concerns are inherently difficult to resolve; the long-term costs involved in restoring fire-adapted ecosystems are potentially enormous; and jurisdictional realities limit the potential scope of the federal role. As daunting as these issues are, the critical question is whether the revised legal regime now governing federal fire policy is up to the task, or whether further revisions to current legal standards, planning processes, assessment procedures, and accountability mechanisms are necessary. To ignore this question in deference to the gathering legal status quo is to put the progress that has been made toward restoring fire on the landscape in jeopardy.

A legal mandate integrating fire into the federal resource management agenda is long overdue. For years Congress has sent primarily negative signals about wildfire and its role on the public lands, as reflected in the early fire control statutes, its open-ended suppression funding scheme, and its post-Yellowstone fire investigations. In fact, Congress has yet to acknowledge explicitly that wildfire plays an important role in shaping and sustaining healthy and resilient forest ecosystems, or that some fires should be permitted in appropriate locations. To be sure, the agencies have interpreted their loosely worded organic mandates and related statutory provisions as giving them the authority to allow designated wildfires to burn and to initiate controlled burns in limited circumstances. Though the HFRA makes provision for prescribed fires,⁴³⁹ it does not expressly recognize fire as a vital ecosystem component, nor does it clarify when prescribed burns may be lit. Other congressional enactments, such as the National Wildlife Refuge System Improvement Act of 1997, have begun to speak in ecological integrity terms,⁴⁴⁰ but this does not ensure any specific role for fire on these

⁴³⁹ See *supra* note 242 and accompanying text.

⁴⁴⁰ 16 U.S.C. § 668dd(a)(4)(B) (2004); see also *supra* notes 158–59 and accompanying text

lands. The point is that Congress has yet to incorporate wildfire management standards into the law governing the public lands.

An important first step is for Congress to acknowledge wildfire's place on the landscape. Wildfire is an ecological process; it is not a resource, at least not as we conventionally conceive of resources. Fire—unlike timber, water, and other resources—has no ready economic value in the marketplace that can be captured for private gain. But fire plays an important role in maintaining healthy and resilient ecosystems; it provides ecological services that have utilitarian value to society as a whole.⁴⁴¹ Yet fire—like floods, avalanches, and earthquakes—is also a potentially destructive force that can radically alter forest ecosystems, consume valuable resources, destroy private property, and endanger human lives. The smoke from fire is also a pollutant that poses potential public health and safety concerns. The law must therefore strike a balance between the benefits of fire and these competing concerns, which means integrating fire into resource management policy. This could be accomplished by an explicit congressional statement acknowledging fire as an important ecological process and also linking wildfire to sustainability in the organic charters for the individual agencies.

Once fire is vested with such stature, legal standards for managing it are necessary. This entails establishing priorities for choosing between fire and other resource values, and identifying appropriate strategies for reintegrating fire onto a landscape altered by the years of suppression.⁴⁴² Given the current limited policy consensus, the presumption should be to permit wildfires to burn in national park, wilderness, and other backcountry locations, to disallow wildfires in the wildland-urban interface zone, and to require the agencies to balance competing resource values and documented risks in making wildfire management decisions on the “lands between.” In choosing between prescribed burning and thinning for hazardous fuel reduction purposes, the legal emphasis should be on promoting ecological restoration and reducing the fire risks for communities. As in the HFRA, endangered species, biodiversity, watershed, and old growth limitations should further guide how projects are designed. When the issue is post-fire salvage logging, which is where much of the fire-related litigation has been,⁴⁴³ the need for additional guidance is even greater, given the potential for industry abuse and long-term environmental harm. At the very least,

(describing the Steens Mountain legislation). See generally *Symposium, Managing Biological Integrity, Diversity, and Environmental Health in the National Wildlife Refuges*, 44 NAT. RES. J. 931–1210 (2004) (discussing at length the interdisciplinary challenges of implementing new refuge legislation framed in ecological and biological terms).

⁴⁴¹ S.T.A. Pickett & Richard S. Ostfeld, *The Shifting Paradigm in Ecology, in A NEW CENTURY FOR NATURAL RESOURCES MANAGEMENT* 271–75 (Richard L. Knight & Sarah F. Bates eds., 1995); see also ARNO & ALLISON-BUNNELL, *supra* note 28, at 51–64 (describing various trees, undergrowth, and animals react when exposed to fire).

