THE STATUTORY VOID: FEDERAL WILDFIRE USE, AGENCY DISCRETION, AND THE LIMITS OF COMPENSATION FOR AFFECTED LANDOWNERS

A White Paper on the Absence of Legal Basis for Intentional Wildfire Management on Federal Lands©

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I. EXECUTIVE SUMMARY

This paper examines a narrow but consequential legal question. When Congress created the Forest Service, through the Organic Administration Act of 1897, the agency to manage federal reserved lands for enumerated purposes: outdoor recreation, range, timber, watershed, and wildlife and fish purposes. Every founding statute that mentions fire at all treats fire as a hazard to be prevented and suppressed. None of them authorizes an agency official to intentionally allow a wildfire to burn, to expand a wildfire's perimeter through deliberate ignition, or to use a naturally ignited fire as a management tool to accomplish ecological objectives.

Since the mid-1990s, and with a significant policy shift formalized in 2009, encouraged by the Federal Land Assistance Management Enhancement (FLAME) Act (P. L. 111-88,) which in Sec. 503 required a national cohesive wildfire management strategy, the Forest Service, the Park Service, and other federal fire agencies have nonetheless developed and implemented a body of interagency policy, agency manuals, and field directives that do exactly this. That body of doctrine, generally referred to as wildland fire use, fire managed for resource benefit, or (in current terminology) a range of strategic responses selected through the Wildland Fire Decision Support System, rests entirely on administrative interpretation of broad, general statutory language, primarily the multiple use language of the Multiple Use Sustained Yield Act and the Federal Land Policy and Management Act, the conservation mandate of the National Park Service Organic Act, and the untrammeled and natural conditions language of the Wilderness Act. None of these provisions was written with wildfire management in mind, none has been the subject of a court decision holding that it affirmatively authorizes intentional fire use, and none of the interagency policy documents that operationalize the practice, the 1995 Federal Wildland Fire Management Policy, the 2001 Review and Update, and the 2009 Guidance for Implementation, was never subjected to notice and comment rulemaking or published as a binding regulation. They are internal executive branch policy statements.

At the same time, when a federal fire management decision, whether an escaped prescribed burn or a wildfire deliberately managed to expand for resource benefit, damages private or other public property, the ordinary avenues of legal recourse are effectively closed. The Federal Tort Claims Act's discretionary function exception, codified at 28 U.S.C. section 2680(a), has been applied consistently and without meaningful exception to shield federal wildfire response decisions from suit, including decisions to monitor or manage a fire for its potential resource benefits rather than fully suppress it. The Tucker Act's takings remedy is theoretically available after the Supreme Court's 2012 decision in Arkansas Game and Fish Commission v. United States, but the causation standard applied by the Court of Federal Claims and the Federal Circuit makes recovery exceedingly difficult, as the government's 2025 victory in McDonough v. United States demonstrates. In the two instances in the last twenty-five years where federal prescribed fire operations caused catastrophic, widely publicized damage, the Cerro Grande Fire of 2000 and the Hermits Peak/Calf Canyon Fire of 2022, Congress did not rely on the Federal Tort Claims Act or the Tucker Act at all. It enacted standalone, no-fault compensation statutes administered by the Federal Emergency Management Agency. That pattern is itself strong evidence that the ordinary remedies do not work.

This paper traces that legal architecture from the Organic Act of 1897 forward: the organic purposes of the agencies, the appropriations that fund fire management, the administrative invention of wildfire use policy since 2010, the doctrinal barriers to accountability, the two instances of special congressional compensation, and a case study of the Black Fire in the Gila National Forest in 2022. It also addresses the fiscal law questions surrounding the use of suppression appropriations for firing and burnout operations and the funding of post-fire rehabilitation. Where the public record does not support a factual premise, this paper says so directly rather than assuming it.

II. THE ORGANIC PURPOSES OF THE FEDERAL LAND MANAGEMENT AGENCIES

A. The Forest Service

The Organic Administration Act of 1897, codified in relevant part at 16 U.S.C. sections 473 through 478 and 551, established the legal purposes of the national forests. Section 475 states that forest reserves may be established "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber." Section 551 authorizes the Secretary of Agriculture to make rules and regulations to "make provisions for the protection against destruction by fire and depredations" on the national forests. The only fire-related language in the founding statute of the Forest Service casts fire as destruction to be prevented, not as a tool to be deployed.

The Multiple Use Sustained Yield Act of 1960, codified at 16 U.S.C. sections 528 through 531, directs that the national forests be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes, on a multiple use and sustained yield basis, "supplemental to, but not in derogation of" the purposes of the 1897 Act. The statute contains no reference to fire management of any kind.

