

THE WEST’S HOT TOPIC: SNUFFING OUT POOR WILDFIRE POLICY IN NATIONAL FORESTS

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INTRODUCTION

*“Unless we are willing to escape into sentimentality or fantasy,
often the best we can do with catastrophes, even our own, is to find
out exactly what happened and restore some of the missing parts.”*

— Norman Maclean, *Young Men and Fire* (1992)¹

A falling tree crushed 19-year-old Trenton Johnson on July 19, 2017,
when his firefighting unit responded to a small blaze in the Lolo National

1. NORMAN MACLEAN, *YOUNG MEN AND FIRE* 46 (The University of Chicago Press 1992 ed. 1976).

Forest.² Less than two weeks later, another falling snag killed 29-year-old Brent Witham while his unit was felling trees to slow the Lolo Peak fire, a different blaze in the same national forest.³ Johnson worked for a private crew contracted by the Forest Service, and Witham worked for a Forest Service Hotshot Crew.⁴

The Forest Service is familiar with death. The Lolo Peak fire's public information officer explained that the agency conducts drills to prepare for these situations.⁵ He added, "[b]ut everyone knows this is dangerous work, and even with the right protections and protocols, accidents can happen."⁶ Falling snags killed both of the young men in the national forest.⁷ Hazardous trees killed 18 firefighters between 1990 and 2014.⁸ These incidents reflect only four percent of the 440 individuals who died fighting wildland fires during that period.⁹

Falling trees are not the only danger, nor are human lives the only loss. The Forest Service spent \$2.41 billion on fire suppression in 2017.¹⁰ For the first time in the agency's 110-year history, it spent over half of its budget fighting fire.¹¹ The Forest Service concedes that this focus on fire prevents the agency from performing other vital functions: promoting outdoor recreation, protecting wildlife habitat, and providing clean air and water.¹² In 2017, the agency transferred \$576.5 million from other programs to fund fire suppression.¹³

Given the danger and expense of fire suppression, the question remains—is it effective? Many ecologists think not.¹⁴ They believe fire is integral to healthy western forests.¹⁵ Many species of plants and animals rely

2. Rob Chaney & David Erickson, *Trenton Johnson Was a Scholar and Standout Athlete, but Fate and the Forest Still Took His Life*, MISSOULIAN (July 20, 2017), http://missoulian.com/news/local/trenton-johnson-was-a-scholar-and-standout-athlete-but-fate/article_0821d92a-48c0-52f3-8887-8ae8d16cf8a1.html.

3. Rob Chaney & Eve Byron, *Firefighter Killed in Lolo Peak Accident was Experienced Hotshot*, MISSOULIAN (Aug. 3, 2017), http://missoulian.com/print-specific/firefighter-killed-in-lolo-peak-accident-was-experienced-hotshot/article_c7dbaddb-539b-5984-864c-b02674a405ca.html.

4. Chaney, *supra* note 2; Chaney, *supra* note 3.

5. Chaney, *supra* note 3.

6. *Id.*

7. Chaney, *supra* note 2; Chaney, *supra* note 3.

8. Chaney, *supra* note 3.

9. *Id.*

10. U.S. DEP'T OF AGRIC., WEEKLY FIRE UPDATE – OCTOBER 23, 2017 [hereinafter Weekly Fire Update].

11. U.S. DEP'T OF AGRIC., FISCAL YEAR 2017 BUDGET OVERVIEW 6 (2016).

12. *Id.*

13. WEEKLY FIRE UPDATE, *supra* note 10.

14. Ashley K. Hoffman & Sean M. Kammer, Note, *Smoking out Forest Fire Management: Lifting the Haze of an Unaccountable Congress and Lighting up a New Law of Fire*, 60 S.D. L. REV. 41, 67 (2015).

15. *Id.*

on fire-ravaged habitats to thrive.¹⁶ Fire suppression projects have actually made national forests more susceptible to higher intensity fires by perverting this natural phenomenon.¹⁷ Paradoxically, fire suppression strategies have produced fuel buildup that creates a ladder between the understory and forest ceiling and results in high-intensity crown fires.¹⁸

Fire suppression may be ineffective, but that has not deterred government officials from implementing suppression policies. The Secretary of the Interior, Ryan Zinke, met with the Secretary of Agriculture, Sonny Perdue, on August 24, 2017, to discuss the Lolo Peak Fire.¹⁹ Zinke blamed environmental extremists for the increase in wildfires, claiming that frivolous litigation prevented the government from managing forests properly.²⁰ Perdue added that the government would change how it manages land to reduce the impact of forest fires.²¹ Perdue did not elaborate, but Zinke released a memo the following month calling for aggressive fuel reduction.²² As explained below, fuel reduction projects may allow the forest to harvest small and large diameter trees, making the projects more akin to outright suppression.

Neither have legislators been deterred. As of 2017, Congress has proposed several bills that would drastically influence forest fire policy.²³ Most bills would allow the Forest Service to expedite fuel reduction projects by excluding such projects from complying with environmental protection statutes.²⁴

The following argument addresses the deficiencies of current forest fire policy. The Forest Service has unsuccessfully attempted to control fire since the agency's inception. Modern fire management techniques are highly contentious. Legislation is trending toward restoring deference for Forest Service management decisions.²⁵ Legislative deference accords the agency great discretion in choosing which fire management techniques to pursue.

16. ROBERT H. NELSON, *A BURNING ISSUE: A CASE FOR ABOLISHING THE U.S. FOREST SERVICE* 15-18 (2000).

17. *Id.* at 17.

18. *Id.*

19. Chris D'Angelo, *Montana Lawmakers Say 'Environmental Extremists' to Blame for Wildfires*, HUFFINGTON POST (Aug. 24, 2017), https://www.huffingtonpost.com/entry/montana-wildfires-environmental-extremists_us_599f328be4b05710aa5aefa.

20. *Id.*

21. *Id.*

22. Press Release, U.S. Dep't of Agric., Secretary Zinke Directs Interior Bureaus to Take Aggressive Action to Prevent Wildfires (Sept. 12, 2017).

23. Matthew Daly, *GOP Targets Environmental Rules After Wildfires*, ASSOCIATED PRESS (Oct. 26, 2017), <https://www.apnews.com/814f362197074ebdb9de4caa4f5d2579/GOP-targets-environmental-rules-after-wildfires>.

24. *Id.*

25. *Id.*

This can result in extreme environmental harm.²⁶ Proposed legislation will only perpetuate poor wildfire policy. Therefore, Congress should enact new legislation that will limit the Forest's Service discretion and require sound management practices.

I. BACKGROUND

Congress began delegating forest fire management to federal agencies in the late 19th century.²⁷ The Organic Administration Act of 1897 granted the Secretary of Agriculture broad authority to “make provisions for the protection against destruction by fire and depredations upon the public forests and national forests.”²⁸ The Act also allowed the executive branch to establish national forest reserves to “secur[e] favorable conditions of water flows” and “furnish a continuous supply of timber.”²⁹ Thus, this organic legislation created a conflict between wildfire and timber production—Congress granted the agency great leeway to prevent wildfires in order to promote a continuous supply of timber.