⁴⁴² The HFRA, with its specific location and old growth cutting limitations on hazardous fuel reduction projects, could serve as a useful statutory model for setting fire-related management standards. See *supra* notes 245–49 and accompanying text for a discussion of these HFRA provisions.

⁴⁴³ See *supra* notes 181–91 and accompanying text.

salvage projects should require justification on ecological restoration, not just commercial grounds.

As part of resource management, fire must be incorporated into agency planning processes, where key decisions should be made defining its role on specific landscapes. To the agencies' credit, this is occurring, but not to the degree required. By necessity, fire planning should be done at the regional level so agency officials can both understand the fire regime and integrate fire into the ownership mosaic.⁴⁴⁴ The difficult issues are how to manage fire on the "lands between" and how to incorporate non-federal lands in the wildland-urban interface zone into the planning effort. Whereas the federal agencies embraced a regional approach to planning as part of the Clinton Administration's ecosystem management agenda, such large-scale planning efforts have fallen into disfavor during the Bush Administration, making it more difficult to address fire at the appropriate scale. Currently, the agencies are addressing fire issues both in their standard resource management plans and in separate fire management plans, the combination of which establish fire management policy on the covered lands.⁴⁴⁵ Regardless of whether two plans are really necessary, the planning process must accomplish two objectives: first, ensure that fire is integrated with other resource management calculations related to sustaining healthy ecosystems; second, determine where wildfires will be allowed to burn and under what conditions, when and where various fuel treatment strategies—prescribed burning, forest thinning, and salvage removal—will be deployed, and how suppression efforts will proceed when necessary. Inasmuch as the federal agencies are bound by their planning decisions,⁴⁴⁶ project proposals should then be implemented in accord with these broader planning commitments. Such a planning process would not only define fire's role on the landscape, but it would also vest fire policy with legitimacy and accountability.

With the lack of consensus over vital fire management issues, the procedure used to plan for fire and to implement fire-related project decisions assumes critical importance. Under the planning and environmental laws, the agencies have traditionally followed a rigorous decision-making process that includes the preparation of NEPA documents, adherence to NFMA planning standards, consultation under the ESA with the regulatory agencies, and oversight through administrative or legal challenge. Though sometimes cumbersome, these formal processes have assured that environmental, economic, social, and other concerns are addressed, and that the public has an opportunity to inject its concerns and values into the process. It is, in the case of fire, a mechanism that ensures the agencies carefully balance competing resource values, ecological implications, safety considerations, and risk factors—all of which are crucial in determining the role fire should play in various public land venues. When these venues are contested (as is the case with the "lands between" roadless

⁴⁴⁴ The need for regional planning is acknowledged by the agencies, but no provision directs them to do such planning. See INTERAGENCY FIRE MANAGEMENT STRATEGY, *supra* note 83, at 9.

⁴⁴⁵ *Id.*

⁴⁴⁶ See *supra* notes 142–43 and accompanying text.

areas), or when implementation strategies are controversial (as is the case with some interface zone thinning proposals), then these assessment processes assume even greater importance. These same concerns loom even larger in the case of salvage logging projects, where the issue is often one of ecological versus commercial values. And the same holds true for contemporary fire suppression efforts, which can have extensive environmental impacts too.

This casts the Bush Administration's NFMA and healthy forest reforms in a different light. Rather than eliminate NEPA analysis requirements, the complexities involved in fire and fuel management demand careful planning and environmental assessment. How else can land managers determine whether mechanical thinning in endangered species habitat on the "lands between" is required to minimize the risk of losing the forest to a catastrophic wildfire? Or how else can the agencies assess the safety and commercial benefits associated with a salvage sale of fire-damaged timber against the ecological and other benefits that might accrue by leaving the area alone? Of course, timeliness may be important in some locations or instances due to excessive fuel accumulations, the risk of a major conflagration, or overarching resource values. But these emergency determinations are best made on a case-by-case basis, not on a wholesale level without a preliminary, site-specific examination of the competing concerns.⁴⁴⁷ When agency officials put forth a plausible emergency argument, NEPA procedural requirements might be waived to facilitate the necessary remedial treatments to minimize the fire danger. But given the diverse values at stake and the manifold uncertainties involved in wildfire management, a more sensitive and deliberative analysis should ordinarily be required to make these important resource-based decisions.

