WILDFIRE LIABILITY AND THE FEDERAL GOVERNMENT: A Double-Edged Sword

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I. RISK OF INTERACTION BETWEEN WILDFIRES AND HUMAN LIVES OR PROPERTY LEADING TO INCREASED LIABILITY

Wildland-Urban Interface ("WUI") represents a growing phenomenon where urban population areas are encroaching upon America's wildlands, which are defined as natural environments on Earth that have not been significantly modified by civilized human activity.[1] In 2008, there were approximately 115 million single-family homes in the U.S., and roughly 40% of those homes were located in a WUI area.[2] Americans built approximately 17 million new homes between 1990 and 2008, and 10 million of those homes were built in or around a WUI area.[3] As a natural consequence of the growing WUI, the number of structures destroyed by wildfire per year has almost tripled since the 1990s.[4] Moreover, "[b]etween 1990 and 2013, wildfires claimed an average of 18 lives per year, but in 2013 the death toll spiked to 34."[5] In 2015, it is expected that wildfire losses will exceed $1.75 billion.[6]

The growing Wildland-Urban Interface, with the attendant increase in wildfires, comes with a broad spectrum of consequences. For example, as discussed below, the federal government has seen an increase in the number of and the amount of claims for damages resulting from wildfires on federal land. This liability can emanate from such events as uncontrolled burns, forest thinning policies, and accidental fires. Indeed, as a result of the increased number of wildfires affecting urban areas, claims that once would

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1. HOWARD BOTTS ET AL., CORELOGIC WILDFIRE HAZARD RISK REPORT: RESIDENTIAL WILDFIRE EXPOSURE ESTIMATES FOR THE WESTERN UNITED STATES 6 (2013), http://www.corelogic.com/research/wildfire-risk-report/2013-wildfire-hazard-risk-report.pdf.

2. *Id.*

3. *Id.*

4. Thomas Jeffery, *Understanding Wildfire Risk: A Closer Look at the Wildland-Urban Interface*, INS. J.: CORELOGIC BLOG (May 30, 2014), http://www.insurancejournal.com/blogs/corelogic/*2014/05/30/*330545.htm.

5. Daniel H. Owsley, *TrinCo and Actual Necessity: Has the Federal Circuit Provided the Tinder to Burn Down the Public Necessity Defense in Wildfire Takings Cases?*, 48 COLUM. J.L. & SOC. PROBS. 373, 374 (2015).

6. *Guy Carpenter Says Wildfire Losses May Exceed $1.75B*, INS. J. (Nov. 2, 2015), http://www.insurancejournal.com/magazines/features/2015/11/02/386437.htm.

have settled are being fully litigated because they have become so expensive. The federal government, on the other hand, is also contributing to the growth in liability for wildfires. Not only has the federal government increased its efforts to hold parties civilly liable for damage to federal lands caused by wildfires, it has also sought to impose criminal liability on those fighting the fires.

Firefighters themselves are facing challenges from both government and the citizenry. Firefighters are now caught in the catch–22 of deciding whether to risk life and limb to protect private homeowners living on the fringe of the WUI or liability for failing to protect those same homeowners in the name of safety. Where fire once constituted the primary danger to a firefighter, today a firefighter must also be concerned about the post-fire ramifications of decisions made and strategies implemented. Indeed, firefighters are not only facing increased liability from the people they are protecting, they are also experiencing potential criminal liability for their decisions in fighting fires.

This paper will provide a survey of wildfire liability issues involving the federal government. As will be discussed, the federal government not only imposes liability as a result of wildfire damages, but is also itself subject to liability. The federal government gets and the federal government gives. The focus of this survey will be the amount of damages the federal government seeks and is subject to, and the varying bases for those damages.

II. THE FEDERAL GOVERNMENT GETS

A. Federal Liability and the Discretionary Function Exception

Parties suing the federal government for wildfire damage generally rely on the Federal Tort Claims Act ("FTCA"), enacted in 1948, as a means of holding the federal government liable "for the torts of its employees committed in the scope of their employment."[7] The discretionary function exception excludes the federal government from liability for "an act or omission of an employee of the [United States], exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid."[8] The more controversial section of the discretionary function exception immunizes the government from liability based upon an employee's exercise or failure to exercise a "discretionary function or duty .

7. Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365, 366 (1995); *see also* 28 U.S.C. § 1346(b)(1) (2013).

8. 28 U.S.C. § 2680(a) (2006).

. . whether or not the discretion involved be abused."[9] Thus, if the alleged tort derived from a permissible exercise of policy judgment, the discretionary function exception shields the federal government from liability.

The question of whether the discretionary function exception protects the federal government from liability arising from acts such as controlled burns gone awry has not been clearly answered by the courts. Although the United States Supreme Court designed a two-part test to determine whether the exception applies to particular government acts, discussed below, the application of the test has not been an easy one.

1. The *Berkovitz* Two-Pronged Test

In *Berkovitz v. United States*, the United States Supreme Court established a two-pronged test to determine whether the discretionary function exception applies to protect the federal government from a tort claim.[10] The first step is to determine whether the government employee's conduct was a matter of judgment or choice.[11] Under the first test, if the government employee was obligated by a statute, regulation, or unwritten policy to act in a certain manner or take certain steps, the discretionary function exception does not apply.[12] If, however, the statute, regulation, or unwritten policy provides the government employee with discretion, then the court will consider the second prong of the test.[13]

The second prong of the test requires the court to determine whether the conduct involved an element of judgment, and, if so, the court determines whether "that judgment is of the kind that the discretionary function exception was designed to shield."[14] For example, if a federal employee drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception might not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.[15]

Thus, once a mandatory directive prescribes a course of action, such as obeying traffic laws, that directive terminates any further use of discretion the employee originally had, because the employee has no rightful option but

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9. *Id.*
10. Berkovitz v. United States, 486 U.S. 531, 536–37 (1988).
11. *Id.* at 536.
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* Caplan v. United States, 877 F.2d 1314, 1316 (6th Cir. 1989).

to adhere to the directive. Therefore, the discretionary function exception protects only governmental actions and decisions based on a permissible exercise of policy judgment.

The discretionary function exception comes into play in regard to wildfire liability when the federal government is sued over damages related to prescribed burns. If one is damaged by the federal government's prescribed burn, the first question will be whether the prescribed burn was being conducted pursuant to a statute, regulation, or unwritten policy and whether the federal employee conducting the prescribed burn had any discretionary choices in accomplishing the burn. This question has been considered by a number of courts, with divergent results.

2. Liability for Prescribed Burns on Federal Lands

a. Anderson Fire

During the month of June 1990, the United States Forest Service ("USFS") and the California Department of Forestry ("CDF") engaged in a prescribed burn in the Cleveland National Forest to reduce the chance of a major forest fire.[16] The USFS used ground and air personnel equipped with torches to burn the undergrowth in a 500-acre area for eight days.[17] The burn escaped and caused an alleged $11.5 million in damages to several homes and vehicles.[18] The owners sued the United States.[19] The appellate court concluded that, because a private party would be liable under California law for "the negligently setting and controlling of the fire," the USFS was liable.[20]

The federal government, however, did not raise the discretionary function exception. *Anderson*, therefore, stands for the proposition that, in a negligence analysis, a federal land agency can be liable for property damage resulting from an escaped prescribed fire. *Anderson* has limited value in discretionary function exception analysis, because the question was never raised.

16. Anderson v. United States, 55 F.3d 1379, 1380 (9th Cir.), *as amended on denial of reh'g* (1995).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 1382.

b. Thune Fire

In *Thune v. United States*, a Wyoming district court reached a different decision.[21] There, the district court concluded that the USFS's conduct fell within the discretionary function exception.[22]

In 1991, the USFS ignited a prescribed fire in the Bridger-Teton National Forest in northwest Wyoming according to a prescribed fire plan.[23] A day later, the weather changed and a wildfire was declared.[24] The following day, the winds increased significantly and the USFS ordered an evacuation of the fire area.[25]

