ESTABLISHING A FRAMEWORK FOR JUDICIAL REVIEW OF FIRE MANAGEMENT DECISIONS ON PUBLIC LANDS

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“[A]t this time, there does not appear to be [a reasonable prudent alternative] other than not using fire retardant on certain parts of the Forests, which we were advised by [the Washington Office] was not an option.”

INTRODUCTION

You are a Field Fire Management Officer for the Bureau of Land Management. The last seventy-two hours of your life have been dedicated to suppressing a ravenous inferno blazing across thousands of acres of federal land. The fire is now rapidly approaching a watershed and you have two options: let the fire pass through or expend all of your resources in hopes of holding the fire. If you choose option one, the fire will likely jump the watershed, scarify the riparian soil, cause twenty-one feet of runoff into the river, and result in the deaths of numerous endangered species. If you choose option two, you will not only risk human lives, but will also risk dropping fire retardant into the river and killing numerous endangered species. What do you do? How do you make your decision? What values do you protect?

In the last ten years, the total acreage of burned federal forestland has more than doubled.2 The cost of fighting wildfires on public lands has proportionately skyrocketed.3 Federal lands keep burning and Congress keeps spending money, with fire suppression costing over $1 billion annually.4 Despite all of the time, resources and money our nation has spent, the law of fire in the United States remains “an uncoordinated and fragmented welter of organic statutory provisions, environmental protection mandates, annual budget riders, site-specific legislation, judicial decisions, policy documents, management plans, and diverse state statutory prohibitions.”5

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3 Id.
4 See id.
Because the law of fire is disjointed, courts lack an adequate framework from which to evaluate federal fire policy, and environmental plaintiffs lack adequate footholds from which to challenge fire management decisions. This Note lays out the current legal regime guiding the fire management activities of the United States Bureau of Land Management (BLM) and the United States Forest Service (USFS). It then uses two recent cases to illustrate the difficulties courts face in evaluating fire management decisions and the difficulties environmental plaintiffs face in challenging fire management decisions. Finally, this Note argues that Congress should address these problems by passing legislation requiring federal agencies to create fire management plans (FMPs) that are compliant with the National Environmental Policy Act (NEPA).

I. THE AMALGAMATION

The federal government owns approximately 650 million acres of land in the United States.6 This ownership entails managing the lands in accordance with an array of diverse interests. In order to accomplish such a daunting task, the federal government divided the lands into systems and established agencies to manage these systems.7 The USFS and BLM control the largest portions of federal land: 193 and 245 million acres, respectively.8 These two agencies have been fighting fires since their inception. Unfortunately, Congress has provided little guidance to these agencies.

A. Fire Policy at the Congressional Level

In 1897, Congress established the National Forest System.9 The Department of Agriculture, through the USFS, currently manages the National Forest System.10 The USFS is responsible for “improv[ing] and protect[ing] the forest . . . secur[ing] favorable conditions of water flows, and [furnishing] a continuous supply of timber.”11 Most importantly, the USFS protects the forestlands from destruction by fire.12 Currently, the National Forest System contains 121 administrative units

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located within nine geographic regions. Each region has a headquarters office and a regional forester who administers that office. In addition, all national forests within a region have their own headquarters administered by a forest supervisor. Finally, the forests are further divided into ranger districts and assigned to a district ranger (or area ranger).

In 1946, Congress created the BLM by merging the Department of Interior’s Grazing Service with the General Land Office. The BLM manages designated lands and resources for a multitude of purposes, and must do so “without permanent impairment of the productivity of the land and the quality of the environment.” Responsibility for the lands is divided among the BLM’s national and field organizations. The BLM’s national organization is divided into a headquarters office and a national operations center. The BLM’s field organization is divided into twelve state offices and each state office is responsible for managing lands falling within its jurisdiction. The BLM is congressionally mandated to “take any action necessary to prevent unnecessary or undue degradation of the lands.”

