

Too Much Discretion, Too Little Protection: Lessons from *Strawberry Water Users Association v. United States*

INTRODUCTION

The wildfire crisis has evolved from a regional issue into a national one, as Americans from coast to coast confront its growing frequency and intensity. In 2024, the United States recorded 64,897 wildfires that burned through 8,924,884 acres of land, an increase of over eight thousand more fires and six million acres burned compared to the previous year.¹ The Southern United States experienced more wildfires than any other region, and the Western United States continues to bear the greatest losses in terms of acres consumed by wildfires.²

Most wildfires occur on private and state-controlled land. In 2024, 78 percent of reported wildfires burned on state, local, and privately owned property.³ However, fires on federally managed land tend to burn larger areas. Though they make up a smaller share of total fires, wildfires on federal land accounted for 55 percent of the total acreage burned in 2024.⁴

Wildfires on federal land can grow so large that they become difficult to control, posing serious risks to both public and private interests.⁵ These fires can devastate recreational areas by limiting public access for extended periods and potentially spread beyond federal boundaries. As these fires increase in frequency and intensity, federal agencies face growing scrutiny over their

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1. NAT'L INTERAGENCY COORDINATION CTR., WILDLAND FIRE SUMMARY AND STATISTICS ANNUAL REPORT 2024 9 (2024), https://www.nifc.gov/sites/default/files/NICC/2-Predictive%20Services/Intelligence/Annual%20Reports/2024/annual_report_2024.pdf.

2. *Id.*

3. *Id.* at 13.

4. *Id.*

5. See, e.g., Brian Maffly, *U.S. Forest Service Faces Lawsuit Over Wildfire Damage from Pole Creek Fire*, THE SALT LAKE TRIB. (Mar. 22, 2023), <https://www.sltrib.com/news/environment/2023/03/22/forest-services-faces-suit-over>; Amanda Pampuro, *Roosevelt Fire Victims Ask 10th Circuit to Revive Claims Against Forest Service*, COURTHOUSE NEWS SERV. (May 17, 2023), <https://www.courthousenews.com/roosevelt-fire-victims-ask-10th-circuit-to-revive-claims-against-forest-service>; Alex Baumhardt, *Judge Dismisses \$33 Million Timber Lawsuit Against U.S. Forest Service over 2020 Wildfire Response*, OR. CAP. CHRON. (Dec. 18, 2024), <https://oregoncapitalchronicle.com/2024/12/18/judge-dismisses-33-million-timber-lawsuit-against-u-s-forest-service-over-2020-wildfire-response>.

responsibility for managing fire risks and mitigating damage. This issue has led to legal disputes, including cases where private entities have sought accountability for losses attributed to federal land management policies on wildfires.

In 2022, the Strawberry Water Users Association (SWUA), a group of water shareholders in South Utah County, Utah, filed suit against the U.S. Forest Service alleging that the Forest Service was negligent in its response to the Pole Creek and Bald Mountain Fires of 2018, and that that negligence damaged SWUA's property.⁶ The district court dismissed SWUA's suit for lack of jurisdiction, ruling that the Federal Tort Claims Act's discretionary-function exception strips the court of jurisdiction.⁷ On appeal to the Tenth Circuit, the court held that the discretionary-function exception to liability under the Federal Tort Claims Act applies to the U.S. Forest Service when it manages forest fires, even if those forest fires eventually enter private lands and raze communities.⁸

The Tenth Circuit's holding in *Strawberry Water Users Association v. United States* is not novel; courts have consistently held that the government is not liable for discretionary decisions made by its agencies, even when those decisions lead to significant harm.⁹ However, this case underscores the urgent need for a mechanism to hold federal agencies accountable when they fail to take a proactive and adaptive approach to fire management—one that balances the ecological necessity of fire with the imperative to protect communities and lives. The pattern seen in this case, where a fire initially deemed manageable is exacerbated by high winds into an unmanageable fire, occurs often.¹⁰ Hindsight has provided ample lessons for the Forest Service, yet the discretionary-function exception continues to shield the agency from accountability when it fails to respond in ways that reduce the impacts of fire on people.

I. LEGAL BACKGROUND

The Federal Tort Claims Act (FTCA) provides a limited waiver of sovereign immunity to allow certain tort claims to be brought against the United States.¹¹ The FTCA permits claims against the government when a federal

6. See Complaint and Request for Advisory Jury Trial at 2, *Strawberry Water Users Ass'n v. United States*, No. 2:22-cv-00002-JNP (D. Utah Mar. 24, 2023).