The Transfer Act of 1905 created the United States Forest Service (USFS) and tasked the agency with managing national forest reserves.³⁰ President Theodore Roosevelt appointed Gifford Pinchot as the first Chief Forester.³¹ Pinchot branded his own form of conservation, “utilitarian conservation.”³² This belief held that USFS should manage economic ventures in national forests in a way that allowed benefits in the present and recurring yields in the future.³³ At its inception, the Forest Service embraced the idea that it could allow economic harvest in national forests so long as it assured a sustainable yield.³⁴

Pinchot believed the forest reserves should serve public gain, but he was not completely sympathetic toward industry.³⁵ He preserved roughly three-quarters of the current National Forest System despite opposition from the

26. Justin Gillis, *Let Forest Fires Burn? What the Black-Backed Woodpecker Knows*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/science/let-forest-fires-burn-what-the-black-backed-woodpecker-knows.html>.

27. Forest Reserve Act of 1891, 26 Stat. 1095, 1103 (repealed 1976).

28. Act of June 4, 1897, ch. 2, 30 Stat. 35 (codified as amended at 16 U.S.C. § 551 (2012)).

29. 16 U.S.C. § 475 (2012).

30. Hoffman & Kammer, *supra* note 14, at 59.

31. Pinchot, *Gifford*, THEODORE ROOSEVELT CENTER AT DICKINSON STATE UNIVERSITY, <https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/Conservation/Gifford-Pinchot>.

32. Hoffman & Kammer, *supra* note 14, at 59.

33. *Id.*

34. *Id.* at 11.

35. *Id.* at 59.

timber industry.³⁶ Interestingly, environmentalists now fault Pinchot for timber harvests on national forest land.³⁷ While Pinchot did not exclusively reserve national forest land for industrial purposes, he believed that timber harvests should be their dominant purpose.³⁸ He only limited timber harvests to the extent that it would guarantee a sustainable yield in the future.³⁹

Pinchot's view of national forests as a sustainable source of timber drastically narrowed the various management objectives that Congress had considered.⁴⁰ Congress first enabled the President to establish forest reserves in 1891.⁴¹ At that time, legislators expressed various possible uses.⁴² Pinchot, however, rejected these considerations in favor of reserving the land for timber harvests and grazing.⁴³ This demonstrates that one of the Forest Service's earliest objectives was to preserve timber for harvest, even at the expense of other resource values.

Since its inception, the Forest Service perceived wildfire as a threat to its timber resources.⁴⁴ The agency created a policy to locate and extinguish all wildfires in order to protect timber reserves.⁴⁵ Congress agreed and established a virtually unlimited funding process to support the Forest Service's firefighting efforts.⁴⁶ The Forest Service applied this approach to suppressing forest fire for most of the 20th century.

II. ARGUMENT

Congress's legislative attempts in the area of fire management have created an environment of competing interests that choke each other of vital resources and inhibit productive growth. Subparts A, B, and C explain the general elements of the argument. Subpart A explains that current management techniques vary in harm, expense, and danger. Subpart B explains that legislation accords the Forest Service great deference, allowing the agency to make management decisions political rather than ecological.

36. *Id.* at 60.

37. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 120 (1992).

38. Hoffman & Kammer, *supra* note 14, at 60.

39. *Id.*

40. SAMUEL P. HAYS, *THE AMERICAN PEOPLE AND THE NATIONAL FORESTS* 13 (2009).

41. Forest Reserve Act of 1891, ch. 563, 26 Stat. 1095–1103 (repealed 1976).

42. Hoffman & Kammer, *supra* note 14, at 60.

43. *Id.* (citing HAROLD K. STEEN, *THE U.S. FOREST SERVICE: A HISTORY* 95 (2004)).

44. Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 ENVTL. L. 301, 305 (2006).

45. U.S. DEP'T OF AGRIC., FOREST SERV., *THE USE OF THE NATIONAL FOREST RESERVES: REGULATIONS AND INSTRUCTIONS* 63 (1905).

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

Subpart C explains that this deference provides the agency excessive leeway in choosing which techniques to use, and this can cause extreme environmental harm. Subpart D then demonstrates that proposed legislation would exacerbate the issue by according the Forest Service even greater deference.

A. Current Management Practices are Harmful, Expensive, and Dangerous.

Land management agencies use multiple methods to combat forest fire, and each has potential pitfalls.⁴⁷ Modern ecologists view fire as a natural part of the landscape—for centuries lightning ignited fires out West, altering the landscape in cyclical intervals.⁴⁸ Paradoxically, a century of fire suppression on federal lands has perverted the natural ecological processes and made forests more susceptible to high-intensity fires.⁴⁹ This has only complicated the tensions between industrial, ecological, and residential concerns.

One important consideration of forest management is that different stands of timber respond differently to fire.⁵⁰ For example, the Southwest's Ponderosa Pine forests were historically prone to "high frequency, low intensity fires" that removed understory without damaging mature trees.⁵¹ These low intensity fires were relatively beneficial for the environment—they replenished soil without causing erosion, altering vegetative patterns, or displacing wildlife.⁵² Contrarily, the lodgepole pine forests prevalent in the Northwest were historically prone to "infrequent, high intensity fires."⁵³ These high intensity fires could be ecologically harmful—altering tree structures, damaging soil, and displacing wildlife.⁵⁴ Finally, other western stands of timber were composed of Redwood, Douglas fir, and Rocky Mountain ponderosa pine trees.⁵⁵ These stands fluctuated between the two extremes, experiencing high-intensity fires and low-intensity fires at regular intervals.⁵⁶ Regardless of the history of federal land management, an effective fire policy would need to consider the different composition of western forests.

47. Tom Zimmerman, *Improving Wildland Fire Management Strategies*, WILDFIRE MAGAZINE, (Jan. 4, 2016), wildfiremagazine.org/article/improving-wildland-fire-management-strategies/.

48. Keiter, *supra* note 44, at 313.

49. NELSON, *supra* note 16, at 17.

50. Keiter, *supra* note 44, at 314.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

This area-specific approach is necessary now more than ever. Fire suppression has permanently altered the ecology of western forests.⁵⁷ The absence of fire has caused fuels to build up in national forests.⁵⁸ Additionally, federal efforts have created forests that are “older, denser, and less healthy, and thus prone to larger and more intense fires than was historically true.”⁵⁹ As noted above, pre-management wildfires in Ponderosa pine stands typically burned the understory without damaging mature trees.⁶⁰ That is no longer the case. Now, fuel buildup often creates a ladder between the understory and the forest canopy, allowing for high-intensity crown fires.⁶¹ Fire suppression efforts throughout the last century were an enormous factor in creating the higher-intensity forest fires that plague the West today.⁶²

The situation has created a significant policy dilemma: should land managers focus their efforts on protecting human lives or the ecological integrity of western forests? To answer in the extreme would be to select one of two management strategies: “suppress all fires under the discredited notion that an uncharred forest is both healthy and safe” or “permit wildfires to burn under the dubious assumption that fire will always benefit forest ecosystems.”⁶³