Thune was operating as a hunting guide when he received word to evacuate the area.[26] Thune was able to evacuate with horses and some equipment, but he did not have sufficient time to fully pack out his equipment.[27] Thune alleged that he lost approximately $43,000 in equipment because the USFS negligently set and controlled the fire and provided insufficient notice to evacuate.[28]

In considering the first element of the *Berkovitz* test, the district court found that decisions made by the individuals who decided to conduct the controlled burn and who fought the fire once it escaped control were "based on many different factors before [them] at that time."[29] The district court reasoned that, as agents of the federal government, those individuals were "entrusted with many discretionary decisions and [their] actions should not be hampered by hindsight judgments by judges and juries."[30] The district court also found that the acts leading to the Thune Fire were based on considerations of public policy and, therefore, were the type of judgments that the discretionary function exception was designed to shield from liability.[31] Because it found that the decisions of the government employees were a result of a judgment or choice the individuals setting the burn and fighting the fire were entitled to make, the district court dismissed the lawsuit based on the discretionary function exception.[32]

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21. Thune v. United States, 872 F. Supp. 921, 924 (D. Wyo. 1995).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 923.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 924.
30. *Id.*
31. *Id.*
32. *Id.* at 925.

The district court's decision in *Thune* was a clear statement that the discretionary function exception could be used by the USFS to immunize the agency from liability when prescribed burns escaped. Not all courts agreed, however.

c. Osceola Fire

In *State of Florida Department of Agriculture & Consumer Services v. United States*,[33] a Florida district court concluded that the discretionary function exception did not protect the USFS from liability related to a negligently planned and performed prescribed burn.[34]

On March 2, 2004, the USFS ignited a prescribed burn in the Osceola National Forest in Florida.[35] On March 7, 2004, "the controlled burn was declared an 'escaped burn.'"[36] The State of Florida owned a leasehold interest in some of the burned land and owned an interest in the revenue from the burned timber.[37] Florida brought suit under the Federal Tort Claims Act, alleging the USFS was negligent.[38]

The federal government defended the suit, arguing that it was immunized by the discretionary function exception.[39] The government employees, however, "admitted to not creating a sufficient Burn Plan."[40] The employees also "admitted to acting contrary to the Burn Plan by using aerial ignition and failing to complete an aerial ignition operation hazard analysis" as they were required to by applicable federal prescribed burn guidelines.[41] Based on the admissions, the court found that the USFS clearly violated non-discretionary mandates and, while the USFS had room for discretion as to how it acted while employing the plan, it did not have discretion as to whether to complete and then follow the plan.[42]

The district court, however, found that the USFS failed the first prong of the Berkovitz two-pronged test, because the USFS's "admissions demonstrate a clear disobedience to mandates that are not discretionary. While [the USFS] may have had discretion as to the analysis conducted within the [Prescribed Fire] Plan, [the USFS] had no judgment or choice

33. Fla. Dep't. of Agric. & Consumer Servs. v. United States, No. 4:09-CV-386, 2010 WL 3469353, at *1 (N.D. Fla. Aug. 30, 2010).
34. *Id.* at *1–4.
35. *Id.* at *1.
36. *Id*.
37. *Id*.
38. *Id.*
39. *Id.* at *1–2.
40. *Id.* at *4.
41. *Id.*
42. *Id.*

whether to complete a [Prescribed Fire] Plan and then follow it once approved."[43] Based on this holding, the discretionary function exception will not apply to a tort claim resulting from a plan initiating a prescribed burn or from a prescribed burn that ultimately escapes, if the plaintiff can show the government's plan was improper or its agents improperly followed a plan.

d. Recent Application of the Discretionary Function Exception Related to Wildfires

In March 2015, a district court in Montana granted the federal government summary judgment on a claim related to damages from a prescribed fire.[44] In that case, although the federal government created and complied with its prescribed fire plan, which would arguably make the discretionary function exception inapplicable, the district court found that the government's decision as to how to manage its resources was a choice, thereby satisfying the *Berkovitz* test.[45] The district court determined that the plaintiff's claims were barred by the discretionary function exception.[46]

In applying the discretionary function exception, the district court in *Taylor* used a relatively broad brush. The district court held that "[e]ven relatively prosaic choices such as how to fight a fire involve 'the type of economic, social, and political concerns that the discretionary function exception is designed to protect' because such choices involve 'a balancing of considerations, including cost, public safety, firefighter safety, and resource damage.'"[47] It is clear from the decision in *Taylor* that at least one court will liberally apply the discretionary function exception to lawsuits related to prescribed burns.