Despite passing general mandates that federal lands be protected from destruction and permanent impairment, Congress has not articulated any principles to guide federal fire fighting efforts. The closest Congress came was in 2003 when it passed the Healthy Forest Restoration Act (HFRA). HFRA authorizes hazardous fuel reduction projects in national forests in order to safeguard wildland-urban interface areas, municipal watersheds and endangered species. However, HFRA fails to address specific fire management objectives, tactics, values to consider, etc. Most Congressional guidance for these issues came from the National Fire Plan (NFP). The NFP was established by, and consists of, a report

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15 Id. at § 200.2(a)(1).
16 Id. at § 200.2(a)(2).
20 Id.
23 Keiter, supra note 5, at 312–13.
prepared by the Secretaries of Interior and Agriculture, and the Fiscal Year 2001 Interior and Related Agencies Appropriations Act. However, NFP focuses solely on tactical and operational fire fighting efforts.

B. Fire Policy at the Administrative Level


Basically, under the Wildland Fire Policy, the Implementation Guide, and the Standards, “[f]irefighter and public safety is the first priority in every fire management activity.” In order to ensure effective firefighting efforts, agencies like the BLM and USFS are required to create FMPs for every “area with burnable vegetation.” These FMPs should complement the area’s Land Resource Management Plan (LRMP), which sets “the objectives for the use and desired future conditions of the various public lands.” An FMP supports the LRMP’s objectives and implementation. Under an FMP, the “[r]esponse to wildfires is based on ecological, social, and legal consequences of the fire. The appropriate response to the fire is dictated by: [t]he circumstances under which a fire occurs, [t]he likely consequence on firefighter and public safety and welfare[, and t]he natural/cultural resources, and values to be protected.” FMPs are important because they identify and integrate “all wildland fire management (both planned and unplanned ignitions) and associated activities within the context of the

26 Id.
27 Id. at ii.
29 Id. at 7.
31 Id. at ch. 1, at 01-1, ll. 34–35.
32 Id. at ch. 9, at 09-1, ll. 5–6.
33 Id. at ch. 1, at 01-1, ll. 38–39.
34 Id. at ch. 1, at 01-1, ll. 40–41.
35 STANDARDS at ch. 9, at 09-3, ll. 27–31.
approved [LRMP] . . . [and] assure that wildland fire management goals and objectives are coordinated.\(^\text{36}\)

**C. Other Agency Obligations under NEPA and ESA**

In addition to complying with the aforementioned statutes and administrative policies, the BLM and USFS must comply with two important environmental acts: the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). In 1969, the United States passed NEPA in order to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . . ”\(^{37}\)

NEPA requires federal agencies to utilize a systematic and interdisciplinary approach in decision-making that incorporates the natural sciences and the environmental design arts.\(^\text{38}\) Basically, it requires both the government and public to consider the environment prior to acting. Under NEPA, a federal agency must compile an Environmental Impact Statement (EIS) prior to taking any “major Federal [action] significantly affecting the quality of the human environment . . . .”\(^\text{39}\) The purpose of an EIS is to ensure that “in reaching its decision [the agency] will have available, and will carefully consider, detailed information concerning significant impacts,” and that “relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.”\(^\text{40}\) NEPA is a procedural mechanism, not a substantive requirement, so an agency does not have to change its course of action just because the environment will be significantly affected.\(^\text{41}\) The agency merely has to consider the environmental effects, i.e. take a “hard look” at the consequences.\(^\text{42}\)

Because an EIS is costly and burdensome to produce, an agency will often choose to complete an Environmental Assessment (EA) instead.\(^\text{43}\) An EA helps an agency decide whether a course of action will significantly impact the environment; if an agency concludes that the action will not lead to a significant impact, then it will issue a ‘finding of no significant impact’ (FONSI) and will not

\(^{36}\) Id. at ch. 9, at 09-2, ll. 18–23.


\(^{41}\) Id. at 350.

\(^{42}\) Id.

\(^{43}\) 40 C.F.R. § 1508.9 (2011).
prepare an EIS. The issuance of the FONSI has to be reasonable and comply with the guidelines set out in 40 C.F.R. § 1508.27.