7. *Strawberry Water Users Ass'n v. United States*, No. 2:22-cv-00002-JNP-DAO, 2023 U.S. Dist. LEXIS 52229, at *2 (D. Utah Mar. 24, 2023).

8. *Strawberry Water Users Ass'n v. United States*, 109 F.4th 1287, 1289 (10th Cir. 2024).

9. See, e.g., *Dalehite v. United States*, 346 U.S. 15, 27-28 (1953); *Berkovitz v. United States*, 486 U.S. 531, 537 (1988); *Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1155 (11th Cir. 2020).

10. See, e.g., Keenan Willard, *Wildfires Break Out Across Texas as Strong Winds Bring Critical Fire Conditions*, NBC 5 (last updated Mar. 4, 2025), <https://www.nbcdfw.com/news/local/wildfires-texas-strong-winds-critical-fire-conditions/3783994>; Alex Sundby et al. *California Firefighters Make Progress on Hughes Fire in Castaic; Maps Show Areas Under Evacuation*, CBS NEWS (last updated Jan. 24, 2025), <https://www.cbsnews.com/live-updates/la-fires-southern-california-high-winds-wildfire-risk>.

11. 28 U.S.C. § 1346.

employee, acting within the scope of their duties, commits a negligent or wrongful act.¹² Courts have recognized that allegations of negligent mismanagement of a forest fire fall within the FTCA's scope.¹³

However, the FTCA includes a significant limitation known as the "discretionary-function exception."¹⁴ This exception shields the United States from liability for claims based on the exercise or performance, or the failure to exercise or perform, a discretionary function or duty by a federal agency or employee, regardless of whether the discretion involved is abused.¹⁵ This exception is designed to prevent courts from second-guessing decisions made by government agencies that require judgment or expertise.¹⁶

In *Berkovitz v. United States*, the Supreme Court established a two-part test to determine whether the discretionary-function exception applies.¹⁷ First, the court must determine whether the action in question involves an element of judgment or choice.¹⁸ If there is a federal statute, regulation, or policy that specifically prescribes a course of action, then the action is not discretionary and the exception cannot apply.¹⁹ Second, if the action does involve a judgment or choice, the court must then determine whether that judgment is of the kind that the discretionary-function exception was designed to shield.²⁰ Typically, the court will look to whether the decision was grounded in public policy considerations and related to economic, social, or regulatory concerns.²¹

12. *Id.* § 1346(b)(1).

13. *See, e.g.,* *Rayonier v. United States*, 352 U.S. 315, 315 (1957); *Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1155 (11th Cir. 2020); *Strawberry Water Users Ass'n*, 109 F.4th at 1289.

14. *See* 28 U.S.C. § 2680(a) ("The provisions of this chapter [the FTCA] . . . shall not apply to—[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon *the exercise or performance or the failure to exercise or perform* a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.") (emphasis added).

15. *See id.*

16. *Strawberry Water Users Ass'n v. United States*, 2023 U.S. Dist. LEXIS 52229, *20 (Mar. 24, 2023) (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 814 (1984)) ("This limitation on the exception is consistent with Congress's desire to pass a law targeted to 'prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'").

17. *Berkovitz v. United States*, 486 U.S. 531, 537 (1988) ("The basis for the discretionary function exception was Congress' desire to 'prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'") (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)).

18. *See id.*

19. *Id.*

20. *See id.* at 536-37.

21. *Id.* at 537 ("The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy.").

II. CASE BACKGROUND

A. *The Fires*

Strawberry Water Users Association v. United States concerned two fires that occurred in August 2018.²² The first fire to start was the Bald Mountain Fire.²³ The Bald Mountain Fire was a wildfire located in the Mount Nebo Wilderness Area that started because of lightning.²⁴ The Forest Service knew of the fire, but opted to let the Bald Mountain fire continue to burn because the origination point of fire was within an area the Forest Service had designated as a “green area.”²⁵ Given the “green area” location and the fact that attempts to control this fire could have jeopardized firefighter safety, the Forest Service put the fire into “monitor status.”²⁶

Just two weeks later, another lightning storm occurred that ignited a second fire.²⁷ This fire, named the Pole Creek Fire, was located about six miles from the Bald Mountain fire.²⁸ Like the Bald Mountain Fire, it originated in another “green area” where the Forest Service determined that it would use a “confine and contain”²⁹ strategy to allow the fire to burn but also to minimize risks of the fire harming firefighters and the nearby communities.³⁰

However, just four days after the start of the Pole Creek Fire, the National Weather Service issued a Red Flag Warning, where “gusts of 25 mph, increasing to 30+ mph” were to be expected.³¹ Given the red flag warning, many of the fire suppression and containment operations for the fires were ceased because of the risk to the firefighters on the ground.³² Within two more days, the Pole Creek Fire had grown to be “between 500 and 600 acres in size” and the Bald Mountain

22. *Strawberry Water Users Ass’n v. United States*, 109 F.4th 1287, 1289 (10th Cir. 2024).