The National Forest Management Act of 1976 amended the Forest and Rangeland Renewable Resources Planning Act of 1974, codified at 16 U.S.C. § 1600 et seq., to require comprehensive, interdisciplinary land and resource management plans. Its only reference to fire, at 16 U.S.C. section 1604(g)(3)(E)(iii), authorizes salvage and sanitation harvesting of timber "substantially damaged by fire, windthrow or other catastrophe," treating fire once again as a damaging event that triggers a subsequent management response, not as an affirmative management tool in itself. The National Forest Management Act is fundamentally a planning and procedural statute. It does not mention prescribed fire, wildland fire use, or resource benefit fire anywhere in its text.

B. The National Park Service

The National Park Service Organic Act of 1916, now codified at 54 U.S.C. section 100101(a), directs the Park Service to "conserve the scenery, natural and historic objects, and wildlife" within the parks "and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." The Act does not mention fire in any form. The dual conservation and enjoyment mandate has been read by internal Park Service policy, not by the statute itself, as supporting the continuation of natural fire processes where consistent with resource objectives. That is an agency interpretation layered atop statutory silence. It is not an express delegation of authority to intentionally allow or expand fire.

C. The Bureau of Land Management

The Taylor Grazing Act of 1934, codified in relevant part at 43 U.S.C. section 315, states its purpose as preserving public rangelands "from destruction or unnecessary injury" and providing for their orderly use and improvement. It contains no fire authorization language. In 1947, the United States Grazing Service and the General Land Office were administratively combined to form the Bureau of Land Management.

The Federal Land Policy and Management Act of 1976, codified at 43 U.S.C. section 1701 and following, is the Bureau of Land Management's organic act. Section 1701(a) declares a policy of managing public lands on a multiple use and sustained yield basis while protecting scientific, scenic, historical, ecological, and other values. Section 1702(c) defines multiple use as a combination of resource uses without permanent impairment of land productivity. The original 1976 text contains no fire provision. A later amendment, codified at 43 U.S.C. section 1748b, directs a joint Forest Service and Department of the Interior cohesive wildfire management strategy report. That is a planning and coordination requirement. It does not authorize any agency official to intentionally allow or expand a wildfire.

D. The Wilderness Act

The Wilderness Act of 1964, codified at 16 U.S.C. section 1131, defines wilderness as an area "where the earth and its community of life are untrammeled by man" and land that has been "protected and managed so as to preserve its natural conditions." This language, particularly the words "untrammeled" and "natural conditions," is the textual hook most frequently cited by agency fire managers to justify allowing natural ignitions to burn in wilderness areas, on the theory that total fire suppression is itself an unnatural human intervention in a fire-dependent ecosystem. The Act does not mention fire specifically anywhere in its text, and no court has held that section 1131 affirmatively authorizes federal officials to intentionally ignite, allow to expand, or otherwise use fire as a management tool. Litigation under the Wilderness Act involving fire has instead concerned whether particular suppression tactics, such as mechanized equipment, chainsaws, or temporary roads, violate the Act's prohibitions on mechanical transport and structures in section 1133(c). The untrammeled and natural conditions language is definitional. It describes a management goal. It is not an operative grant of authority to burn.

E. Summary

Reviewing the full body of organic legislation governing the Forest Service, the National Park Service, and the Bureau of Land Management, every statutory reference to fire is protective or suppressive in character. The word fire appears in these statutes only in the context of preventing destruction by fire, addressing damage after a fire, or defining a natural condition in the abstract. No organic statute contains language that can fairly be read as an affirmative congressional authorization for a federal official to intentionally allow a wildfire to burn, to expand a wildfire's perimeter, or to use fire as a tool to accomplish resource objectives.

III. CONGRESSIONAL APPROPRIATIONS FOR FIRE MANAGEMENT

Congress funds wildland fire management through the annual Interior, Environment, and Related Agencies Appropriations Act, which divides the Wildland Fire Management appropriation into several distinct program activities: Preparedness, Suppression Operations, Hazardous Fuels Management, Burned Area

Rehabilitation, and, since 2018, a dedicated Wildfire Suppression Operations Reserve Fund. Each activity is described in agency budget justification documents as serving a specific purpose. Suppression Operations funds active response to wildfires. Hazardous Fuels Management funds prescribed burning and mechanical fuel reduction conducted before a fire occurs, under an approved burn plan. Burned Area Rehabilitation funds post-fire watershed and land stabilization work.

For decades, when suppression costs exceeded appropriated amounts within a fiscal year, agencies transferred funds from unrelated accounts, such as recreation, research, and land acquisition programs, to cover the shortfall, a practice widely known as fire borrowing. The Government Accountability Office documented the resulting project cancellations and delays in a 2004 report, GAO-04-612.