The Endangered Species Act (ESA) is another statute that the USFS and BLM must abide by. Under the ESA, Congress requires all federal agencies to “seek to conserve endangered species and threatened species.” Specifically, all federal agencies have a duty to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” In order to comply with ESA, federal agencies are required to consult with the Secretary of the Interior to ensure their course of action is not likely to jeopardize any endangered species. There are two types of consultations—formal and informal. Often an agency will prepare a biological assessment to determine whether an action is likely to adversely affect a listed species. If the biological assessment determines the action is likely to adversely affect a listed species, then the agency must enter into formal consultation with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NOAA), who in turn prepare a biological opinion that predicts whether the federal action is likely to jeopardize the continued existence of any listed species or adversely modify a listed species’ critical habitat. If the FWS or NOAA decides the proposed federal action will likely result in jeopardy, the agency needs to issue reasonable and prudent alternatives to the action. If the action will result in the loss of some species, but will not jeopardize the entire population, then FWS/NOAA must (1) issue an incidental “take statement” specifying the impact of the incidental takes on the species, and (2) specify reasonable and prudent alternatives to minimize the impact.

II. THE RESULTING CONCEPTUAL DIFFICULTIES

This disjointed welter of organic statutory mandates and administrative policies has created several problems for plaintiffs seeking judicial review of federal fire management decisions. First, agencies like the BLM and the USFS can escape judicial review by simply refusing to engage in fire management planning. Second, because the choice regarding what values should be protected in a fire

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49 Id. § 402.02.
50 Id. § 402.14(h)(3).
51 Id. § 402.14(h)(3).
emergency is inherently a political decision, courts will likely be reluctant to grant plaintiffs the substantive relief that they seek.

A. Escaping Judicial Review

Under the current regime, the extent to which federal agencies are obligated to create fire management plans is not at all clear. Beyond the requirements of organic legislation that generally mandate agencies to protect the public lands from fire, and HFRA, which obligates agencies to create Implementation Plans for hazardous fuel reduction projects, agencies are not required to compile or adopt FMPs. While agencies like the USFS have policies in place that inform fire management planning, a serious question exists as to whether these policies are binding on the agency.

For example, in 2005 the United States District Court for the Northern District of California ordered the USFS to bring its FMP governing the Sequoia National Forest into compliance with NEPA. Instead of complying with the court order, the USFS “decided to withdraw the Fire Plan in its entirety, and . . . then sought (and received) from the Chief of the Forest Service a waiver of the Forest Service Manual provision requiring a fire management plan for the Sequoia National Forest.” On June 6, 2006, the USFS notified the court of the waiver and requested that the court dismiss the action as moot. Because the requirement to create the fire management plan was grounded only in a Forest Service manual, and not in a statute, the court’s order that the USFS comply with NEPA was dismissed.

Because fire management planning is not required by federal statute, agencies are not held accountable if they fail to create and/or abide by FMPs. There are few if any consequences for this failure. Further, firefighting directives found in documents like the Forest Service Manual and Interagency Handbooks are not typically enforceable by citizen lawsuits. This lack of accountability is problematic because “[p]lanning is key to implementing Fire Policy on the ground.” If agencies are not required to engage in sound fire management planning, then on the ground response efforts may be compromised.

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55 See id.
58 Id. at 2.
59 See W. FIRE ECOLOGY CTR., supra note 54.
60 Id.
61 Id.
B. The Value Question

Under the current regime, courts must decide whether, and to what extent, fire management activities are subject to the ESA and NEPA. However, the decision of whether the ESA or NEPA apply to emergency fire management activities is better left for Congress because it involves an inherently political question: do we protect endangered species at the risk of human lives?

Recently, the USFS’s use of fire retardant came under judicial scrutiny. In 2003, the Forest Service Employees for Environmental Ethics sued the USFS claiming that the agency needed to comply with NEPA and the ESA. According to the plaintiff, the USFS had dropped 15 to 40 million gallons of retardant annually on public lands. The plaintiff proffered evidence that from August 2001 to December 2002 the USFS dropped chemical retardant into water inhabited by endangered species a total of eight times.

The United States District Court of Montana reviewed the USFS’s fire management policy and ordered the USFS to: 1) compile an EA or an EIS on the general use of retardant on public lands and 2) formally consult with the FWS and NOAA. The court set a NEPA compliance date of August 8, 2007, but did not enjoin the use of fire retardant. The USFS did not comply until February 18, 2008, by which time it had consulted with FWS and NOAA, prepared an Environmental Assessment, and issued a FONSI. The court dismissed the case on March 12, 2008; three weeks later the plaintiffs filed another suit alleging that the biological opinions and FONSI were statutorily inadequate.