23. *Id.* at 1291.

24. *Id.*; Kasha Patel, Fires Ablaze in Northeastern Utah, NASA EARTH OBSERVATORY (Sept. 19, 2018), <https://www.earthobservatory.nasa.gov/images/92800/fires-ablaze-in-northeastern-utah>.

25. *Strawberry Water Users Ass’n*, 109 F.4th at 1290-91. A “green area” is a pre-designated area in which, if there is a fire, the Forest Service will allow the fire to have a larger footprint. *Id.*

26. *Strawberry Water Users Ass’n*, 2023 U.S. Dist. LEXIS 52229, at *8. Monitoring a fire means the “orderly collection, analysis, and interpretation of environmental data to evaluate progress toward meeting objectives, and to. Identify changes in natural systems.” *Wildland Fire Monitoring*, NAT’L PARK SERV., <https://www.nps.gov/articles/wildland-fire-monitoring.htm> (last updated June 8, 2017).

27. *Strawberry Water Users Ass’n*, 109 F.4th at 1291.

28. *Id.*

29. A confinement strategy means to manage a “fire perimeter by a combination of direct and indirect actions and use of natural topographic features, fuel, and weather factors.” *Wildland Firefighting Tactics*, NAT’L PARK SERV., <https://www.nps.gov/subjects/fire/wildland-firefighting-tactics.htm> (last updated Jan. 27, 2025). A containment strategy is when a “control line has been completed around the fire and around any associated spot fires; [which] can reasonably be expected to stop the fire’s spread.” *Id.*

30. *See Strawberry Water Users Ass’n*, 109 F.4th at 1292.

31. *Strawberry Water Users Ass’n*, 2023 U.S. Dist. LEXIS 52229, at *12.

32. *See id.*

Fire was between “20 and 30 acres in size.”³³ The wind had picked up in gusts between “40 and 50 miles per hour,” and fire crews were forced to evacuate.³⁴ By the end of the fires, just three weeks from their start, the fires burned nearly one hundred thousand acres of public and private lands.³⁵ The once “small fires that managers believed they could contain for beneficial uses” had grown out of control such that when they were finally contained, the fires “had spread far beyond their expected range.”³⁶

B. *The District Court’s Opinion*

The district court took on the question of whether SWUA satisfied the *Berkovitz* test. SWUA argued that the Forest Service could not have exercised a discretionary choice because the Forest Service’s promulgation of maps and decision trees based on those maps fell outside its discretion and authority.³⁷ SWUA was particularly concerned with the Forest Service’s use of a red/green map that communicated the Forest Service’s intention to allow certain public lands surrounding the “[f]ires’ ignition points to burn for resource management purposes.”³⁸ The district court ruled that SWUA failed to establish that the Forest Service “acted outside the confines of its authority.”³⁹ The court ruled that SWUA’s assertions here were better addressed by claims brought under the National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA),⁴⁰ and not the FTCA because the FTCA’s waiver of sovereign immunity is only for those actions which “a private person could be held liable under state tort law.”⁴¹ Finding that Forest Services procedures cannot be equated with the conduct of private persons, the district court concluded it was without jurisdiction because the discretionary exception applied.⁴² To rule otherwise, the court concluded, would make the Forest Service liable “for *improperly exercising the discretion it undoubtedly possessed . . . defeat[ing] the purpose of the discretionary function exception.*”⁴³

33. *Id.* at *13.

34. *Id.* at *15.

35. *Id.* at *16.

36. *Id.* at *16-17.

37. *Id.* at *22-23.

38. *Id.* at *32.

39. *Id.* at *24.

40. NEPA and NFMA claims allow for plaintiffs to challenge agency actions and procedures, thereby providing an avenue to challenge the procedure of promulgating a map. *Native Village of Point Hope v. Jewell*, 740 F.3d 489, 493 (9th Cir. 2014) (“NEPA imposes procedural requirements.”); *Native Ecosystems Council v. Forest Serv.*, 428 F.3d 1233, 1249 (9th Cir. 2005) (“NFMA creates a two-step process for the management of our national forests.”).