Congress first attempted a structural fix in the FLAME Act of 2009, enacted as part of the Omnibus Public Land Management Act, Public Law 111-88. The FLAME Act created a reserve fund, the Federal Land Assistance, Management and Enhancement Fund, dedicated to emergency wildfire suppression costs on Department of the Interior and Forest Service lands. Its purpose, as stated in the statute, is exclusively to fund suppression of large or emergency fires. It does not authorize the use or expansion of a wildfire for ecological objectives. It funds putting fires out.

A more comprehensive fix arrived with the Consolidated Appropriations Act of 2018, Division O, titled the Wildfire Suppression Funding and Forest Management Activities Act, Public Law 115-141. This statute amended the Balanced Budget and Emergency Deficit Control Act of 1985 to create a disaster-style budget cap adjustment for wildfire suppression, effective beginning in fiscal year 2020, and to provide additional budget authority starting at 2.25 billion dollars and rising to 2.95 billion dollars by fiscal year 2027. The purpose of this legislation, as reflected in its text and legislative history, was to end fire borrowing by giving agencies access to suppression funding comparable to how Congress funds other natural disasters. It also included forest management provisions expediting certain hazardous fuels and insect and disease treatment projects. It contains no provision authorizing the intentional expansion of a wildfire for resource benefit.

None of the appropriations statutes reviewed for this paper, including the FLAME Act and the 2018 funding fix, contains language authorizing wildfire use for resource benefit. Every one of them is framed, and funded, around the objective of suppression. Within current agency practice, however, funds appropriated for Suppression Operations and the Wildfire Suppression Operations Reserve Fund are not segregated by management strategy. Whether a fire is fought under a full suppression strategy, a confine and contain strategy, a point protection strategy, or a monitoring strategy that allows the fire to spread while achieving resource objectives, the costs of that response, including any firing or burnout operations conducted as part of it, are drawn from the same Suppression Operations and Reserve Fund accounts. There is no separate appropriation line item and no statutory definition distinguishing costs incurred to put out a fire from costs incurred to manage a fire for ecological benefit while it continues to burn.

IV. THE ADMINISTRATIVE INVENTION OF WILDLAND FIRE USE, POLICY WITHOUT STATUTE

A. The 1995 Federal Wildland Fire Management Policy

Following the severe fire fatalities and losses of 1994, the Secretaries of Agriculture and the Interior chartered an interagency Fire Management Policy Review, which produced the Federal Wildland Fire Management Policy and Program Review, Final Report, dated December 18, 1995. The draft policy was published in the Federal Register as a notice, 60 Fed. Reg. 32,469, June 22, 1995, seeking public comment, not as a proposed rule under the notice and comment procedures of the Administrative Procedure Act. The final 1995 policy, for the first time, formally authorized what it called prescribed natural fire, later termed wildland fire use, permitting naturally ignited fires to burn under an approved fire management plan to achieve resource objectives. The document itself states that it is an umbrella interagency policy that does not replace agency-specific policies, and it cites no specific statute as the source of its authority. It was never codified in the Code of Federal Regulations.

B. The 2001 Review and Update

After the May 2000 Cerro Grande Fire, discussed in detail in Section VII below, the Secretaries commissioned a review that produced the Review and Update of the 1995 Federal Wildland Fire Management Policy, dated January 2001. This document is described by the Department of the Interior and the Department of Agriculture as the primary interagency wildland fire policy still in force today. It carried forward the 1995 principles, tightened procedures for prescribed fire escapes, and reaffirmed wildland fire use as a management category distinct from suppression. It too is an interagency policy statement, not a regulation, implemented operationally through the Interagency Strategy for the Implementation of Federal Wildland Fire Management Policy, dated June 20, 2003, and issued under the authority of the Wildland Fire Leadership Council, an interagency coordinating body with no independent statutory basis.

C. The 2009 Guidance for Implementation

This is the document most directly responsible for the current legal landscape. In 2008 the Wildland Fire Leadership Council directed field testing of new operational rules, and on February 13, 2009, the Guidance for Implementation of Federal Wildland Fire Management Policy was approved and signed, not by the Secretaries of Agriculture or the Interior, but by the interagency Fire Executive Council, composed of fire and aviation directors from the Forest Service, the Bureau of Land Management, the National Park Service, the Fish and Wildlife Service, and the Bureau of Indian Affairs. The 2009 Guidance eliminated the prior rule that a wildland fire could be managed for only one objective at a time. The 2004 operational rule it replaced had stated plainly that "a wildland fire cannot be managed for both objectives concurrently." The 2009 Guidance replaced that rule with the opposite instruction: "A wildland fire may be concurrently managed for one or more objectives and objectives can change as the fire spreads across the landscape." The separate designation "Wildland Fire Use" was retired, and all wildfire response decisions were folded into a single framework evaluated through the Wildland Fire Decision Support System, a computer-based analytical tool used by agency administrators to select and document a strategic response. It is this 2009 change, an internal interagency executive directive signed by fire program managers rather than the Secretaries, let alone Congress, that created the administrative and operational basis for a single wildfire to be simultaneously fought in one location and allowed, or actively helped, to expand in another, in pursuit of stated ecological objectives.