B. Federal Liability and the Fifth Amendment Taking Clause

The federal government has also faced lawsuits related to wildfire losses under the Fifth Amendment's taking clause. Plaintiffs have contended that wildfires are becoming more prevalent and resulting in increased damages because of the federal government's policies related to its land management policies. Two examples follow.

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43. *Id.*

44. Taylor v. United States, No. CV-12-59-H-CCL, 2015 WL 1299226, at *9 (D. Mont. Mar. 23, 2015).

45. *Id.* at *7–8.

46. *Id.* at *8.

47. *Id.* at *7 (quoting Miller v. United States, 163 F.3d 591, 595 (9th Cir. 1998)).

1. California "Cedar Fire"

In October and November 2003, the Cedar Fire burned more than 273,000 acres (1.134.2 km^2), destroyed 2,232 buildings, and killed fifteen people, including one firefighter.[48] The fire started on October 25 in the Cleveland National Forest and was not one hundred percent controlled until December 3, 2003.[49]

Plaintiffs, who had lost houses to the fire, brought suit against the U.S. under the Fifth Amendment's taking clause.[50] The plaintiffs

> accused the Forest Service of taking the known calculated risk that its land management policies in the [Cedar National Forest] would result in a taking of adjacent landowners' property in the event of a fire originating in the [Cedar National Forest] that spread outside its boundaries. Thus, they alleged that the United States took their property by inverse condemnation without just compensation.[51]

The plaintiffs focused on the fact that in "2003, the year of the Cedar Fire, 97% of fires were extinguished within twenty-four hours of their discovery," which "altered the 'fire ecology' of the [forest] by disrupting the natural, frequent, low-intensity fires."[52] They argued that the historical "low-intensity fires" helped reduce the ground material, which, in turn, helped reduce the incidents of wildfire.[53] Under the current plans, the constant suppression of wildfire allowed overgrowth of the ground material, which, in turn, helped the incidence and growth of wildfires.[54] As a result, plaintiffs contended, "[a]ny fire in the [forest], if not immediately controlled, would become a devastating firestorm, and [in this instance], the lost hunter illegally set such a fire."[55]

Plaintiffs brought their claims against the federal government under the Tucker Act,[56]

> which grants the Court of Federal Claims jurisdiction over claims for money damages "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with

48. Cary v. United States, 552 F.3d 1373, 1375 (Fed. Cir. 2009).

49. *Cedar Fire and Memorial*, LAKESIDE HISTORICAL SOC'Y, http://www.lakesidehistory.org/cedarfire/cedar_fire_memorial.htm#2 (last visited Feb. 13, 2016).

50. *Cary*, 552 F.3d at 1375.

51. *Id.* at 1373.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. 28 U.S.C. § 1491(a)(1) (2000).

> the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[57]

The plaintiffs' case was dismissed, because the court found that the fire was not caused by the federal government's policies, but by the hunter.[58] The court concluded that, because the government did not start the fire, it did not cause plaintiffs' damages.[59]

2. *Trinco v. U.S.*

In 2008, a number of fires burned in the Shasta-Trinity National Forest.[60] The USFS set a number of backfires to reduce the amount of timber feeding the fire.[61] The backfires escaped and burned hundreds of acres of individuals' property.[62] Landowners suffering losses from the escaped backfire brought suit against the federal government, contending that the forest fire would not have reached their properties if left to its natural course, but they suffered losses as a result of the government's decision to set the backfires.[63]

The government raised the defense of necessity.[64] The trial court dismissed the case based on the government's defense.[65] The court of appeals overturned the decision and remanded.[66] The court of appeals held that:

> In the case below there are legitimate questions as to imminence, necessity, and emergency. While there is no doubt that there was a fire, there is also no doubt that at the time TrinCo's property was burned, only approximately 2% of the 2.1 million-acre national forest was in flames. It is clearly relevant to the present case to learn in discovery why the Plaintiff's property had to be sacrificed, as opposed to other property, including other portions of the National Forest itself. It would be a remarkable thing if the Government is allowed to take a private citizen's property without compensation if it could just as easily solve the problem by taking its own.[67]

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57. *Cary*, 552 F.3d at 1376 (quoting 28 U.S.C. § 1491(a)(1) (2000)).
58. *Id.* at 1376–79.
59. *Id.* at 1378–79.
60. TrinCo Inv. Co. v. United States, 722 F.3d 1375, 1377 (Fed. Cir. 2013).
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 1381.
67. *Id.* at 1380.

The court in *Trinco* was clearly not convinced that the wildfires posed imminent danger to the plaintiffs' properties.[68] *Trinco* calls into question the decisions made by those fighting the fires and, unlike the court in *Thune*, *supra* Part II.A.2.b, the court of appeals in *Trinco* took no issue with allowing the court or jury to apply hindsight judgment to those decisions.

C. The Federal Government Also Imposes Liability for Wildfires

The focus above has been on efforts to hold the federal government liable for losses sustained by prescribed burns executed by the federal government. On the other hand, the federal government has also raised the stakes in terms of the liability it will attempt to impose resulting from wildfires on federal lands. Indeed, the federal government has indicated that it "will seek fire damages to the fullest extent allowed under state laws."[69] In so doing, the federal government has sought to significantly increase the types of damages it will seek, including the loss of the public's enjoyment of the damaged lands.[70] As shown below, the federal government has not only sought to hold individuals and entities liable for the costs of suppressing fires caused by third parties and by seeking astronomical awards, but has also sought to impose criminal liability against those fighting the fires.

1. Federal Government Claims Against Landowners

a. Moonlight Fire

In 2007, The Moonlight fire burned more than 65,000 acres in Northern California.[71] The fire started on private property being logged by Sierra Pacific Industries, Inc., a logging company, and spread to land owned by the federal government.[72] The company did not own the property but had timber rights on it.[73] It was alleged that the fire started when the front blade of a bulldozer, owned by a contractor hired by Sierra, struck a rock and created a spark.[74]

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68. *Id.*
69. Mike Enfield, *Federal Lawsuits Make Wildfire Liability Unpredictable*, PSA PERSPECTIVE (June 9, 2013), http://www.psafinancial.com/2013/07/federal-lawsuits-make-wildfire-liability-unpredictable/.
70. *Id.*
71. *Id.*
72. United States v. Sierra Pac. Indus., 100 F. Supp. 3d 948, 953 (E.D. Cal. 2015).
73. Enfield, *supra* note 69.
74. *Sierra Pac. Indus.*, 100 F. Supp. 3d at 953

The federal government sued the property owner, the logging company, and the contractor.[75] The government sought an award of $790 million for the fire.[76] While the federal government would typically seek damages for the costs incurred in fighting the fire and for lost timber, a large component of the claim in the Moonlight fire litigation was for "deprivation of the public's future access to the damaged federal lands."[77] The case settled once the court ruled that the federal government could seek its unique claims for loss of access.[78] The defendants agreed to pay approximately $122 million under the settlement.[79]

The amount of the award sought by the federal government has created concern among those living and working in the WUI. Indeed, one observer has opined that "as a result of recent federal lawsuits based on excessively high claims [like in the Moonlight fire litigation], wildfire liability has become unpredictable."[80]

b. Union Pacific Railroad Co.