41. *Strawberry Water Users Ass’n*, 2023 U.S. Dist. LEXIS 52229, at *32 (quoting *United States v. Agronics Inc.*, 164 F.3d 1343, 1346 (10th Cir. 1999)).

42. *Id.* at *33-34 (citing *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 537 (1st Cir. 1997)).

43. *Id.* at *38.

C. *The Tenth Circuit's Opinion*

The Tenth Circuit took up the case to determine the question of whether the discretionary-function exception to liability under the FTCA applies to the Forest Service's alleged mismanagement of the Pole Creek and Bald Mountain fires.⁴⁴ The court affirmed the trial court and held that the discretionary-function exception applies, and, thus, that it did not have jurisdiction.⁴⁵

First, the court outlined the relevant administrative background preceding the two fires.⁴⁶ At the time of the two wildfires, the forest plan ("Plan") that governs the area had guidelines for determining when a natural fire in that forest area should be allowed to burn.⁴⁷ The court stated that the Plan permitted the Forest Service "to use rather than suppress wildfire under certain conditions."⁴⁸ The court noted that "[n]othing in the Plan mandates the immediate suppression of wildfires."⁴⁹

The Tenth Circuit then began its analysis under the *Berkovitz* test with the second prong: whether the challenged decision was based on public policy considerations.⁵⁰ The court held that the Forest Service's use of an Incident Decision balanced "several competing public-policy interests," which squarely brought the Forest Service into protection under the second prong.⁵¹

Turning to SWUA's particular arguments, the Tenth Circuit addressed each in turn. First, SWUA argued that the Supreme Court had previously held that the Forest Service is liable for negligent management of forest fires.⁵² The court rejected the argument, holding that that decision⁵³ only addressed the scope of the FTCA's waiver, and not the discretionary-function exception to that waiver.⁵⁴ Thus, while the Forest Service might be liable for its management of forest fires, the next step is to analyze whether the discretionary-function exception applies.

Second, SWUA argued that the first prong of the *Berkovitz* test was not satisfied.⁵⁵ The court rejected this argument and stated that "the Forest Service undoubtedly acted within the ambit of its authority in allowing the fires to burn."⁵⁶ In particular, the court reasoned that Congress specifically granted the Secretaries of Agriculture and Interior to employ "the appropriate management

44. *Strawberry Water Users Ass'n v. United States*, 109 F.4th 1287, 1289 (10th Cir. 2024).

45. *Id.*

46. *See id.*

47. *See id.* at 1289-90.

48. *Id.* at 1290.

49. *Id.*

50. *See id.* at 1293-94.

51. *Id.* at 1293.

52. *See id.* at 1294.

53. The prior decision in question is *Rayonier v. United States*, 352 U.S. 315 (1957).

54. *Strawberry Water Users Ass'n*, 109 F.4th at 1294.

55. *Id.*

56. *Id.* at 1295.

response to wildfires.”⁵⁷ Under the national strategy set out by the Secretary of Agriculture, the Forest Service has the authority to “safely and effectively extinguish fire when needed; use fire where allowable; manage our national resources; and, as a nation, to live with wildland fire.”⁵⁸

Third, SWUA argued that the Forest Service acted without authority by adopting the “Default Initial Fire Response Map” without conducting a NEPA analysis, which by nature strips the agency of its discretion to promulgate the map.⁵⁹ The court was unmoved by this argument, reasoning that even had the map been improperly adopted, the baseline regulations do not require immediate extinguishment of the fires.⁶⁰

In conclusion, the Tenth Circuit affirmed the trial court in holding that the discretionary-function exception applies, and, as such, it is without jurisdiction to entertain SWUA’s claims.⁶¹

III. ANALYSIS

The Tenth Circuit’s holding in *Strawberry Water Users Association v. United States* is a predictable extension of existing jurisprudence, strengthening a view that the discretionary-function exception under the FTCA has a broad scope. By extending Supreme Court precedent in this way, and aligning with similar decisions in other circuits,⁶² the holding reinforces the principle that government agencies cannot be held liable for discretionary decisions, even when those decisions result in serious and negative consequences for citizens. While legally consistent, this decision highlights the concern that the discretionary-function exception continues to shield the government from accountability in ways that may no longer serve the public interest, particularly as wildfire management becomes an increasingly urgent issue.⁶³

57. *Id.* (quoting 43 U.S.C. § 1748b(b)(3)).