D. Agency Manuals

The Forest Service Manual, chapter 5130, on wildfire response, states policy that a wildland fire may be concurrently managed for one or more objectives, language mirroring the 2009 Guidance, and permits managing natural ignitions toward land and resource management plan objectives when risk is judged to be within acceptable limits. The specific statutory citations found within the Forest Service Manual's fire chapters are narrow and procedural, referencing 36 C.F.R. section 211.5, which governs emergency fire assistance, and 42 U.S.C. section 1856b, which governs reciprocal fire protection agreements between agencies. Neither provision authorizes intentional wildfire expansion. Every page of the Forest Service Manual carries the standard disclaimer that guidance documents lack the force and effect of law unless expressly authorized by statute.

The National Park Service implements comparable direction through Reference Manual 18 and Director's Order 18, issued under the Service's Management Policies 2006, citing no independent statutory authority beyond the general conservation mandate of the 1916 Organic Act.

E. Rulemaking Status

None of the 1995, 2001, or 2009 policy documents underwent notice and comment rulemaking under the Administrative Procedure Act, 5 U.S.C. section 553. Only the 1995 draft received any Federal Register publication, and that publication was a notice soliciting comment on a policy report, not a proposed rule. None of the three documents was ever codified in the Code of Federal Regulations. They are, in the technical and legal sense, internal executive branch policy statements, not law.

F. The One Place Congress Did Legislate, and What It Did Not Cover

Congress has enacted one statutory provision touching directly on fire ignited by federal officials: 16 U.S.C. section 551c-1, which restricts the Forest Service from conducting prescribed burns, meaning planned, deliberately ignited fires under an approved burn plan, on days of extreme fire danger, and requires annual reporting to Congress on prescribed fire activity. This provision implicitly acknowledges that the Forest Service conducts planned prescribed burns, and it regulates the conditions under which that planned activity may occur. It says nothing about unplanned, naturally ignited wildfires that agency officials choose to allow to continue burning, or to expand through firing operations, in pursuit of resource objectives. Congress has narrowly legislated on the planned ignition side of fire management. It has not legislated on the unplanned wildfire use side at all.

G. Conclusion

No act of Congress authorizes a federal official to intentionally allow a naturally ignited wildfire to continue burning, or to expand a wildfire's perimeter through deliberate firing operations, in order to accomplish ecological or resource management objectives. That practice rests entirely on a chain of interagency executive policy documents beginning in 1995, restructured in 2009 by a body below Cabinet level, interpreting broad and general statutory language, principally the multiple use provisions of the 1960 and 1976 organic acts and the untrammeled and natural conditions language of the Wilderness Act, none of which mentions fire management as such. As reflected in Government Accountability Office reports and Congressional Research Service products that describe federal fire policy as a patchwork of legislation and agency guidance, the practice of wildfire use rests on executive discretion rather than express congressional delegation.

V. ACCOUNTABILITY: THE DISCRETIONARY FUNCTION EXCEPTION

The Federal Tort Claims Act, 28 U.S.C. sections 1346(b) and 2671 through 2680, waives the sovereign immunity of the United States for torts committed by federal employees acting within the scope of their employment, under circumstances where a private person would be liable under the law of the place where the act occurred. Section 2680(a), the discretionary function exception, withdraws that waiver for any claim "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." That final clause is the operative barrier for landowners harmed by federal fire decisions. It applies even where the agency's exercise of discretion was, in the plaintiff's view, wrong, careless, or unreasonable.

The Supreme Court set out the governing two-part test in Berkovitz v. United States, 486 U.S. 531 (1988), and United States v. Gaubert, 499 U.S. 315 (1991). First, the conduct at issue must involve an element of judgment or choice. If a federal statute, regulation, or internal policy specifically prescribes a mandatory course of action, leaving the official no discretion to deviate, the exception does not apply. Second, if choice exists, the exception protects only judgment of the kind grounded in social, economic, or political policy considerations, even if the official did not consciously weigh those considerations in the moment, so long as the decision is of a type that policy analysis would inform.