Neither extreme is a sufficient response. Complete fire suppression has failed and left forests more prone to catastrophic fires.⁶⁴ Additionally, modern suppression techniques can have adverse consequences because they entail developing access roads, spraying fire-retardant chemicals, and exposing firefighters to blazes.⁶⁵ A hands-off approach to fire is not much better. Such an approach may have worked a century ago, but it will not restore historical fire because suppression efforts permanently changed the ecology of western forests.⁶⁶ Allowing fires to burn in remote areas could prove beneficial, but such a technique would prove dangerous in areas where high intensity fires might endanger human life or important natural resources.⁶⁷

Federal land managers adopted middle-ground approaches instead of embracing the extreme techniques mentioned above. One popular method

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. Hoffman & Kammer, *supra* note 14 at 68.
62. NELSON, *supra* note 16, at 17.
63. Keiter, *supra* note 44, at 315.
64. *Id.*
65. *Id.* at 316.
66. *Id.*
67. *Id.*

reflects the age-old adage of fighting “fire with fire:” prescribed burning.⁶⁸ Advocates prefer this method because they deem it a more natural solution than other alternatives.⁶⁹ It is relatively inexpensive and “minimizes intensive human intrusions into the natural environment.”⁷⁰

However, prescribed burning has its downsides. For one, “[m]any scientists believe it is not possible to rely solely on prescribed fire to restore historical fire regimes because the fuel loads are so high in many locations that the resulting fires would be more intense than historically was the case.”⁷¹ This makes prescribed burning impractical in forests that abut residential areas. Specific attempts have been disastrous. For example, the Cerro Grande fire of 2000 started as a prescribed burn which grew out of control and overran the town of Los Alamos, New Mexico.⁷² The fire created political obstacles to prescribed burns and required additional expenses that mitigate its cost-effective nature.⁷³ Agencies now prepare additional resources to control prescribed burns in case they grow out of control which increases overall costs.⁷⁴ Environmental compliance requirements can further raise expenses.⁷⁵ Finally, prescribed burns are feasible only during certain times of year when the weather will allow agencies to maintain control of the blaze.⁷⁶ These limitations severely restrict the use of prescribed burning in national forests.

Another popular technique is forest thinning, also known as hazardous fuel reduction.⁷⁷ This method can take three increasingly intense forms: defensible zones near communities, fuel breaks in remote areas, or complete forest restoration.⁷⁸ Advocates claim that this method reduces the fuel buildup caused by a century of fire suppression.⁷⁹ Specifically, projects can target buildup in the understory that operates as a ladder to the forest canopy.⁸⁰ Proponents justify fuel reduction in residential areas to preserve human life and justify thinning in remote areas to protect important natural resources.⁸¹

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 316–17.
72. *Id.* at 317.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 318.
79. *Id.* at 317.
80. *Id.*
81. *Id.* at 318.

Fuel reduction has its cons. Thinning is labor intensive and inherently expensive.⁸² Environmental compliance only compounds this significant cost.⁸³ Agencies can mitigate this cost by harvesting large, old growth trees in addition to understory fuels, but this strategy is not popular with environmentalists.⁸⁴ Given the extractive nature of federal land agencies, many environmental groups fault them for using fuel reduction as a guise to harvest mature timber.⁸⁵ Also, experts disagree on how much fuel should be removed to ensure forest health.⁸⁶ Fuel reduction, therefore, is a highly contentious technique in the environmental realm and one that allots agencies significant discretion.

Discretion is the heart of the argument. The ultimate policy question is twofold: (1) which technique should agencies favor; and (2) where agencies should use them. The environmental camp advocates using fuel reduction in residential areas, a hands-off approach in remote areas, and prescribed burns on the lands in between.⁸⁷ The industrial camp advocates using fuel reduction in all areas when necessary to preserve human life or protect natural resources.⁸⁸ These questions are further complicated because different regions call for different techniques. The ponderosa pine forests of the Southwest may require extensive thinning instead of prescribed burns.⁸⁹ Contrarily, neither fuel reduction nor prescribed burns may prove effective in the lodgepole forests of the Northwest.⁹⁰ These various considerations may have prevented Congress from enacting legislation that provides the Forest Service sufficient guidance. However, Congress's limited attempts to address the issue have accorded the Forest Service great deference and allowed the agency to prioritize politics over science when answering difficult policy questions.

B. Legislative history demonstrates a trend towards restoring the Forest Service's deference.

Early legislation supported the Forest Service's fire suppression policy. The Organic Administration Act of 1897 encouraged the President to

82. *Id.*

83. *Id.*

84. *Id.* at 318–19.

85. *Id.* at 319.

86. *Id.*

87. *Id.*

88. *Id.* at 318.

89. *See id.* at 320 (explaining that fuel loads are too high for agencies to safely implement prescribed burns).

90. *See id.* (explaining that thinning would be ineffective and expensive and prescribed burns would be dangerous).

establish forest reserves to provide for the “continuous supply of timber.”⁹¹ The Act also tasked the Secretary of Agriculture with implementing rules to protect the reserves from wildfire.⁹² Congress later enacted the Weeks Act of 1911.⁹³ The Weeks Act allowed the Secretary of the Interior to partner with states to implement fire protection programs in private and state forests abutting navigable waterways.⁹⁴ Finally, Congress passed the Clarke-McNary Act in 1924.⁹⁵ Notably, the Clarke-McNary Act allowed the federal government to expend significant sums to promote coordinated federal, state, and private fire suppression projects.⁹⁶ Collectively, these acts demonstrated significant Congressional support for fire suppression.

The wind shifted later in the century. Congress passed the Multiple-Use Sustained-Yield Act (MUSY) in 1960.⁹⁷ MUSY failed to address wildfire, but it demonstrated a Congressional interest in preserving national forests for their recreational value.⁹⁸ Congress then passed the Wilderness Act in 1964.⁹⁹ Congress proposed the Wilderness Act after a large public movement called for protection of primitive areas.¹⁰⁰ The Wilderness Act is important because it demonstrates a significant “stripping away” of Forest Service authority.¹⁰¹ Though neither act had a major impact on wildfire policy, they both demonstrated a shift in Congress’s perception of national forests. Both acts limited the Forest Service’s previously unfettered discretion because Congress recognized that national forests are valuable for more than timber.¹⁰²

The wind continued to turn throughout the subsequent decade. Congress passed NEPA in 1969.¹⁰³ Academics have dubbed NEPA the “Magna Carta” of environmental law.¹⁰⁴ Generally, NEPA requires federal agencies to

91. 16 U.S.C. § 475 (2012).

92. 16 U.S.C. § 551 (2012).

93. Weeks Act of 1911, Pub. L. No. 61-435, 36 Stat. 961 (1911) (codified as amended at 16 U.S.C. §§ 480, 500, 515-19, 521, 552, 563 (2018)).

94. 16 U.S.C. § 563 (2012).

95. Clarke-McNary Act, Pub. L. No. 68-270, 43 Stat. 653 (1924) (codified as amended at 16 U.S.C. §§ 505, 568-570 (2018)).