58. *Id.* (quoting U.S. DEP’T OF AGRIC. & U.S. DEP’T OF THE INTERIOR, THE NATIONAL STRATEGY: THE FINAL PHASE IN THE DEVELOPMENT OF THE NATIONAL COHESIVE WILDLAND FIRE MANAGEMENT STRATEGY iii (2014), <https://www.forestsandrangelands.gov/documents/strategy/strategy/CSPhaseIIINationalStrategyApr2014.pdf>).

59. *Id.*

60. *See id.* at 1296.

61. *Id.* at 1297.

62. *See, e.g., Knezovich v. United States*, 82 F.4th 931 (10th Cir. 2023) (holding that the discretionary-function exception shielded the Forest Service from suit regarding the Roosevelt Fire); *Esquivel v. United States*, 21 F.4th 565 (9th Cir. 2021) (holding that the discretionary-function exception shielded the Forest Service from suit in a claim related to fire management); *Abbott v. United States*, 78 F.4th 887 (6th Cir. 2023) (holding that the National Park Service’s Fire Management Plan was discretionary).

63. *See, e.g., Confronting the Wildfire Crisis*, U.S. FOREST SERV., <https://www.fs.usda.gov/managing-land/wildfire-crisis> (last visited Mar. 20, 2025); Amanda Cutshall & Darcy Sprague, *Bastrop County Prepares Ahead of Wildfire Season*, CMTY. IMPACT, <https://communityimpact.com/austin/bastrop-cedar-creek/government/2024/05/31/bastrop-county-prepares-ahead-of-wildfire-season> (last updated May 31, 2024); Michael Copley, *A Warm, Dry Spring*

A. *The Issue: Shielded Misjudgments*

The discretionary-function exception exists to prevent courts from interfering with agency decision making that involves social, economic, and political considerations. The Supreme Court's two-part test in *Berkovitz v. United States* requires that the decision in question involve an element of judgment or choice and that the judgment be grounded in public policy considerations.⁶⁴ The rationale for the discretionary-function exception is that agencies need flexibility to make complex policy decisions without constant threat of litigation or second-guessing by the courts with the aid of hindsight.

The problem is that the Court's framework assumes agencies make informed, responsible choices. When it comes to wildfire management, that assumption does not always hold. The reality is that our understanding of wildfires has evolved, and certain strategies—like allowing fires to burn without suppression during peak wildfire season⁶⁵—often backfire and lead to more destructive wildfires. Yet the law still insulates these decisions from meaningful judicial review, even when they contradict modern wildfire science and best practices.

One troubling aspect of the discretionary-function exception is that it effectively removes judicial oversight over decisions that may be based on outdated or flawed policies. In *Strawberry Water Users Association*, the government's decision to allow a fire to burn rather than immediately suppressing it was protected under the exception, despite the fact that the Forest Service knew high winds would affect the area (though the Forest Service thought it would have more time before those weather conditions set in) and that worsening climate conditions and historical data suggest that such strategies often lead to uncontrolled wildfires.⁶⁶ The courts, bound by this expansive view of the discretionary-function exception, have little room to question the wisdom of these decisions, even when hindsight can reveal mismanagement. This creates a paradox in which agencies are entrusted with making high-stakes decisions to protect public safety but are insulated from poor decision making.

Has U.S. Forecasters Worried About the Upcoming Wildfire Season, NPR, (Mar. 21, 2024), <https://www.npr.org/2024/03/21/1239925707/warm-dry-weather-wildfire-climate-change-el-nino>.

64. *Berkovitz v. United States*, 486 U.S. 531, 537 (1988).

65. See, e.g., Elisabeth Kwak-Hefferan, *The Summer Yellowstone Burned. What Went Wrong in 1988?*, YELLOWSTONE NAT'L PARK TRIPS (May 6, 2022), <https://www.yellowstonepark.com/park/history/1988-fires-yellowstone> (“The ‘Let it Burn’ policy, as the national media coined it, was widely blamed for the destruction and the park faced intense scrutiny as the park continued to burn.”); Zach Urness, *Forest Service Prescribed Burn Escapes, Becomes 120-Acre Wildfire Near McKenzie Bridge* THE REGISTER-GUARD, <https://www.registerguard.com/story/news/state/2023/05/31/mckenzie-bridge-wildfire-prescribed-burn-escapes-willamette-national-forest-oregon/70273317007> (last updated May 31, 2023).