The plaintiffs sought review under the Administrative Procedure Act (APA). Apparently, NOAA’s biological opinion concluded that the use of fire retardant by the Forest service was likely to jeopardize the existence of 27 listed species and destroy or adversely modify 23 critical habitats. The FWS’s biological opinion concluded that the proposed action would jeopardize 45 species and destroy or adversely modify 45 critical habitats. However, both NOAA and the FWS issued

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63 Id. at 1244.
64 Id.
65 Id. at 1257.
66 Id.
68 Id.
69 Id. at 1200.
70 Id. at 1202.
71 Id. at 1204.
reasonable and prudent alternatives. NOAA’s reasonable and prudent alternatives were as follows:

1. The Forest Service must evaluate the toxicity of two retardant formulations that have not yet been studied, and must similarly evaluate any new formulations, and report the results to NOAA Fisheries within two years.

2. The Forest Service must perform toxicological studies on all currently approved long-term fire retardants to evaluate acute and sub-lethal impacts on fish. The Forest Service must work with NOAA Fisheries to develop a research plan with-in one year.

3. The Forest Service must develop guidance for on-site assessment of waterways in which retardant is dropped.

4. The Forest Service must implement a policy requiring personnel to report to NOAA Fisheries on all drops in waterways, including information on the amount of retardant dropped, the area affected, whether the drop was accidental or intentional, the expected direct and indirect impacts, and the results of field evaluation of the affected waterway.

5. The Forest Service must provide NOAA Fisheries with a biannual summary of the cumulative impacts of the Forest Service’s continued use of fire retardant.

The FWS’s reasonable and prudent alternatives were that the USFS had to: (1) prepare maps indicating where the species that would be potentially jeopardized lived; (2) begin fuel reduction near critical habitats; (3) try to use less toxic retardants; and (4) engage in emergency consultation procedures in the course of fighting a wildfire. The FWS further made clear that the biological opinion “in no way limits the actions that an incident commander deems necessary to undertake during a fire emergency response.” Neither the FWS nor NOAA included an incidental take provision in their biological opinions.

After receiving the NOAA and FWS reports, the USFS issued a FONSI. The USFS decided that an EIS was not needed because the likelihood of accidental

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73 Id. at 1202–03.
74 Id. at 1205.
75 Id. at 1227.
76 Id. at 1202–05.
entry of retardant into waterways was small and therefore would not have a significant impact on the environment.\textsuperscript{78} At trial, the plaintiffs argued that the USFS should have prepared an EIS and that the agencies acted arbitrarily and capriciously because the reasonable and prudent alternatives would not avoid jeopardy.\textsuperscript{79}

The court found that the issuance of the FONSI was arbitrary and capricious and ordered the USFS to prepare an EIS.\textsuperscript{80} The decision of whether to issue a FONSI depends on whether the proposed action will have a significant impact on the environment; significance is judged in terms of action’s context and intensity.\textsuperscript{81} When an action adversely affects an endangered species it is considered significant under NEPA.\textsuperscript{82} The plaintiffs argued that it is fundamentally inconsistent with NEPA to allow the USFS to only prepare an EA when both the FWS and NOAA found that using fire retardant would result in the jeopardy and/or adverse modification of habitat of seventy-two species.\textsuperscript{83} The USFS argued that the incorporation of the reasonable and prudent alternatives, coupled with the current policy of not allowing retardant dumps within 300 feet of water (except in cases of emergency), and the infrequency of accidental spills in the past, made it unlikely that retardant would be released into the water and therefore less likely that the use of retardant would result in jeopardy.\textsuperscript{84}

The USFS argued that these factors would sufficiently protect the environment from any significant impact.\textsuperscript{85} The court ruled that incorporating the reasonable and prudent alternatives did not mitigate the harm; the alternatives did not provide a reasonable buffer for the species, specifically, both sets of alternatives stated that they in no way limited what the USFS could do in an emergency.\textsuperscript{86} If the USFS decided that it needed to dump retardant right on the edge of a river that contained endangered species it would be free to do so. For these reasons, the court held that continuing to use fire retardant on the public lands could significantly impact the environment and ordered the USFS to compile an EIS.\textsuperscript{87}