96. *Id.* at §§ 1-3.

97. Multiple-Use Sustained-Yield Act of 1960; Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified as amended at 16 U.S.C. §§ 528-31 (2012)).

98. 16 U.S.C. § 528 (2012).

99. Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131-36 (2012)).

100. Hoffman & Kammer, *supra* note 14, at 64.

101. *Id.*

102. 16 U.S.C. § 1131(c); 16 U.S.C. § 528.

103. National Environmental Policy Act of 1969, Pub. L. No. 90-190, 83 Stat. 852 (1969) (codified as amended at 42 U.S.C. §§ 4321, 4331-4335, 4341-47 (2012)).

104. Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J. L. & POL’Y 293, 293 (2010).

prepare an environmental assessment (EA) or environmental impact statement (EIS) for “any action significantly affecting the human environment.”¹⁰⁵ However, NEPA alone proved inadequate in the realm of forest management.¹⁰⁶ For one, “NEPA does not regulate the substance of agency decisions, including the content of forest plans, at all.”¹⁰⁷ NEPA’s requirements are “essentially procedural.”¹⁰⁸ Despite its insufficiencies, NEPA is important because it forces the Forest Service to consider environmental impacts when making land management decisions.¹⁰⁹ Therefore, it limited the Forest Service’s discretion.

Congress passed the National Forest Management Act (NFMA) in 1976 to place procedural and substantive requirements on the Forest Service.¹¹⁰ Congress enacted NFMA to cure the insufficiencies of MUSY, which lacked a true enforcement mechanism.¹¹¹ Among others, NFMA includes procedural provisions requiring the Forest Service to develop land and resource management plans¹¹² and maintain renewable resource assessments.¹¹³ It also contains substantive provisions that limit timber harvests,¹¹⁴ restrict clearcutting,¹¹⁵ and require biological diversity.¹¹⁶ Together, NEPA and NFMA significantly restricted the Forest Service’s discretion in land management decisions and put an end to the agency’s unfettered discretion.¹¹⁷

However, NEPA and NFMA claims have had mixed results in holding the Forest Service accountable for adhering to substantive requirements.¹¹⁸ The *Chevron* doctrine creates a substantial hurdle for plaintiffs suing under either statute.¹¹⁹ The doctrine holds, “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious,

105. 42 U.S.C. § 4332(2)(C) (2012); 40 C.F.R. §§ 1502.1, 1508.9 (2017).

106. Hoffman & Kammer, *supra* note 14, at 64–65.

107. *Id.* at 65.

108. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

109. *See Mandelker, supra* note 104, at 293 (describing the function of NEPA).

110. *See generally* National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1969) (codified as amended at 16 U.S.C. §§ 472, 476, 500, 513–16, 518, 521, 528, 576, 594–2, 160002, 1604, 1606, 1608–14 (2012)) (imposing new provisions to better manage renewable resources).

111. Hoffman & Kammer, *supra* note 14, at 64–65.

112. 16 U.S.C. § 1604(a).

113. *Id.* § 1601.

114. *Id.* § 1604(g)(3)(E).

115. *Id.* § 1604(g)(3)(F).

116. *Id.* § 1604(g)(3)(B).

117. Keiter, *supra* note 44, at 333.

118. *See id.* at 343–344 (describing when the statutes hold the Forest Service accountable).

119. *See infra* Subpart C.

or manifestly contrary to the statute.”¹²⁰ The doctrine accords the Forest Service great deference to implement regulations because neither NEPA nor NFMA specifically addresses wildfire.¹²¹ Additionally, courts have found that trained experts—not the judiciary—should be responsible for making highly technical fire policy decisions.¹²² Thus, courts have upheld most agency decisions to conduct hazardous fuel reduction projects.¹²³

NEPA and NFMA created an additional problem by failing to address wildfire specifically—they allowed fire policy to become political. Absent guidance from Congress, different presidential administrations have been free to pursue radically different fire policies.¹²⁴ The Clinton Administration relied on prescribed burns, acknowledging that fire is “an important ecological process.”¹²⁵ Conversely, the Bush Administration relied on mechanical thinning and salvage logging operations, depicting fire as “a political and legal problem” needed “to curtail catastrophic wildfire events.”¹²⁶

President Bush forced this shift after complaints from the Forest Service during the Clinton Administration.¹²⁷ The Forest Service claimed that environmental enforcement statutes, including NEPA and NFMA, spurred costly litigation and administrative appeals. This tied the agency’s hands and prevented it from managing forests effectively.¹²⁸ After a severe fire season in 2002, President Bush introduced the Healthy Forests Initiative.¹²⁹ Generally, the initiative sought to curb litigation and appeals by expediting fuel reduction on public lands—the concept being that the agency could spend more time managing land if it spent less time justifying its decisions in court.¹³⁰ The administration designed the initiative to weaken obligations under NEPA, NFMA, and other environmental statutes.¹³¹ Under NEPA, the initiative minimized analysis obligations to prevent administrative appeals and judicial review of fire projects.¹³² Under NFMA, the Forest Service revised planning rules to eliminate biodiversity standards and documentation

120. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

121. National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2012); 16 U.S.C. § 1604(g) (2012).

122. Keiter, *supra* note 44, at 326.

123. *Id.* at 336.

124. *Id.* at 366.

125. *Id.*

126. *Id.*

127. Keiter, *supra* note 44, at 312.

128. *Id.* at 337.

129. *Id.* at 312.

130. *Id.*

131. *Id.*

132. *Id.* at 339.

requirements.¹³³ However, the Healthy Forest Initiative failed to achieve its intended purpose of reducing litigation.¹³⁴

The reforms encompassed in the Healthy Forest Initiative are not as important as the message they convey. Various jurisdictions limited the reforms in the litigation that ensued.¹³⁵ The Administration eventually suspended its amended NFMA regulations, “believing them too burdensome, expensive, and difficult to administer,” and again amended the regulations in 2005.¹³⁶ The Obama Administration amended the regulations again in 2012.¹³⁷ The takeaway is that different presidential administrations have significant discretion to dictate forest fire policy by amending regulations under the existing environmental statutes. President Bush exploited that failure by presenting wildfire as a primarily economic problem, adding a political patina to an otherwise ecological issue.¹³⁸

Congress also retained the political veneer when it finally addressed wildfire. President Bush signed the Healthy Forests Restoration Act (HFRA) in 2003.¹³⁹ HFRA is the first piece of legislation to govern wildfire policy specifically.¹⁴⁰ Congress enacted HFRA after three severe fire seasons.¹⁴¹ HFRA’s stated purposes demonstrate that “Congress perceives fire primarily as a political rather than an ecological matter.”¹⁴² One purpose is “to reduce wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative process of planning, prioritizing, and implementing hazardous fuel reduction projects.”¹⁴³ Another purpose is “to enhance efforts to protect watersheds and address threats to forest and rangeland health, including catastrophic wildfire, across the landscape.”¹⁴⁴ HFRA defines fire as a catastrophic event, not an important ecological process.¹⁴⁵ Like Bush’s Healthy Forest Initiative, Congress employed fear rhetoric to plunge fire policy further into the political mire.