Union Pacific Railroad Co. ("Union Pacific") was sued by the federal government for a fire in Northern California that started when Union Pacific employees repairing railroad tracks "failed to take the necessary precautions to prevent the fire."[81] The employees thought they had put the fire out, but it ultimately burned more than 52,000 acres of land and cost more than $22 million to fight.[82] Union Pacific settled for $102 million after the court confirmed the government could seek more than $13 million for "damage to wildlife habitat and public enjoyment of the forest," as much as $33 million to plant trees, and $122 million in lost timber.[83]

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75. *Id.*

76. Enfield, *supra* note 69.

77. *Id.*

78. *Id.*

79. Settlement Agreement and Stipulation at 2–3, United States v. Sierra Pac. Indus., Inc., 100 F. Supp. 3d 948 (E.D. Cal. 2015) (requiring $55 million to be paid in cash and a conveyance of 22,500 acres of fee simple title).

80. Enfield, *supra* note 69.

81. Press Release, Dep't of Justice, Largest Settlement Ever in a Forest Fire Case 1 (July 22, 2008), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5305710.pdf.

82. *Id.* at 1–2.

83. Don Thompson, *Union Pacific to Pay $102 Million for Forest Fire*, N.Y. SUN (July 22, 2008), http://www.nysun.com/national/union-pacific-to-pay-102-million-for-forest-fire/82418/.

2. Criminal Prosecution of Firefighters

a. Public Law 107-203

On July 10, 2001, fourteen firefighters were trapped while they were fighting a fire known as the Thirtymile Fire.[84] The firefighters were cut off from their escape route and moved up a canyon road into a rock field.[85] The firefighters and two civilians were ultimately overrun by the fire.[86] As the fire swept over the firefighters and civilians, four of the firefighters were killed.[87]

Following the Thirtymile Fire, an official investigation concluded that the four firefighters who died ignored orders from the on-scene commander that might have saved their lives.[88] The families of the dead firefighters were not satisfied with the findings and demanded changes.[89] In response, in 2002, Congress enacted Public Law 107-203,[90] which provides as follows:

> In the case of each fatality of an officer or employee of the Forest Service that occurs due to wildfire entrapment or burnover, the Inspector General of the Department of Agriculture shall conduct an investigation of the fatality. The investigation shall not rely on, and shall be completely independent of, any investigation of the fatality that is conducted by the Forest Service.[91]

Public Law 107-203 has created great concern in the firefighting community. Some feel that the law is nothing more than "a license to criminalize wildland fire management."[92] Indeed, since the bill's passage, there have been at least two incidents in which firefighters have faced criminal liability from the decisions they made while in the field of battle against a wildfire.[93]

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84. Evan Halper, *Thirtymile Fire Left Bitter Lessons*, SEATTLE TIMES (July 5, 2013), http://www.seattletimes.com/nation-world/thirtymile-fire-left-bitter-lessons/.

85. *Id.*

86. David Bowermaster et al., *Thirty Mile Crew Boss Charged in Four Fire Deaths*, SEATTLE TIMES (Dec. 21, 2006, 12:00 AM), http://www.seattletimes.com/seattle-news/thirty-mile-crew-boss-charged-in-4-fire-deaths/.

87. Halper, *supra* note 84.

88. JOHN N. MACLEAN, THE ESPERANZA FIRE: ARSON, MURDER, AND THE AGONY OF ENGINE FIFTY-SEVEN 135 (2013).

89. *Id.*

90. *Id.*

91. Act of July 24, 2002, Pub. L. No. 107-203, 116 Stat. 744 (codified as amended at 7 U.S.C. §§ 2270(b)–(c) (2002)).

92. MACLEAN, *supra* note 88, at 135.

93. *Id.* at 135–36.

b. The Cramer Fire

On July 22, 2003, two firefighters died fighting a wildfire in the Salmon-Challis National Forest in Idaho, known as the Cramer Fire.[94] Pursuant to Public Law 107-203, the Office of the Inspector General (OIG) conducted an investigation of the deaths.[95] OIG's report was critical of the USFS. OIG concluded that "the deaths may have been prevented if firefighting policies and tactics had been followed 'particularly by the [Incident Commander].'"[96]