The court then ruled that under the ESA, the biological opinion was inadequate and that the FWS would need to do more analysis.\textsuperscript{88} In its biological opinion, the FWS concluded the Forest Service’s fire retardant policy was likely to

\textsuperscript{78} Id. at 1206.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 1218.
\textsuperscript{81} Terminology and Index, 40 C.F.R. § 1508.27 (2011).
\textsuperscript{82} Id.
\textsuperscript{84} Id. at 1217.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 1218.
\textsuperscript{87} Id.
result in the jeopardy of forty-five species.\textsuperscript{89} However, the FWS claimed that its reasonable and prudent alternative would avoid jeopardy and the destruction of critical habitat.\textsuperscript{90} The reasonable and prudent alternatives required the USFS to develop certain species-specific measures that could be implemented during the course of fighting a fire.\textsuperscript{91} These measures included the following: preparing maps of where endangered species lived, enhancing populations, reducing fuels near a listed species habitat whenever it was practical, using water or a less toxic fire retardant whenever it was practical, and engaging in emergency consultation during a fire fighting effort.\textsuperscript{92} However, the biological opinion made clear that these measures could be set aside if an incident commander deemed it necessary.\textsuperscript{93} In the case of an emergency, the reasonable and prudent alternatives did not impose any restrictions on agency action and essentially gave the USFS free reign to violate the ESA.

After evaluating the FWS’s justifications for not imposing restrictions on the USFS, the court found the FWS “elevated fire suppression over the protection of jeopardized listed species” to avoid political blame for not allowing the use of fire retardant.\textsuperscript{94} The FWS considered restricting the use of retardants altogether.\textsuperscript{95} They decided against it because they were not fire fighting experts; the FWS stated they “should not be interfering with fire fighting decision makers in their ability to respond to a given emergency by using the tools they deem appropriate.”\textsuperscript{96} The FWS believed that restricting the use of fire retardant altogether could result in the loss of homes and lives, and it wanted to avoid being blamed for such loss. The court found that the FWS’s decision was arbitrary and capricious and ordered the biological opinion remanded to the agency.\textsuperscript{97}

Finally, the court addressed the failure of both the FWS and NOAA to include incidental take statements in their biological opinions. The agencies refused to include incidental take statements because they believed the decision regarding the appropriate amount of take would be best made during an emergency consultation.\textsuperscript{98} The court rejected the agencies’ reasoning because it found that in an emergency consultation the agencies would be “left entirely to their own devices” and would most likely not keep in mind the best interests of the endangered species. The court did not find it adequate that all that stood “between the listed species and take from exposure to fire retardant [was] an undefined

\textsuperscript{89} Id. at 1226.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{93} Id. at 1227.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{98} Id. at 1230.
emergency consultation process." However, despite finding clear and blatant ESA and NEPA violations the court refused to enjoin the use of fire retardant.

III. A Solution

The reasons why the court refused to enjoin the use of fire retardant were likely very similar to the reasons why the FWS and NOAA would not limit the USFS’s discretion during a fire emergency. The issue percolating behind the Montana case is an unspoken tension between protecting environmental values or protecting human life and property. Fear of loss of life and property underlie every one of the justifications that the FWS gave for not interfering with the USFS’s use of fire retardants. Fear is also the reason why the Montana court refused to enjoin the use of fire retardants on USFS lands. The court’s refusal to issue an injunction evidences that the decision of whether the ESA should limit agency discretion in emergency situations turns on an inherently political question and is therefore a decision that should be left to Congress.

Fortunately, saving human lives and not harming endangered species do not have to be mutually exclusive. With some minor changes, Congress can ensure the interests of both are preserved in the firefighting process. In order for firefighters to do their jobs and protect themselves, they need to be afforded a high degree of discretion in fighting fires. Because great discretion needs to be delegated to firefighters at the fighting stage, the only way to ensure that environmental considerations are taken into account is by safeguarding them at the planning stage. Accordingly, Congress should statutorily mandate that all federal agencies engaging in firefighting efforts on public lands create NEPA compliant FMPs. This will: (1) result in sound planning, (2) ensure public participation, and (3) give environmental plaintiffs footholds from which to challenge fire management decisions and judges a framework from which to evaluate such decisions.