133. *Id.* at 343.

134. *Id.* at 342.

135. *Id.* at 341–42.

136. GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LANDS AND RESOURCES LAW 735 (6th ed. 2007).

137. Rules and Regulations of Department of Agriculture, 77 Fed. Reg. 21162, 21162 (Apr. 9, 2012) (codified at 36 C.F.R. pt. 219).

138. See Keiter, *supra* note 44, at 312 (“The issue no longer focused on fire control or restoration policy, but rather the overlay governing fire-related activities on public lands. Put simply, the fire problem was recast as a litigation problem.”).

139. COGGINS ET AL., *supra* note 136, at 738.

140. Keiter, *supra* note 44, at 344.

141. *Id.*

142. *Id.*

143. Healthy Forests Restoration Act of 2003, 16 U.S.C. § 6501(1) (2012).

144. *Id.* § 6501(3).

145. Keiter, *supra* note 44, at 344.

HFRA's similarities to the Healthy Forest Initiative do not end there. For one, HFRA included several provisions used in Bush's reforms.¹⁴⁶ Additionally, HFRA generally expedites fire projects by reducing environmental analyses under NEPA and limiting administrative and judicial review.¹⁴⁷ HFRA also endorses one technique over another—only once does it list prescribed burning as an acceptable method of preventing wildfire.¹⁴⁸ Instead, HFRA directs agencies to “implement authorized hazardous fuel reduction projects.”¹⁴⁹ A final similarity is that HFRA may fail to curb litigation. It may be too soon to tell, but academics speculate that, “Fuel reduction sales under the HFRA and salvage sales are likely to dominate Forest Service litigation in the upcoming years.”¹⁵⁰ Essentially, HFRA may allow environmental harm to avoid litigation costs, though it is unclear whether it will accomplish that objective.

HFRA places substantive limitations on Forest Service actions, but these are outweighed by procedural provisions that reduce environmental compliance and review. Substantively, HFRA includes provisions that: prohibit fuel reduction in wilderness areas¹⁵¹; recommend restoration of old growth stands¹⁵²; and encourage removal of small diameter trees rather than large ones.¹⁵³ HFRA contains procedural provisions: requiring parties to file administrative appeals before a final decision is issued¹⁵⁴; limiting judicial review to federal courts where the project was located¹⁵⁵; and categorically excluding projects from NEPA analysis that span less than 1,000 acres.¹⁵⁶ Ultimately, the procedural provisions prevent the substantive provisions from having any teeth—provisions that “recommend” or “encourage” certain conduct are powerless if decisions under the statute are reviewed only on a limited basis.¹⁵⁷

Finally, HFRA contains several limitations that inhibit its effectiveness in the realm of forest fire policy. First, HFRA principally targets the Wildland Urban Interface (WUI), the term defining residential areas that abut federal public land.¹⁵⁸ Therefore, NEPA and NFMA continue to govern most

146. *Id.*

147. *See generally* 16 U.S.C. §§ 6501–91.

148. *Id.* § 6512(f)(1)(A).

149. *Id.* § 6512(a).

150. COGGINS ET AL., *supra* note 136, at 740.

151. 16 U.S.C. § 6512(d)(1).

152. *Id.* § 6512(e)(2).

153. *Id.* § 6512(f)(1)(A)-(B).

154. *Id.* § 6515(a).

155. *Id.* § 6516(a).

156. *Id.* § 6554(d).

157. Healthy Forests Restoration Act of 2003, 16 U.S.C. § 6501(1).

158. *See id.* § 6501(1) (listing a stated purpose of the act as reducing wildfire risk by implementing hazardous fuel reduction projects); *see also id.* § 6513(d)(1)(a) (requiring agencies to

management projects. Second, HFRA requires that fuel reduction projects remain consistent with resource management plans under NFMA.¹⁵⁹ As demonstrated above, planning regulations can change drastically under different presidential administrations. Thus, in an attenuated fashion, fuel reduction projects under HFRA are subject to the political issue that plagues NFMA.

HFRA has not had an overwhelming effect on forest fire policy, but it reveals yet another shift in congressional opinion of wildfire policy. Though HFRA places some limitations on Forest Service action, its primary purpose is to expedite fuel reduction by limiting review of Forest Service actions and reducing compliance obligations under NEPA.¹⁶⁰ In this sense, the statute constitutes a step back from NEPA, allowing the Forest Service to conduct dangerous fuel reduction projects in areas where they may have been prohibited before HFRA. Ironically, an act that portends to restore national forests seems, more accurately, to restore a slight portion of the Forest Service's deference.

C. Litigation reveals the deficiencies of current legislation.

Montana provides an appropriate example of the relationship between fire policy and the law. Two young firefighters died in the Lolo National Forest in the summer of 2017, while combatting forest fires from dangerous fuel reduction projects.¹⁶¹ Shortly after the young men passed, Secretary of the Interior Ryan Zinke met with Secretary of Agriculture Sonny Perdue in Montana to discuss the Lolo Peak Fire.¹⁶² There, Zinke blamed catastrophic wildfires on “environmental extremists,” claiming that “frivolous lawsuits” prevented the Interior and the Forest Service from managing forests in a way that would prevent wildfires.¹⁶³ Zinke and Perdue refused to admit that other factors, like climate change or a century-old policy of fire suppression, could be responsible for the increased intensity of forest fires in recent years.¹⁶⁴ Fuel reduction litigation in Montana demonstrates the deficiencies of NEPA, NFMA, and HFRA in limiting the Forest Service's use of hazardous fuel reduction strategies.¹⁶⁵

spend at least half of the funds authorized for hazardous fuel reduction projects on projects within the WUI).

159. *Id.* § 6512(b).

160. *Id.* § 6501(1).

161. Chaney, *supra* note 3.

162. D'Angelo, *supra* note 18.

163. *Id.*

164. *Id.*

165. Montana proposed a recent bill to establish a pilot arbitration program. This program would essentially force arbitration—controlled by the Forest Service—to resolve the Montana's

The Forest Service's first HFRA project in Montana spurred litigation.¹⁶⁶ In *WildWest Institute v. Bull*, the Ninth Circuit decided whether the proposed Middle East Fork Hazardous Fuel Reduction Project violated NEPA, NFMA, and HFRA.¹⁶⁷ The court held that it did not.¹⁶⁸

Prior to the case, severe wildfires ravaged Montana's Bitterroot National Forest in 2000.¹⁶⁹ The Forest Service evacuated the entire Middle East Fork area, but the fires did not destroy the community.¹⁷⁰ The court explained that the burn, however, left many unburned fuels, making the community susceptible to future fires.¹⁷¹ The Forest Service proposed the fuel reduction project to protect the community from future harm.¹⁷²

WildWest filed suit in the United States District Court for the District of Montana after the Forest Service issued its final decision to conduct the project.¹⁷³ After the court denied WildWest's request for a temporary restraining order and preliminary injunction, the parties filed cross-motions for summary judgment.¹⁷⁴ The district court granted the Forest Service's request for summary judgment, and WildWest eventually appealed to the Ninth Circuit.¹⁷⁵

Several of WildWest's arguments demonstrate the obstacles to NEPA, NFMA, and HFRA claims. First, WildWest alleged that the Forest Service violated NFMA's soil productivity requirement.¹⁷⁶ NFMA prohibits the agency from harvesting timber if it will irreversibly damage "soil, slope, or other watershed conditions."¹⁷⁷ The Forest Service applied its regional soil quality standards to the project because the Bitterroot National Forest Plan does not provide specific standards.¹⁷⁸ Specifically, WildWest argued that the agency erred in analyzing the soil conditions of specific harvesting units

"chronic litigation" issue. The result is that "hazardous fuel reduction projects developed...will be implemented more quickly" at the expense of environmental law compliance. Scott Shindledecker, *Senator Daines Touts Forest Management Bill*, Daily Inter Lake, (Aug. 24, 2018), https://www.dailyinterlake.com/local_news/20180824/senator_daines_touts_forest_management_bill.