Following OIG's report, the U.S. Attorney General began the process of prosecuting Incident Commander Alan Hackett for the deaths.[97] Hackett ultimately entered a deal with prosecutors to avoid being criminally charged.[98] Under the deal, Hackett was sentenced to eighteen months of probation and agreed to not seek employment with the forest service during that period.[99] Hackett was not required to enter a guilty plea.[100]

c. Thirtymile Fire

As discussed above, Public Law 107-203 came about as a result of pressure from the families of the four firefighters who died in July 2001 while fighting a wildfire.[101] In December 2006, Ellreese N. Daniels, an Incident Commander during the Thirtymile Fire and the supervisor of the deceased firefighters, was charged with an eleven-count complaint, including four charges of involuntary manslaughter and a charge of lying to investigators.[102]

Daniels was in charge of a fourteen-man crew charged with fighting spot fires in Chewuch Canyon.[103] The larger portion of the fire was some distance away to the south.[104] What started out as a "mop-up" operation, however,

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94. Becky Bohrer, *Fire Crews Face Possible Liability After Deadly Blazes*, SPOKESMAN-REV. (July 9, 2006), http://www.spokesman.com/stories/2006/jul/09/fire-crews-face-possible-liability-after-deadly/.

95. *Id.*; Act of July 24, 2002, Pub. L. No. 107-203, 116 Stat. 744 (codified as amended at 7 U.S.C. §§ 2270(b)–(c) (2002)).

96. Bohrer, *supra* note 94 (quoting U.S. DEP'T OF AGRIC., OFF. OF INSPECTOR GEN., REPORT OF INVESTIGATION (2004)).

97. *Id.*

98. *Id.*

99. *Id.*; *Wildland Fire Commander Gets Probation Re: Action at Wildland Fire*, FIREFIGHTERCLOSECALLS (Dec. 26, 2004), http://www.firefighterclosecalls.com/news/fullstory/newsid/16321/layout/no.

100. Bohrer, *supra* note 94.

101. *See supra* section II.C.2.a.

102. Bowermaster et al., *supra* note 86.

103. *Id.*

104. *See* Halper, *supra* note 84.

quickly escalated into a fight for survival for the fourteen firefighters and the two civilians who had joined them.[105]

After seeing the fire escalate, Daniels attempted to evacuate his crew out of the canyon, only to find all escape routes had been cut off by fire.[106] Daniels directed his crew back up the canyon to a site he thought would provide a safe haven as they waited for the fire to pass.[107] The fire turned, however, and headed directly for them.[108]

Daniels and seven members of his crew made shelters in a road, while the remaining six firefighters sought shelter in a rock scree farther up the canyon.[109] Four of the six firefighters seeking shelter in the rocks died.[110]

During the incident investigation, Daniels said that he told the six firefighters to return to the road with the rest of his crew.[111] That claim was challenged by the survivors, however.[112] Prosecutors alleged that Daniels lied regarding his orders to the other firefighters and that he "should have known that the four firefighters who perished in the fire would be trapped and should have better protected them."[113]

The charges against Daniels marked the first time criminal charges had been filed against an incident commander, "absent malice."[114] Ultimately, Daniels pled guilty to lesser misdemeanor charges and lying to investigators and was sentenced to three years probation and ninety days of house arrest.[115] However, the *Daniels* case has created a precedent that creates concern among firefighters. Indeed, "[f]rom that point on, Forest Service firefighters would be exposed to the possibility of criminal charges for nonmalicious mistakes, or perceived mistakes, that led to fatalities."[116]

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105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. Bowermaster et al., *supra* note 86.
110. Halper, *supra* note 84.
111. *See* Bowermaster et al., *supra* note 86.
112. *Id.*
113. Paul Peluso, *Washington Crew Boss' Criminal Charges Worry Wildland Fire Groups*, FIREHOUSE (Jan. 12, 2007), http://www.firehouse.com/news/10501599/washington-crew-boss-criminal-charges-worry-wildland-fire-groups.
114. John Maclean, *Mistakes on the Fire Line Can Lead to Prosecution*, HIGH COUNTRY NEWS (Sept. 9, 2008), http://www.hcn.org/wotr/mistakes-on-the-fire-line-can-lead-to-prosecution.
115. *Id.*
116. MACLEAN, *supra* note 88, at 136.