The notion of legal accountability through judicial and administrative oversight has assumed a central role in public land law and policy. But under the HFRA and the Bush Administration's Healthy Forests Initiative and other reforms, the primary legal accountability mechanisms—in the form of NEPA, NFMA, the ESA, and administrative review—have all been altered to facilitate sometimes controversial fuel reduction, controlled burning, and salvage logging projects.⁴⁴⁸ To be sure, public involvement provisions still ensure interested constituents an initial voice in shaping these decisions, but

⁴⁴⁷ Applying NEPA categorical exclusions to 1000-acre thinning and 4200-acre salvage logging projects does not ensure informed decision making. *See supra* notes 202–03 and accompanying text. Moreover, though the courts have thus far sustained the Forest Service's broad "emergency situation" definition in its revised administrative appeal rules, *supra* note 216, this definition is too broad for NEPA purposes. When the resource management goal is forest restoration, an "emergency situation" justifying the waiver of NEPA environmental analysis requirements should not turn on the potential loss of economic value; rather, it should require the showing of imminent and substantial harm to ecological resources. Only when faced with such a threat should the agency be allowed to dispense with a structured NEPA analysis of competing resource values, environmental impacts, and risk factors before authorizing forest thinning, salvage, or other projects.

⁴⁴⁸ It is worth noting that, with the elimination of legal accountability options, local communities—just like environmental groups and individual citizens—are prohibited from contesting controlled burns or other fire management decisions on NEPA and other legal grounds, leaving them potentially vulnerable to agency misjudgments and other mistakes.

the agencies can ultimately disregard these views. Although mandated adaptive management protocols interject some degree of scientific scrutiny into the process, and fiscal considerations will provoke congressional oversight in some instances, neither of these accountability mechanisms is an adequate substitute for meaningful judicial review to ensure case-by-case adherence to relevant standards and procedures. That the Bush Administration jettisoned these well-accepted legal accountability mechanisms is not surprising, inasmuch as its broader political agenda—as reflected in its tort reform and deregulation initiatives—similarly seeks to limit legal recourse. But given the resource values, uncertainties, and risks involved in fire management, legal accountability is essential to ensure that the public interest is being well served.⁴⁴⁹

Restoring fire and fire-resilient ecosystems to the public lands will be both an expensive and long term process requiring adequate and secure funding. Meaningful reform should enable us to live in an economically tolerable relationship with a more natural fire regime. How, therefore, should the federal government fund its fire management efforts, including hazardous fuel reduction projects and fire protection efforts in the wildland-urban interface zone? Because the agencies have rarely been held liable under the FTCA for their fire-related management decisions,⁴⁵⁰ Congress faces mainly political—rather than legal—pressures to underwrite fuel reduction and related projects. Having long subsidized an ill-advised total suppression fire policy and an expansive timber harvesting program, Congress should not now balk at redirecting some of these funds toward an ecologically sensitive forest restoration effort that utilizes fire to accomplish resource management objectives. In some cases, fuel reduction funding costs might be off-set by incorporating large-diameter, commercially valuable trees in a thinning project or stewardship contract, which can offer the private sector attractive incentives consistent with federal forest restoration goals. Direct subsidies may be necessary to bring new commercial biomass facilities on-line to utilize the brush and small diameter trees that are being removed.⁴⁵¹ While the private sector must be enlisted in the forest restoration effort, the federal government should assume most of the costs as part of its new ecological management agenda.

Given the size and scale of the wildfire problem, the federal government cannot address and solve the matter by itself. State and local governments must utilize their regulatory powers to promote necessary reforms, while the private insurance industry can assist through the marketplace as well. With their inherent police powers, state and local government should begin to address private land-use and development patterns to better control the fire risk in the volatile wildland-urban interface zone.⁴⁵² Local government can—

⁴⁴⁹ For a discussion of how emergency situations might be addressed, see *supra* note 447 and accompanying text.

⁴⁵⁰ The principal exception is when federal agencies have negligently implemented prescribed burning projects. See *supra* notes 307–09 and accompanying text.

⁴⁵¹ As noted, the HFRA contains such a funding provision. See *supra* note 251 and accompanying text.