Applied to wildfire management, federal courts have consistently held that decisions about how to respond to a wildfire, including decisions to monitor a fire, to allow it to continue burning, or to manage it for potential ecological benefit rather than fully suppress it, are discretionary policy judgments protected by section 2680(a). The most directly relevant recent decision is Strawberry Water Users Association v. United States, decided by the United States Court of Appeals for the Tenth Circuit on July 30, 2024. In that case, the Forest Service initially chose to monitor and contain, rather than fully suppress, the 2018 Bald Mountain and Pole Creek Fires in Utah, reasoning that limited fire could benefit forest health. Unexpected high winds caused the fires to escape that strategy, and the resulting fires burned approximately 100,000 acres, including private land. The District of Utah dismissed the resulting suit for lack of subject matter jurisdiction, and the Tenth Circuit affirmed, holding that the incident commander's decision, balancing firefighter safety, risk to private property, and potential resource benefits, was precisely the kind of policy judgment the discretionary function exception was designed to shield, even though the agency was aware of the risk of expansion and even though the fire ultimately damaged private property.

A comparable result was reached in Miller v. United States, 163 F.3d 591 (9th Cir. 1998), involving a fire on the Ochoco National Forest in Oregon that spread onto private land, where the Ninth Circuit held that the Forest Service's choices about attack method, balancing cost, safety, and resource considerations, reflect exactly the type of economic, social, and political judgment the discretionary function exception protects. District courts applying the same framework, including McDougal v. United States Forest Service, 195 F. Supp. 2d 1229 (D. Or. 2002) have reached similar conclusions in the firefighting-response context.

No case identified in researching this paper has held that a federal official's decision to deliberately manage or expand a wildfire for resource benefit fell outside the discretionary function exception. The pattern in the reported case law is structural and consistent, not an occasional outcome. Property owners whose land is damaged by a wildfire that federal officials chose to monitor, manage for resource benefit, or expand through firing operations have, as a practical matter, no viable claim under the Federal Tort Claims Act, because the very decision to take that approach is treated as the kind of policy judgment Congress intended to insulate from judicial second guessing when it enacted section 2680(a) in 1946.

VI. THE ILLUSORY TAKINGS REMEDY

The Tucker Act, 28 U.S.C. section 1491, gives the Court of Federal Claims jurisdiction over claims against the United States founded upon the Constitution, including claims that government action has affected a taking of private property without just compensation in violation of the Fifth Amendment. In theory, a landowner whose property is deliberately burned as a result of a federal firing or burnout operation, or as a result of a decision to allow a fire to expand for resource benefit, could bring an inverse condemnation claim rather than a tort claim, since the discretionary function exception applies only to tort claims under the Federal Tort Claims Act and does not bar takings claims under the Tucker Act.

The Supreme Court's 2012 decision in Arkansas Game and Fish Commission v. United States, 568 U.S. 23 (2012), established that temporary, government-induced flooding is not categorically excluded from takings liability merely because it is not permanent, rejecting a Federal Circuit rule that had required permanence or inevitable recurrence. That decision provides the doctrinal foundation for arguing that a temporary but government-caused invasion of property, including one caused by fire, can in principle support a takings claim.

In practice, however, the causation standard applied by the Federal Circuit makes such claims extremely difficult to win. Under Ridge Line, Inc. v. United States, 346 F.3d 1346 (Fed. Cir. 2003), and Moden v. United States, 404 F.3d 1335 (Fed. Cir. 2005), a plaintiff must show that the government's action was intended or was the direct, natural, or probable result of authorized government conduct, not merely an incidental or consequential effect of it, and that it appropriated a benefit to the government or preempted the owner's use of the property, rather than merely diminishing its value. This test requires the plaintiff to prove that the government's conduct actually caused the damage, in the sense that the damage would not have occurred absent the government's intervention.

That causation requirement was tested directly in McDonough v. United States, decided by the Court of Federal Claims following a December 2024 bench trial, with judgment entered September 11, 2025. The plaintiffs, ranch owners near Wolf Creek, Montana, claimed a taking arising from the Forest Service's intentional backburn and firing operations during the 2017 Alice Creek Fire, in which the agency deliberately burned the plaintiffs' forage and timber as fuel to protect other structures. Even though the government's ignition of fire on the plaintiffs' land was intentional and undisputed, the court held that the plaintiffs still bore the burden of proving that the government's action, rather than the natural, lightning-caused, drought- and wind-driven fire itself, was the actual cause of the loss. On the facts, the court found that the fire would likely have caused equal or greater damage to the property even without the government's firing operation, and it ruled for the United States.

McDonough illustrates the structural problem facing landowners in these cases. Federal fire officials operate in an environment of drought, wind, and terrain that would often have caused significant fire damage regardless of any specific agency decision. That reality allows the government to argue, and allows courts to find, that even a deliberate, intentional firing operation did not legally cause the resulting damage, because the same or worse damage was likely to occur naturally in any event. The same emergency conditions- drought, wind, extreme fire behavior- that agencies invoke to justify their operational choices in the first place, including the choice to manage a fire for resource benefit rather than to fully suppress it, become the government's causation defense when a landowner later seeks compensation. The public is left in the position of confronting a government decision that expanded a fire's damage without a practical way to prove, under the governing legal standard, that the expansion, rather than the underlying natural conditions, caused its loss.