A. Holding Agencies Accountable Incentivizes Sound Planning

Requiring agencies to create NEPA compliant FMPs will result in sound planning because agencies will be held accountable for the contents of their FMPs and will be forced to consider the environmental impacts of fire management activities. The creation of an FMP can significantly affect the human environment because FMPs serve as a baseline in deciding whether a fire will be put out or managed; also, FMPs direct the way in which an agency will manage or suppress a fire. Currently, the federal government routinely closes national parks during a wildfire, “thereby prohibiting on-the-ground monitoring of firefighting actions by the public and the press. The result is that fire suppression operations are rarely critically examined, and the public is kept in the dark about firefighting

99 Id. at 1232.
100 Id.
101 Id.
actions and their associated risks, costs, and impacts.” Among the various impacts of fighting a fire are the following: fireline construction, tree felling, chemical use, water use, damage caused by backfire, off-highway vehicle use, road reconstruction, spread of noxious and invasive weeds, post-fire logging, and the opening of roadless areas. Incorporating NEPA into the planning process will ensure that agencies take all of these effects into consideration prior to selecting a course of action. It will ensure that agencies make informed decisions.

FMPs force federal agencies to pick a course of fire management in advance. FMPs organize and direct the appropriate response. Requiring agencies to create FMPs is desirable because “[g]ood plans result in sound, efficient decisions.” Having an FMP in place to guide response efforts ensures that firefighters are prepared and have some background knowledge of the terrain that they have been assigned to protect. An FMP is the appropriate avenue through which to evaluate fire management issues like whether the use of retardants on a particular patch of land is desirable. Using fire retardant may be completely appropriate in certain areas and wholly inappropriate in others. Addressing the use of fire retardant during the compilation of an FMP is optimal because the agency has time to survey the area, address the species that reside in the area, and evaluate what resources, if any, will be sacrificed if the fire is allowed to burn.

Finally, having an FMP in place also ensures that fire-fighting efforts are consistent with objectives of the area’s LRMP. The fire management planning stage is where all of the impacts of fire suppression, including the use of fire retardant, can and should be evaluated. In some areas, the use of fire retardant could jeopardize endangered species, significantly affect the environment, and could be totally uncalled for. Conversely, in other areas, the use of fire retardant may be completely justified because it is necessary to save human lives or even endangered species that may be put at greater risk if the fire is not put out.

Critics may argue that requiring federal agencies to comply with NEPA may be too taxing and could compromise firefighting efforts. However, some federal agencies already take account of the environmental impacts of firefighting in their planning and have successful FMP models in place. In particular, the Utah BLM’s FMPs are exemplars of sustainable planning. Currently, there are five FMPs that cover all of the BLM lands located in Utah: the Southern Utah Support Area FMP, the Moab Fire District FMP, the Salt Lake FMP, the Richfield FMP, and the Vernal FMP. All of these FMPs are NEPA compliant.

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103 Id.

104 Id.

105 STANDARDS, supra note 30.

B. Public Participation and an Interdisciplinary Approach

Because NEPA requires the use of an interdisciplinary approach and allows for public participation, it is an ideal way to ensure that environmental values are taken into account.\footnote{42 U.S.C. § 4332 (2006).} In fire management planning, it is important to use an interdisciplinary approach and allow for public participation because “[t]eamwork is vital to successful planning [and by] including land managers and neighbors and stakeholders and resource specialists and fire specialists and the public, [agencies are able to] gather all those important perspectives necessary to write the best fire management plan.” Opening up an FMP to public comment would give the public an opportunity to weigh in on an agency’s decision to use fire retardant on a specific tract of land. Allowing for public comment will ensure that both local and national values are considered in the planning stage and therefore more likely protected at the fighting stage.