⁴⁵² See NATIONAL ACADEMY, WILDFIRE SUPPRESSION, *supra* note 399, at 40–42.

and should—exercise its regulatory authority to limit new construction in unsafe areas, impose fireproof building requirements, and establish fire-resistant landscaping standards. Congress could prompt these local reforms through its conditional spending powers by making federal fire planning assistance and disaster funds contingent upon communities adopting fire-sensitive zoning, siting, and building codes.⁴⁵³ In addition, the private insurance industry can—and should—assertively promote fire-sensitive land-use and building code reforms. The industry can invoke the power of the market—through pricing incentives, risk assessments, and the like—to encourage homeowners to fireproof their properties and to discourage new construction in the dangerous interface zone. These reforms would reduce the pressure on the federal agencies to safeguard private residences in the interface zone, and thus enable them to concentrate their suppression and other efforts on fire-related resource management concerns rather than property protection. Whether there is sufficient political will or market pressure to prompt such changes, however, remains to be seen.

V. CONCLUSION

Wildfire serves as an apt metaphor for our evolving approach to public land and natural resource policy. We are still in the process of sorting out how we live with or accommodate wild untamed nature, including the ubiquitous flames that historically blazed across our forests. Having once undertaken to eliminate fire from the landscape, we have now reversed course and are making room for it, at least in some venues. We are doing so in recognition of the valuable ecological role that fire plays in sustaining the landscape, and out of sheer necessity. But we no longer live in a frontier landscape. Our communities and homes are edging ever closer to federal public land boundaries, placing them in significant danger from fire. Having pursued an aggressive, all-embracing fire suppression policy, we are now reaping the fruits of that policy in the form of overgrown, fire-prone forests. Shaping a sensitive yet effective federal wildfire restoration policy that accommodates these divergent concerns is not proving an easy task, yet the need for such a policy cannot be gainsaid.

The law is fundamental to the fire restoration effort. It has thus far provided the public land agencies with sufficient latitude to begin reshaping federal fire policy to account for the multifarious values and resources found on the public domain. Infused with a new ecological consciousness, the agencies have begun integrating fire policy into their resource management and planning agendas, where it belongs. They have identified key issues confronting this new approach to fire, namely where to permit wildfires to burn and where to remove hazardous fuels, as well as the diverse strategies—prescribed burning, forest thinning, and salvage removal—that can be employed to manage fire. But there is no consensus over these fire management issues. Rather than address conflicting viewpoints within the procedural framework of the existing planning and environmental laws, the

⁴⁵³ See *supra* notes 357–59, 362–67, 429 and accompanying text.

agencies have sought—and secured—the authority to step outside the law in making fire-related decisions. In doing so, notwithstanding assertions of the need for flexibility to curb the catastrophic fire threat, the agencies have been equally motivated by the desire to forestall litigation over controversial, unresolved resource policy issues.

But the law is not a straitjacket on the public domain. It provides an essential framework for addressing and resolving the difficult resource allocation decisions that are part of contemporary public land management, particularly when Congress—as in the case of fire—has not provided clear-cut policy guidance. Now that wildfire, in this new age of ecology, has attained recognition as an important dimension of forest management policy, it is particularly troubling that it is in danger of being divorced from the environmental laws that facilitate rational planning and decision making. Given the uncertainties and risks attached to wildfire, as well as the diverse public perspectives on fire management strategies, the existing legal framework offers a structured process for asking and answering these vital questions, and for ensuring meaningful accountability on the part of the agencies overseeing this venture into an uncertain policy world. To the extent time is of the essence in particular locations, these circumstances can be addressed on an individual, site-specific basis within this framework.

At the end of the day, wildfire will be restored to the landscape in appropriate venues that by necessity extend beyond our current preserved enclaves. Fire must be recognized as an important natural process and managed at a landscape scale that acknowledges its historic sweep and ecological impact. At the same time, we will continue actively managing fire to protect private property interests and important resource values, utilizing diverse fuel removal and control strategies that take account of countervailing environmental concerns. Despite ever-present litigation concerns, the law governing the public lands has established a time-tested planning and decision process that can—and should—be used to integrate fire into natural resource policy. Until Congress provides more definitive guidance clarifying fire's role on the landscape, the agencies will carry the principal burden for formulating and implementing federal fire and forest restoration policy. Faced with that challenging task, current efforts to distance the law from fire management are both unwise and counterproductive.