No case identified in this research has held in a plaintiff's favor on a taking’s theory arising from intentional wildfire expansion or wildfire use for resource benefit. Arkansas Game and Fish Commission establishes that such a claim is not categorically barred. It does not establish that such a claim can realistically be won.

VII. WHEN STATUTES FAIL: AD HOC CONGRESSIONAL COMPENSATION

In the two instances in the last twenty-five years where a federal fire ignited or managed by federal officials caused catastrophic, widely publicized property damage, Congress did not rely on the Federal Tort Claims Act or the Tucker Act to provide a remedy. It enacted standalone compensation statutes.

A. The Cerro Grande Fire Assistance Act of 2000

The Cerro Grande Fire began on May 4, 2000, as a National Park Service prescribed burn at Bandelier National Monument in New Mexico. It escaped its planned boundaries, burned approximately 47,750 acres, destroyed more than two hundred structures, burned through the Nation’s preeminent nuclear research development and assembly laboratory run by the University of California, Berkeley, and forced the evacuation of the city of Los Alamos. Congress responded with the Cerro Grande Fire Assistance Act, Public Law 106-246, Title I, 114 Stat. 584, enacted July 13, 2000, implemented through regulations at 44 C.F.R. Part 295.

The Act created a no-fault, causation-based compensation program administered by the Federal Emergency Management Agency through a dedicated Office of Cerro Grande Fire Claims. A claimant needed to show only that a loss resulted from the fire, not that any federal employee acted negligently, and needed to elect the statutory claims process as an exclusive remedy, after which final compensation released the government and its employees from further liability. Compensable categories included real and personal property loss, business loss, financial loss, personal injury, and reforestation and mitigation costs, categories broader and more forgiving than ordinary tort damages. Congress ultimately appropriated approximately 661 million dollars, including approximately 455 million dollars for victim and insurer subrogation claims, approximately 45 million dollars for administrative costs, and the remainder for related purposes, including watershed remediation and tribal lands. Claimants were required to file a Notice of Loss within two years of the regulations first taking effect, a deadline that expired August 28, 2002, with no statutory mechanism for extension.

B. The Hermits Peak/Calf Canyon Fire Assistance Act of 2022

The largest wildfire in New Mexico's recorded history began as two separate Forest Service prescribed fire operations, the Las Dispensas prescribed burn, ignited April 6, 2022, and holdover embers from a January 2022 pile burn in Calf Canyon thought to have been extinguished. The two escaped fires merged and ultimately burned more than 341,000 acres. Congress responded with the Hermits Peak/Calf Canyon Fire Assistance Act, Division G of Public Law 117-180, 136 Stat. 2114, 2168, enacted September 30, 2022, implemented through regulations at 44 C.F.R. Part 296.

The statute follows the same architecture as the Cerro Grande Act: a no-fault administrative compensation program run through a dedicated FEMA claims office, paying actual compensatory damages upon a showing that the loss resulted from the fire, without any requirement to prove negligence, and expressly excluding punitive damages, interest, and attorney or agent fees. Compensable categories include real property loss and diminution in value, personal property, business loss, financial and investment loss, reforestation and revegetation costs, and risk reduction and mitigation costs, with caps on several of these categories removed by rulemaking in 2023 and 2024. Congress appropriated 2.5 billion dollars in the original 2022 Act, an additional 1.45 billion dollars in the Consolidated Appropriations Act of 2023, and a further 1.5 billion dollars in December 2024, for a cumulative total of approximately 5.45 billion dollars, the largest sum Congress has ever appropriated to compensate victims of a single wildfire. The original claims deadline, set for two years after the interim final rule, was extended twice by subsequent legislation, ultimately to March 14, 2025.

C. The Common Pattern

Both statutes share the same core design, and that design is instructive in itself. Rather than amend the Federal Tort Claims Act to remove or narrow the discretionary function exception for prescribed fire operations, and rather than rely on the Tucker Act's takings remedy, Congress in both instances created an entirely separate, no-fault administrative compensation fund, paid for with new appropriations, and administered outside the courts altogether. Neither statute's public legislative record contains an explicit floor statement declaring that the Federal Tort Claims Act or the Tucker Act were legally foreclosed. But the structural choice speaks for itself. Prescribed burn planning decisions, weather window judgments, staffing determinations, and burn plan approvals are precisely the kind of policy-laden discretionary decisions that section 2680(a) shields from tort liability, and wildfire-caused property damage is precisely the kind of loss that the Ridge Line and Moden causation standard makes difficult to recover under the Tucker Act. Congress did not test those propositions in either case. It bypassed them entirely, twice, and created a fund instead. A landowner harmed by a comparable fire today, absent a third act of Congress, has no equivalent recourse.