C. The Articulation of a Workable Legal Framework

Statutorily mandating federal agencies to create NEPA compliant FMPs may alleviate various hurdles that environmental plaintiffs face in mounting challenges to land management decisions. Such action will also likely focus a court’s attention on appropriate justiciable issues. Because the law of fire is disjointed, many management decisions escape public scrutiny and legal challenge. The problem can be summed up by the general rule that “[i]t is far easier to sue over violations of specific statutory commands . . . than it is to challenge an action taken pursuant to vague discretionary mandates.”\footnote{COGGINS ET AL., supra note 17, at 207.} Passing the legislation will likely alleviate questions regarding whether an agency’s creation of an FMP constitutes final agency action, whether environmental plaintiffs can establish standing to challenge fire management decisions, whether such cases are ripe for review, and the type of relief that courts can order.

The APA allows any person who has been “adversely affected or aggrieved by agency action within the meaning of a relevant statute” to file suit.\footnote{5 U.S.C. § 702 (2006).} And,
“[w]here no other statute provides a private right of action, the agency action complained of must be final agency action.” 111 Currently, the problem with challenging an agency’s fire management decision is there are no “relevant statutes” mandating agencies to engage in fire management planning, 112 nor specifying what the contents of a sound fire management plan should be. Therefore, obtaining judicial review of a land agency’s fire policy is difficult.

One avenue for a plaintiff seeking judicial review is to argue that an agency’s adoption of a fire policy qualifies as a major federal action significantly affecting the human environment, and therefore falls under NEPA. The plaintiff could then argue that he or she has been aggrieved because the agency did not complete an EA or an EIS prior to creating an FMP. However, there are many problems with such a challenge, first, it is entirely unclear that an agency who has decided to adopt certain firefighting techniques will use those techniques in the future. Therefore, it is difficult to say that the agency has acted in any significant way.

Another way that a plaintiff could possibly challenge an agency’s fire management planning would be to argue that under the agency’s organic legislation the agency is generally responsible to protect the land from destruction by fire, and that this responsibility gives rise to a duty to engage in planning. 113 The problem with this approach is that it could very easily be argued that a plaintiff’s harm does not fall within the meaning of the statute because the organic legislation was only concerned with protecting federal land from destruction by fire and Congress did not intend for the agency to protect the land from the impacts of firefighting.

Standing is another hurdle that environmental plaintiffs have to overcome prior to challenging the environmental effects of an agency’s fire fighting efforts. There are two types of standing: prudential and constitutional. 114 To establish prudential standing, plaintiffs must prove that the harms that they have allegedly suffered fall within the zone of interests that Congress sought to address in its legislation. To establish constitutional standing, plaintiffs must show that “1) they have suffered an injury-in-fact; 2) the injury is fairly traceable to the challenged action (causation); and 3) a favorable decision from the court will be likely to redress that injury.” 115 In challenging federal fire fighting efforts, plaintiffs could run into problems establishing an injury-in-fact because agencies are not required to approach fire fighting in any particular way. It will be difficult for a plaintiff to say that he or she suffered harm because the agency decided to suppress a

114 COGGINS ET AL., supra note 17, at 104.
115 Id.
particular fire when the agency could have let it burn, or that the agency used fire retardants in an area where it may have been uncalled for.

Another obstacle that could potentially stand in the way of legal challenge is that courts dismiss cases that are not ripe for review. In deciding whether an agency decision is ripe for judicial review, a court will look at “(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.” Because fires are often unpredictable, many agency decisions regarding fire management have to occur in the future, and are subject to change. Fire management agencies can argue that such decisions are not ripe for review because the agencies’ given course of action is still amenable to change.

Finally, there is uncertainty as to what kind of relief a court can afford. The scope of judicial review of agency action in public land cases, and the relief that a court can grant, is for the most part articulated in 5 U.S.C. 706. Under the APA:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall- (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusion found to be- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law.

The primary role of the court under statute is best described by the following slogan: “[f]actual questions are for the agency and legal questions are for the court.” A court’s review of agency action or non-action is further tempered by the Chevron Doctrine, which mandates that:

When a court reviews an agency’s construction of [a] statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress

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117 Id. at 733.
118 COGGINS ET AL., supra note 17, at 230.
119 Id.
120 Id.
has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.\textsuperscript{121}