166. Perry Backus, *Forest Service Wins Suit Over Fuel Reduction Project*, Billings Gazette (Nov. 6, 2008), http://billingsgazette.com/news/state-and-regional/montana/forest-wins-suit-over-fuel-reduction-project/article_c51b49ad-469d-501d-9e39-10b9f7ceeee2.html.

167. *WildWest Inst. v. Bull*, 547 F.3d 1162, 1165 (9th Cir. 2008).

168. *Id.* at 1163.

169. *Id.* at 1166.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 1167.

174. *Id.* at 1168.

175. *Id.*

176. *Id.* at 1171.

177. 16 U.S.C. § 1604(g)(3)(E)(i).

178. *WildWest* 547 F.3d at 1172.

rather than the broader landscape.¹⁷⁹ In rejecting WildWest's argument, the court explained that the agency retains the "discretion to determine the physical scope used for measuring environmental impacts" if it does not act arbitrarily.¹⁸⁰ The court determined that the Forest Service satisfied this standard by explaining in its final EIS that WildWest's requested methodology was impossible "because of the variability in soil texture, the amount of organic matter and ground cover, soil response to past projects, and the intensity of past projects."¹⁸¹ This serves as an example of how courts frequently defer to technical agency decisions under the "arbitrary" standard.¹⁸²

Second, WildWest alleged that the Forest Service violated NEPA by disregarding the opinion of WildWest's soil expert.¹⁸³ The court explained that NEPA requires agencies, in a final EIS, to discuss and respond to opposing views that were not discussed adequately in the draft EIS.¹⁸⁴ The Forest Service incorporated WildWest's findings into the Draft EIS, but WildWest's expert testified that the agency had edited the findings, causing "deliberate removal of information that accurately portrayed the conditions of the soils and the prescriptions and mitigations needed to address those degraded soil conditions."¹⁸⁵ The Forest Service created a peer review group to evaluate WildWest's findings before the Final EIS.¹⁸⁶

The peer review group used a different method than did WildWest.¹⁸⁷ The group conceded that WildWest's method may be more appropriate for specific project areas but claimed that its own methodology was more appropriate for determining a project baseline.¹⁸⁸ The Forest Service used the group's method, claiming that WildWest's method "overestimated the amount of detrimental soil damage."¹⁸⁹ The court held that this reasoning, paired with other references to WildWest's data in the Final EIS, sufficiently satisfied the NEPA standard.¹⁹⁰ This issue reveals the difficulty of contesting agency science under NEPA.

179. *Id.* at 1173.

180. *Id.*

181. *Id.*

182. Charles J. Cooper. *The Flaws of Chevron Deference*, 21 Tex. Rev. L. & Pol. 307, 308

(2016).

183. *WildWest*, 547 F.3d at 1171.

184. *Id.*

185. *Id.*

186. *Id.*

187. *See id.* (describing the different methodologies).

188. *Id.*

189. *Id.* at 1171–72.

190. *See id.* at 1172 (describing the data considered in the Final EIS).

Finally, the court considered a HFRA claim. HFRA requires the Forest Service to “maintain, or contribute toward the restoration of, the structure and composition of old growth stands” when implementing fuel reduction projects.¹⁹¹ Specifically, WildWest contested the method the Forest Service used to classify old growth trees, arguing that the agency relied on an “imminently dead” standard.¹⁹² The court explained that the agency used the “imminently dead” standard to mark trees, not determine whether the stand constituted an old growth forest.¹⁹³ It went further, adding, “And in any event, WildWest’s arguments on this point are not convincing. The Forest Service properly applied its selected methodology, and it disclosed such methodology, as well as its findings, to the public. It further addressed objections to its methodology raised during the comment period.”¹⁹⁴ Contesting agency science is incredibly difficult because the Forest Service need only disclose its methodology, explain its reasoning, and respond to contrary opinions.¹⁹⁵

The court best encapsulated the issue in a footnote to the opinion:

[W]e do not “act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding wildlife viability, choose among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty.” Rather, we only require “that the Forest Service . . . support its conclusions that a project meets the requirements of the NFMA and relevant Forest Plan with studies that the agency, in its expertise, deems reliable. The Forest Service must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable. We will conclude that the Forest Service acts arbitrarily and capriciously only when the record plainly demonstrates that the Forest Service made a clear error in judgment in concluding that a project meets the requirements of the NFMA and relevant Forest Plan.”¹⁹⁶

191. Healthy Forests Restoration Act of 2003, 16 U.S.C. § 6512(e)(2) (2012).

192. *WildWest*, 547 F.3d at 1174.

193. *Id.*

194. *Id.*

195. *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1077 (10th Cir. 2014).

196. *WildWest*, 547 F.3d at 1171 n.4 (quoting *The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008)).

WildWest demonstrates the great deference the statutes provide the Forest Service in scientific issues.¹⁹⁷ Furthermore, the court in *WildWest* validated the Forest Service's discretion in choosing which specific management techniques it may use.¹⁹⁸ The case is important because it demonstrates that courts will often side with the Forest Service in disputes involving dangerous fuel reduction projects. Though many ecologists do not agree with using such strategies to combat forest fires, the Forest Service will almost always secure a favorable decision in court if it can articulate a reasonable basis for its decision.¹⁹⁹ Interested parties have little recourse to combat such decisions with outside science.²⁰⁰

In a more recent HFRA case, *Decker v. U.S. Forest Service*, the United States District Court for the District of Colorado determined that clearcutting was an appropriate implementation tool under the statute.²⁰¹ The court found that it must accord the Forest Service Chevron deference in making its decision because HFRA is ambiguous and the Forest Service used a "sufficiently formal process."²⁰² The Court acknowledged that *Chevron* only applies to formal decision making, but it concluded that the Forest Service met this burden by notifying the public in a "Supplemental EA" and allowing for public comment.²⁰³ The case is very troubling for those who oppose fuel reduction as a way of combatting forest fires. Subpart A of this note explains the contentious nature of modern forest management techniques. *Decker* reveals that the Forest Service has great discretion to choose such techniques because of HFRA's ambiguity.²⁰⁴ Further, a reviewing court may apply *Chevron*, a highly deferential standard, so long as the Forest Service used a "sufficiently formal process" that includes notification and public comment.²⁰⁵

Together, *WildWest* and *Decker* demonstrate the deferential nature of current legislation, regarding both science and technique. *WildWest* highlights another important point—HFRA has not foreclosed litigation. *WildWest* filed the case roughly three years after the enactment of HFRA²⁰⁶

197. See *id.* at 1171 (noting the Forest Service only needs to support conclusions with reliable expertise not specific measurements).