VIII. CASE STUDY: THE BLACK FIRE AND THE GILA AND ALDO LEOPOLD WILDERNESS, 2022

The Black Fire began on May 13, 2022, near Middle Mesa in the Gila National Forest in New Mexico. Publicly available reporting attributes the fire's origin to human causes under investigation by law enforcement, not to a lightning strike. It grew rapidly under extreme drought and wind conditions, at times exceeding 27,000 acres of growth in a single day and became the second largest wildfire in modern New

Mexico history, behind only the Hermits Peak/Calf Canyon Fire of the same year. Final reported acreage figures vary somewhat across sources, generally ranging from 325,000 to 330,000 acres. The fire burned through more than 90% of the Aldo Leopold Wilderness and portions of the surrounding Gila National Forest, reached 70% containment by late June 2022, and was reported substantially extinguished by late July 2022.

Daily incident updates and Forest Service materials confirm that fire managers conducted firing and burnout operations during the response, including the use of unmanned aircraft systems, commonly described as drones, equipped with plastic sphere dispenser devices that release incendiary spheres, sometimes referred to informally as dragon eggs, filled with potassium permanganate and ignited on contact with an injected chemical. The stated tactical purpose of these operations, as described in incident updates, was to strengthen containment lines, to keep the fire south of a state highway and west of another, and to provide point protection for structures and infrastructure. This paper's research did not locate specific public reporting confirming that aerial ignition operations were deliberately planned or targeted to burn through the interior of the Aldo Leopold Wilderness or the Gila Wilderness, as distinct from being used along containment lines at the fire's edges. Given the fire's extraordinarily rapid natural spread under red-flag conditions, the available public record does not clearly establish how much of the wilderness acreage burned as a result of the fire's uncontrolled growth versus how much resulted from deliberate firing operations. This paper states that limitation plainly rather than asserting a causal breakdown the public record does not support.

A cost figure of approximately 27.2 million dollars for Black Fire suppression appears in aggregated reporting, but this paper was unable to independently verify that figure against a clearly identified primary source, and no breakdown of that figure by tactic, including aerial ignition or air tanker operations specifically, was located. No lawsuit, congressional inquiry, Government Accountability Office report, or Inspector General review specific to the Black Fire's firing operations or its effect on the Aldo Leopold Wilderness was identified in this research, in marked contrast to the extensive congressional and public scrutiny, and the 5.45-billion-dollar compensation fund, that followed the Hermits Peak/Calf Canyon Fire burning in the same state in the same year. That contrast is itself part of this paper's thesis. A prescribed burn that escapes generates a name, a statute, and a compensation fund. A wildfire that officials choose to manage for resource benefit, using the same suppression appropriations, the same aerial ignition tools, and causing comparable landscape scale damage to a wilderness area, generates no comparable public accounting, in part because it is legally classified as fire suppression response to a naturally occurring event rather than as an agency-initiated action, even where officials actively used ignition devices to expand the burned area.

As to funding, whatever the specific mix of monitoring, containment, and firing operations conducted during the Black Fire, all of it was funded from the same Wildland Fire Management Suppression Operations and Reserve Fund accounts described in Section III above. There is no separate statutory appropriation, and no separate legal category, for the cost of expanding a fire for resource benefit as opposed to the cost of containing it. Both draw on the identical suppression appropriation.

IX. THE APPROPRIATIONS QUESTION: IS FUNDING BURNOUT OPERATIONS AND COMPENSATION FROM SUPPRESSION MONEY A FISCAL IRREGULARITY

The Purpose Statute, 31 U.S.C. section 1301(a), provides that appropriations shall be applied only to the objects for which they were made, except as otherwise provided by law. The Anti-Deficiency Act, 31 U.S.C. sections 1341 and 1342, prohibits federal officials from obligating or expending funds in excess of an appropriation or before an appropriation is made, subject to a narrow exception for emergencies involving the safety of human life or the protection of property. Together, these statutes and the body of Government Accountability Office decisions interpreting them, collected in the Government Accountability Office's Principles of Federal Appropriations Law, establish the necessary expense doctrine: an expenditure is a proper use of an appropriation if it is reasonably necessary to accomplish the object for which the appropriation was made, even if not literally described by the appropriation's text.