A plaintiff challenging an agency’s fire policy may want to assert that a particular FMP should be set aside, that an agency failed to consider certain aspects when it created the FMP, or that fighting a fire may significantly affect the human environment. However, in each instance, issues of agency obligation and discretion arise. A court will likely have trouble granting a plaintiff relief and compelling agency action because land agencies like the USFS and BLM are, arguably, under no duty to create FMPs. Because fire policy is mostly found in inter-agency manual provisions, there are questions as to whether the manuals are legally binding on the agency and whether the court can enforce them.\textsuperscript{122} Answering these questions will depend on both the “substantive and procedural aspects of the administrative material.”\textsuperscript{123} Robert Fischman explicates the two aspects as: “[t]he substantive dimension is the content of the manual policy. It is concerned with whether the policy encodes, through particular standards, methods, and binding language, duties an agency must meet. The procedural dimension is the manner in which the agency promulgates the manual provision.”\textsuperscript{124}

An agency would likely argue that just because a manual says that the agency is committed to managing land in a certain way the agency is not precluded from changing its mind.\textsuperscript{125} When management objectives are set forth in an agency’s LRMP, as required under NFMA or FLPMA, the objectives should guide agency action for a set period of time; however, courts may still find the objectives do not produce legally binding commitments enforceable under 5 U.S.C. § 706.\textsuperscript{126} There are two situations when a court may enforce future action explained in an agency’s plan: “(1) where the action merely reiterates duties the agency is already obligated to perform; and (2) perhaps, where language in the plan itself creates a binding commitment on the agency.”\textsuperscript{127} For example, if an FMP were required to list what tools could and could not be used in X forest, the FMP could arguably be said to create a binding commitment by creating a requirement.

If a statute mandated the compilation of an FMP there might be questions as to the extent to which a court could review the contents of the FMP. Normally,

\textsuperscript{122} COGGINS ET AL., \textit{supra} note 17, at 244.
\textsuperscript{123} Id.
\textsuperscript{124} Id. (citing Robert L. Fischman, \textit{From Words to Action: The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies}, 26 STAN. ENVTL. L.J. 77 (2007)).
\textsuperscript{126} Id.
\textsuperscript{127} COGGINS ET AL., \textit{supra} note 17, at 473, n.4 (internal quotations altered).
actions that are left to agency discretion are only overturned if they are arbitrary
and capricious.\footnote{Id. at 230.} If the content of an FMP is left solely to agency discretion then a
court will afford the contents a high degree of deference.\footnote{Id.} In the firefighting
stage, deference is generally needed; however, in the planning stage,
environmental safeguards should be created that reduce agency discretion. These
safeguards should require FMPs to take account of the following: the fire’s
proximity to endangered species, the fire’s proximity to the wildland-urban
interface, the composition of the forest, and the use that the land has been
dedicated to under the LRMP. These safeguards should serve as a basis for
evaluating the most appropriate firefighting techniques for a specific parcel of
land. Environmental issues, such as whether fire retardant use is suitable for the
terrain or whether the preferred method of management is letting the fire burn,
should be addressed in the planning stage through an FMP.

Passing legislation that requires agencies to create NEPA compliant FMPs
will significantly help environmental plaintiffs overcome the aforementioned
hurdles to judicial review. The legislation will allow plaintiffs to sue in any case
where an agency did not create an FMP or where an agency created an FMP
without fully considering the environmental impacts of its chosen course of fire
management. Opening up fire management decisions to this kind of legal challenge
will result in sounder policy, greater accountability, a better framework for courts
from which to evaluate the use of fire retardant, and ensure that agencies are
afforded the discretion that they need to respond to fire emergencies.

CONCLUSION

Much of the difficulty in forming a unified federal fire policy lies in the fact
that the United States consists of thousands of miles of distinct and varied terrain.
A diversity of soils, trees, rivers and species exist in our forests. The divergent
terrain necessitates that certain aspects of fire policy be developed on a local and
not a national level. However, national standards do need to be developed in order
to ensure local offices preserve national values.

There is no doubt that wildfires are a pressing concern nowadays. Fire
management is an area of governmental activity that could greatly benefit from
Congressional action. The time has come to reevaluate our approach and pass
legislation that will make federal agencies accountable for their fire management
activities. Only after such legislation is passed will courts have a proper framework
from which to evaluate fire management decisions. Such legislation will result in
better planning and more focused judicial scrutiny, which ensures that national
values are safeguarded at a local level.

\footnote{Id. at 230.}
\footnote{Id.}