198. *Id.* at 1173.

199. Cooper, *supra* note 182, at 307.

200. *Id.*

201. *Decker v. U.S. Forest Service*, 780 F. Supp. 2d 1170, 1176–77 (D. Colo. 2011).

202. *Id.* at 1176.

203. *Id.*

204. *Id.*

205. *Id.*

206. See also COOGINS ET AL., *supra* note 136, at 738 (observing that President Bush signed HFRA into law December 2003).

in response to Montana's first fuel reduction program under HFRA.²⁰⁷ Litigation then ensued for two-and-a-half years.²⁰⁸ Montana's Ravalli County intervened in the case on the Forest Service's behalf.²⁰⁹ When asked about the case, county attorney George Corn called the lawsuit frivolous.²¹⁰ He elaborated, "They just kept throwing something up against the wall in hopes that something would stick."²¹¹ He added, "This lawsuit wasted a lot of resources of the Forest Service, the county and the judicial system."²¹² What will happen if environmental advocates continue to throw at the wall? Public backlash could result in even less favorable legislation. The case casts serious doubts on whether HFRA will accomplish its intended purpose of reducing litigation. If it cannot achieve that purpose, then it will limit environmental compliance and review in vain, probably to the detriment of national forests and at-risk communities.

D. Proposed Legislation would provide the Forest Service even greater deference and, thereby, perpetuate poor management practices.

As of the writing of this Note, Congress has proposed several bills that would overhaul fire management policy, but only the Resilient Federal Forests Act of 2017 (RFFA) is likely to become law.²¹³ The bill passed the House on November 1, 2017 and was referred to the Senate Committee on Agriculture, Nutrition, and Forestry on November 2.²¹⁴ The bill has received significant support—18 representatives cosponsored the bill, including representatives from each side of the aisle.²¹⁵ The official title demonstrates RFFA's potential issues. It reads, "To expedite under the National Environmental Policy Act of 1969 and improve forest management activities on National Forest System lands, on public lands under the jurisdiction of the Bureau of Land Management, and on Tribal lands to return resilience to overgrown, fire-prone forested lands, and for other purposes."²¹⁶ If HFRA demonstrated a shift in the political wind, RFFA constitutes a complete reversal. RFFA would allow land managers to skirt environmental

207. Backus, *supra* note 166.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. Resilient Federal Forests Act of 2017, H.R. 2936, 115th Cong. (2017) (passing the House vote 232 to 188.)

214. *Id.*

215. *Id.*

216. H.R. 2936.

compliance on large swaths of federal land and severely limit review of agency decisions.²¹⁷

Principally, RFFA undermines many NEPA protections. It accomplishes this in several ways. First, the Act allows the Forest Service to consider only two alternatives if the agency proposes a management project that falls under a broad list of activities.²¹⁸ The alternatives an agency may consider are a no-action alternative or the alternative of conducting the project.²¹⁹ This all-or-nothing approach would prevent the Forest Service from considering other viable projects. The requirement applies to projects that: (1) are developed through a collaborative process; (2) are proposed by a resource advisory committee; (3) occur on land the Secretary determines are suitable for timber production; (4) lands subject to HFRA; or (5) are covered by a community wildfire protection plan.²²⁰

Provision (3) is radically self-serving. If the Secretary of Agriculture determines that an area is suitable for timber harvests, the Forest Service must only consider two alternatives—implementing the project or not implementing it—to comply with NEPA.²²¹ Under current regulations, the Forest Service must establish several requisites before determining that land is suitable for timber harvests.²²² However, as demonstrated in *WildWest*, courts will likely be extremely deferential when reviewing agency decisions under the agency's own regulations.²²³ This provision would surely expedite the NEPA process and streamline timber reduction in national forests.

RFFA would further expedite projects under NEPA by creating a long list of categorical exclusions. These would include projects intended to: (1) address insect or disease infestations; (2) reduce hazardous fuels; (3) protect municipal water sources; (4) protect critical habitat from catastrophic events; (5) increase water yield; (6) produce timber; or (7) any combination of these provisions.²²⁴ Provisions (2) and (6) are especially worrisome given the Forest Service's extractive history, even more so because RFFA would expand the allowed area for such exclusions to 10,000 acres.²²⁵ Further, the Act would increase the allowed area to 30,000 acres if a project is developed through a collaborative process, proposed by a resource advisory committee,

217. *Id.*

218. H.R. 2936 § 101(b).

219. *Id.*

220. *Id.* § 101(a).

221. *Id.* § 101(b).

222. Forest Service, 36 C.F.R. § 219.11 (2017).

223. *WildWest Inst.*, 547 F.3d at 1173 (“Agencies have ‘discretion to determine the physical scope used for measuring environmental impacts.’”).

224. H.R. 2936 § 111(b).

225. *Id.* § 111(d)(1).

or covered under a community wildfire program.²²⁶ By categorically excluding such projects, RFFA dissuades the Forest Service from conducting either an EA or an EIS for timber projects that fit within the acreage requirements.²²⁷

The above examples are only two of the ways in which RFFA would expedite projects under NEPA. However, RFFA would also severely limit review of Forest Service actions. First, RFFA includes the flat prohibition “no amounts may be obligated or expended from the Claims and Judgment Fund of the United States Treasury to pay any fees or other expenses under such sections to any plaintiff related to an action challenging a forest management activity carried out pursuant to this Act.”²²⁸ Practically, this denies plaintiffs the ability to receive any attorney fees in citizen-suits involving forest management.²²⁹ The provision may prevent citizens from filing suit if they fear they cannot cover the cost of hiring an attorney.

Second, RFFA limits injunctive relief.²³⁰ RFFA requires a court considering a request for injunction to balance the short and long-term effects of implementing a forest management project against those of not implementing the project.²³¹ If the court decides to grant the request, the injunction will last no more than 60 days unless the court decides to renew it.²³² While modest, this provision requires parties seeking an injunction to move for renewal on a frequent basis in order to prevent agency action.²³³

Most importantly, RFFA would establish a pilot arbitration program that precludes judicial review.²³⁴ Under the program, the Secretary of Agriculture or Interior retains sole discretion to determine whether complaints are subject to arbitration or judicial review.²³⁵ Annually, the Secretary may only assign ten objections to arbitration in each Forest Service Region.²³⁶ However, this limitation applies only to specific management activities not yet subject to arbitration.²³⁷ Thus, if numerous parties complain about the same activity, the Secretary could send all their complaints to arbitration, but the consolidated complaint would only count as one objection toward the ten-

226. *Id.* § 111(d)(2).
227. 40 C.F.R. § 1508.4.
228. H.R. 2936 § 301.
229. H.R. 2936.
230. *Id.*
231. H.R. 2936 § 302(a).
232. *Id.* § 302(b).
233. *Id.*
234. H.R. 2936 § 311(a)(1).
235. *Id.* § 311(a)(2).
236. *Id.* § 311(a)(3).
237. *Id.* § 311(a)(4).

objection maximum.²³⁸ The practical result is that the Secretary may send complaints regarding ten different Forest Service activities in the same Forest Service Region to arbitration each fiscal year before a court can hear any claims from opposing parties.²³⁹ It is hardly a limitation at all.