This paper's research did not locate any Government Accountability Office decision, Department of the Interior or Department of Agriculture Inspector General report, or published legal opinion that squarely addresses whether firing or burnout operations that expand a wildfire's perimeter, whether conducted as a suppression tactic to strengthen a containment line or as part of a strategy to manage a fire for resource benefit, fall within or outside the appropriated purpose of wildfire suppression. That is a genuine gap in the public record, not a settled legal conclusion in either direction. What can be said with confidence is that current agency practice does not distinguish, for funding purposes, between the cost of a full suppression response and the cost of a monitoring or resource benefit response to the same fire. Both are paid from the same Suppression Operations and Wildfire Suppression Operations Reserve Fund accounts, under the same appropriation. Whether that commingling itself represents sound appropriations practice, given that the two strategies serve materially different purposes, one aimed at extinguishing a fire and the other at allowing or helping it continue, is a question Congress has not addressed through separate line-item appropriations, and that the Government Accountability Office does not appear to have separately audited.

On the question of compensation to affected landowners, the answer is considerably clearer. Direct compensatory payments to owners of property damaged by a federal fire are not payable from ordinary suppression or emergency appropriations. Both the Cerro Grande Fire Assistance Act and the Hermits Peak/Calf Canyon Fire Assistance Act were freestanding statutes, each creating a new appropriation and a new FEMA claims office, precisely because the existing wildfire suppression appropriations provide no legal authority to pay tort-like compensation to third parties for property damage. Absent a comparable act of Congress following a specific fire, suppression appropriations cannot lawfully be redirected to compensate landowners, regardless of how that fire was managed.

The Burned Area Emergency Response program, commonly known as BAER, which funds post-fire watershed and land stabilization work, is not authorized by its own dedicated organic statute. It operates under Forest Service Manual 2523, whose stated statutory authority traces to section 323(a) of Public Law 105-277, as amended by section 434 of Public Law 109-54, provisions authorizing watershed restoration agreements and expenditures where there is a clear benefit to National Forest System lands, together with Public Law 106-558, which addresses funding for BAER team personnel. BAER is funded through the Burned Area Rehabilitation activity within the Wildland Fire Management appropriation, alongside Suppression Operations, rather than through a separate dedicated statute comparable to the Cerro Grande or Hermits Peak Acts. It is a program built on agency manual authority interpreting general watershed restoration provisions, not a standalone congressional program targeted at post-wildfire recovery generally, and it funds work on federal land, not compensation to private or other non-federal landowners.

X. CONCLUSION

Tracing the law from the Organic Act of 1897 forward produces a consistent result. Every statute that created or expanded the authority of the Forest Service, the National Park Service, and the Bureau of Land Management to manage federal reserved lands addresses fire, where it addresses fire at all, as a hazard to be prevented, suppressed, or cleaned up after. No organic statute, and no fire-specific appropriations statute, including the FLAME Act of 2009 and the 2018 wildfire funding fix, authorizes a federal official to intentionally allow a wildfire to burn or to expand its perimeter in pursuit of ecological objectives. That practice, formalized nationally in 2009 through an interagency guidance document signed by fire program officials rather than by the Secretaries or Congress, rests on an administrative interpretation of general multiple-use and conservation language never written with wildfire management in mind, and it has never been subjected to notice-and-comment rulemaking.

When that practice results in damage to private or other public property, the persons harmed face a legal landscape built almost entirely around insulating the responsible officials from consequence. The Federal Tort Claims Act's discretionary function exception has been applied uniformly to shield wildfire response decisions, including decisions to manage a fire for resource benefit, from tort liability. The Tucker Act's takings remedy is theoretically available but, as the government's victory in the 2025 McDonough decision demonstrates, requires a landowner to disprove a counterfactual, that the same natural conditions the agency cites to justify its own decisions would have caused equivalent damage anyway, a standard that is exceptionally difficult to meet even where the government's ignition of fire on the plaintiff's property is undisputed. In the two cases where federal fire operations caused catastrophic, well-documented harm, Congress bypassed both of those remedies entirely and legislated bespoke, no-fault compensation funds, a pattern that confirms rather than contradicts the conclusion that the ordinary legal system does not provide a realistic path to compensation.

The Black Fire of 2022 illustrates what happens in the more common case, where a fire causes comparable landscape-scale damage, including to one of the most significant wilderness areas in the United States, but does not generate the singular public narrative of an escaped prescribed burn. No comparable statute, inquiry, or compensation fund followed it. The same suppression appropriation that funds extinguishing a fire also funds expanding one, with no separate legal accounting between the two, and no public authority appears to have examined whether that commingling is itself sound. Absent a specific act of Congress, either narrowing the discretionary function exception for wildfire management decisions, clarifying the causation standard for wildfire related takings claims, or creating a general, standing compensation mechanism for property owners harmed by fires that federal officials chose to manage rather than suppress, the current legal architecture leaves those officials making high consequence, low accountability decisions, and leaves the landowners in a fire's path with little more than the hope that their fire becomes prominent enough, and politically visible enough, that Congress decides to act.