d. The Consequences of Public Law 107-203

The decision to file criminal charges against an incident commander for decisions he made while combatting a fire may have significant and deleterious effects on the nation's firefighting community. As a result of potential criminal liability, firefighters involved in a deadly fire are concerned that "their testimony could be used to support criminal charges against them and their fellow workers."[117] Many firefighters have felt the need to acquire their own liability insurance.[118] Firefighters may now be less likely to accept assignments as incident commanders.[119] Indeed, traditionally, firefighters would open up and tell investigators the truth when the focus of the investigation centered on investigations focused on learning lessons and training opportunities, and "there was no consequence of jail, no need for a lawyer."[120]

Following the Yarnell Hill Fire, in which nineteen hotshot firefighters died, the USFS refused to allow its employees to be interviewed by the Arizona Division of Occupational Safety and Health ("ADOSH").[121] The refusal to allow its employees to testify may have been the USFS's response to Public Law 107-203. That law "may have made the USFS so fearful of criminal charges and lawsuits that they are refusing to cooperate with fire investigations."[122] While the response by the USFS is understandable, there is real concern that such a policy will "severely disrupt future lessons[-]learned inquiries, and in some cases could make them 'useless.'"[123] Indeed, one commentator suggests that Congress should

> admit their knee-jerk reaction to the Thirtymile fire [passage of Public Law 107-203] has caused a great deal of unintended harm. In 2001 they thought their ill[-]advised idea might enhance the safety of firefighters, but it has accomplished the reverse. Lessons

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117. *Id.*

118. Bill Gabbert, *New Guide for Accident Reports Requires Conclusions and Recommendations to be Kept Secret*, WILDFIRE TODAY (Sept. 21, 2013), http://wildfiretoday.com/2013/09/21/new-guide-for-wildfire-accident-reports-requires-conclusions-and-recommendations-to-be-kept-secret-intended-for-internal-agency-use-only/.

119. Bohrer, *supra* note 94.

120. *Id.*

121. Bill Gabbert, *Forest Service's Explanation for Their Refusal to Fully Cooperate with Yarnell Hill Fire Investigations*, WILDFIRE TODAY (Dec. 9, 2013), http://wildfiretoday.com/2013/12/09/forest-services-explanation-for-their-refusal-to-fully-cooperate-with-yarnell-hill-fire-investigations/.

122. *Id.*

123. *Id.* (quoting ARIZ. DIV. OF OCCUPATIONAL SAFETY & HEALTH, INSPECTION NARRATIVE 6 (2013), http://www.wildfirelessons.net/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2913c11a-2226-4bec-bd69-f74695865b04.

> learned are becoming more difficult to uncover. Mistakes are more likely to be repeated because of their legislation which became Public Law 107-203. They wanted investigations, but investigations have always occurred following serious accidents. Their legislation had zero benefits, and had far-reaching negative consequences.[124]

III. CONCLUSION

There is little doubt that our population is continually expanding the areas of interaction between our urban population and the wildlands. This has led to the inescapable consequence of increased wildfires, which itself has led to increased incidences and types of liability resulting from those wildfires. The federal government has influenced this increase in liability on both sides of the ledger. The federal government has committed to pursuing damages for wildfire losses, while it has also seen an increase in claims for others' losses from wildfires on federal land. It will be interesting going forward to observe the evolution of the discretionary function exception in relation to claims brought against the federal government. If, for example, the federal government requires more specific and detailed plans for prescribed burning, will that chill the opportunity to use the discretionary function exception because there will be less discretion in implementing and fighting prescribed burns? Or will the courts focus more on the various decisions scene commanders must make and conclude that their options create a basis for the discretionary fund exception? In the same light, will the federal government continue its efforts to place responsibility for fire fighter deaths on local scene commanders and, if so, will that chill the number and quality of firefighters willing to serve as scene commanders? These questions will not go away as we continue to enlarge the Wildland Urban Interface and will, if anything, only become more complicated. Since there is no perceivable way to slow the ever growing interface, answers must come from the federal government and state legislatures as to how to create a consistent and workable framework for imposing liability without negatively impacting the ability to combat the ever increasing wildfire threat.

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124. Gabbert, *supra* note 118.