The arbitration program also requires that the agency and the complaining party agree in selecting an arbiter.²⁴⁰ If they cannot agree within 14 days, the Secretary selects an arbiter from a list of at least 20 arbiters that he or she prepares.²⁴¹ Therefore, the agency need only hold out for 14 days before it can select its own arbiter to settle the dispute.²⁴² Even then, the arbiter may not modify any proposal and must choose between either the agency's proposal or an intervening party's proposal.²⁴³ The program then requires the arbiter to consider each proposal's consistency with the relevant forest plan in making that decision.²⁴⁴ The entire program is tailor-made to keep forest management activities out of the courts. It would substantially limit judicial review, though the program would terminate seven years after enactment.²⁴⁵ RFFA's provisions allow the Forest Service greater deference in implementing one kind of policy—dangerous fuel reduction. Some deference is necessary because different forests require different management strategies. However, the public must be involved in those decisions to ensure that the Forest Service balances ecological and economic concerns.

RFFA would cripple NEPA and, thereby, afford the Forest Service a level of deference comparable to that of its outright suppression days. Like HFRA and Bush's Healthy Forest Initiative, it focuses on reducing environmental compliance and limiting judicial review in order to curb litigation.²⁴⁶ However, it ignores a much important concern—ecological integrity.²⁴⁷ Like HFRA, RFFA mentions prescribed burns only once and nowhere does it recognize fire as a natural ecological process.²⁴⁸ Additionally, it allows the agency to spend countless sums fighting fire unsuccessfully. By limiting judicial review, RFFA precludes outside parties

238. H.R. 2936.

239. *Id.*

240. *Id.* § 311(c)(3)(A).

241. *Id.* § 311(c)(1)–(3)(B).

242. *Id.* § 311(c)(1), (c)(3)(A)–(B).

243. *Id.* § 311(d)(1).

244. *Id.* § 311(d)(2)(A).

245. *Id.* § 311(a)(5).

246. Press Release, The Wilderness Society, Memo: House farm bill forestry title potentially disastrous for national forests (Apr. 19, 2018) (on file with author), <https://www.wilderness.org/articles/media-resources/memo-house-farm-bill-forestry-title-potentially-disastrous-national-forests>.

247. *Id.*

248. *Id.* §§ 115(b)(2)(A).

from contesting the Forest Service's methods and proposing techniques that are more effective and less harmful.²⁴⁹ This reduction in scrutiny will not help federal land managers discover how to restore fire as an ecological process, which should be the primary goal. In a worst-case scenario, RFFA may subject national forests to aggressive timber extraction and irreparable environmental harm.

III. SOLUTION

Henry David Thoreau admonished, "There are a thousand hacking at the branches of evil to one who is striking at the root."²⁵⁰ By focusing on litigation, recent legislation has undoubtedly hacked at the branches. Public interest litigation may hinder effective land management to some degree, but the ultimate hindrance is the Forest Service's preference for timber extraction over ecological health. First and foremost, future legislation should acknowledge that wildfire is a natural process that carries certain ecological benefits. Congress should then balance the competing interests of preserving human life and restoring historical fire regimes. Only then can federal land managers move toward a safe, viable solution to wildfire policy.

Subpart A of this note demonstrates that modern management techniques are contentious at best. Congress must provide substantive requirements for which techniques to use and where to use them. Legislation should adopt a middle-ground approach that allows fuel reduction projects in the WUI only when needed to preserve human life. In areas that fail to implicate human life, Congress should require the Forest Service to prefer prescribed burning over fuel reduction. Because fuel reduction projects are expensive, dangerous, and possibly ineffective, they should be a last resort option available only in instances where prescribed burns may grow out of control.

Subpart B of this note demonstrates that legislation shifted back to restoring the Forest Service's deference. The Forest Service enjoyed significant discretion until the passage of NEPA and NFMA. However, the legislature restored agency deference in the area of fire management by enacting HFRA. Congress should reverse this trend. Unfettered discretion and lack of scrutiny allowed the Forest Service to pursue an outright suppression strategy that left national forests choked with fuel. This contributed to the more frequent, higher intensity fires that occur today. Subpart B further demonstrates that legislation allowed fire policy to become a partisan issue, changing drastically under different presidential

249. *Id.* §§ 111–15, 311(a)(1).

250. HENRY DAVID THOREAU, *WALDEN AND ON THE DUTY OF CIVIL DISOBEDIENCE* 101 (Floating Press 2014) (1854).

administrations. Congress should alleviate this problem by depicting fire policy as an ecological, rather than a political problem.

Subpart C demonstrates current legislation's deficiencies in governing agency decision making. Namely, NEPA, NFMA, and HFRA allow the Forest Service to conduct any project that it can reasonably justify so long as the agency invites public comment and addresses the public's concerns. Future legislation must require more than reasonable justification. If such legislation allows hazardous fuel reduction projects primarily in the WUI, it could also force the Forest Service to collaborate with the municipal leaders of endangered areas. It could then require that projects be approved at the local level. Employing a referendum mechanism would allow the Forest Service to incorporate its own science into management projects, but it would require a majority vote from the at-risk community before the project could proceed. For projects outside the WUI, Congress would need to establish a mechanism that requires the Forest Service to incorporate opposing science unless it is inherently flawed or inapplicable. This may prove difficult, but it would place a larger burden on the Forest Service by requiring it to disprove opposing science rather than justify its own science. Subpart C further demonstrates that *Chevron* accords the Forest Service great deference when Congressional language is ambiguous. For that reason, future legislation must specifically address the recommendations above.

Finally, Subpart D demonstrates that the Resilient Federal Forests Act of 2017 could prove detrimental. It attacks fire policy from the wrong angle—focusing on litigation rather than forest health. RFFA would have devastating impacts by expediting timber harvests and limiting judicial review. Accordingly, Congress should reject RFFA outright.

CONCLUSION

Attempts to control forest fire have proven largely ineffective. Congressional attempts to limit the Forest Service's autonomy have proven slightly more successful. However, they allowed the Forest Service to retain its discretion in the area of fire management. The current administration intends to apply the same ineffective strategies, and Congressional proposals would expedite the process. Congress should instead consider legislation that would limit the Forest Service's discretion in fire policy and require sound management practices. Failing to implement such legislation will have dire consequences. The Forest Service will continue to send young men to their death. It will spend billions of dollars each year fighting forest fires, diverting millions from other valuable federal programs—all for a political agenda that will irreparably alter the ecology of western forests.