66. See *Strawberry Water Users Ass'n v. United States*, No. 2:22-cv-00002-JNP-DAO, 2023 U.S. Dist. LEXIS 52229, at *12 (D. Utah Mar. 24, 2023) (“While fire managers had expected wind to move into the region at some point, this weather event arrived earlier than expected.”).

While controlled burns are a widely accepted method for reducing wildfire risk, their effectiveness depends on careful timing and execution.⁶⁷ Allowing controlled burns during peak wildfire seasons or in conditions that are conducive to rapid fire spread is a policy choice that should invite scrutiny. However, under the current legal framework, even decisions that contradict best practices or lead to devastating outcomes are protected from legal challenge so long as there is a discretionary choice and the decision shows semblances of involving policy considerations.

B. The Recommendation: Congressional Action

The decision in *Strawberry Water Users Association* highlights a troubling gap between doctrine and the evolving realities of wildfire management. While courts are not positioned to craft fire policy or to direct firefighting operations, the current interpretation of the discretionary-function exception under the FTCA functionally forecloses judicial oversight. Although courts cannot and should not assume the role of wildfire policy makers, it does not follow that Congress must refrain from imposing statutory guardrails that facilitate accountability and encourage science-informed decision making.

Reforming the FTCA's discretionary-function exception offers one potential avenue. Congress could amend the statute to authorize limited judicial review of decisions under a reasonableness standard. Such a revision would not invite courts to second-guess agency judgments in real time. Rather, it would allow courts to assess whether agency decisions—particularly those made at the planning or supervisory level—reflect a rational engagement with known risks such as high wind forecasts, extended drought conditions, or the proximity of human communities. A reasonableness standard would provide a calibrated tool for distinguishing between legitimate discretionary judgments and departures from professional norms that result in preventable harm.

Alternatively, Congress could adopt a more targeted approach by carving out an express exception to the discretionary-function doctrine for wildfire management decisions. This would not depart from established norms in other high-risk domains, since courts have already recognized that the discretionary-function exception does not extend to federal employees who violate mandatory protocols.⁶⁸ Similarly, medical malpractice claims against federal healthcare providers typically fall outside the exception, as those claims are evaluated against established standards of care rather than insulated policy

67. *It's Medicine that Keeps a Forest Healthy: The Facts About Prescribed Burning*, U.S. FOREST SERV., https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5321629.html (last visited Mar. 20, 2025) (“These burns are carefully planned and executed to reduce forest fuels and improve plant and animal habitats.”).

68. See *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 238 (2d Cir. 1967) (“[E]ven if we were to assume that the creation of the FAA regulations was a discretionary function, it is true nevertheless that no discretion was left to the [air traffic] controller as to whether to comply . . .”).

considerations.⁶⁹ A tailored wildfire exemption could trigger judicial review where agencies disregard information like fire behavior modeling, proceed in the absence of sufficient containment resources, or fail to adapt to predictive weather data.

While this review may impinge on agency discretion, these changes would not subject every firefighting decision or daily agency operation to judicial scrutiny. Rather, they would ensure that when agency decisions deviate meaningfully from established science or professional standards such decisions are not categorically shielded from review.⁷⁰ Rather than undermining agency discretion, these reforms would help reinforce it by demanding discretion be exercised in a manner consistent with professional norms and scientific evidence.

CONCLUSION

Ultimately, *Strawberry Water Users Association* affirms the status quo; however, in an era of increasingly destructive wildfires, this approach risks becoming untenable. As wildfire seasons grow more intense, it is worth considering whether the current legal framework strikes the right balance between protecting agency decision making and ensuring that policies evolve to meet modern challenges. Given the limitations of judicial review, Congress should modify the FTCA's discretionary-function exception to encourage more responsible and adaptive wildfire management strategies. While such reforms have yet to take place, *Strawberry Water Users Association* demonstrates the ongoing tension between broad protections for agencies and the need for a tool to hold agencies accountable and foster an effective response to an increasingly pressing issue.

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69. See *Fang v. United States*, 140 F.3d 1238, 1242 (9th Cir. 1998) (“[T]he United States is *not* immune from claims which challenge the actual administration of medical care by its employees when the claims do not concern actions which are the product of judgment driven by the consideration of competing policy-based choices.”).

70. Especially important in this context is the fact that forest and fire management agencies may no longer have choices about how to manage fires because of a lack of staffing. As thousands of U.S. Forest Service employees are laid off, the policy balancing that may be acceptable is simply the fact that the fire might need to burn because there is no staffing to actually suppress or control the wildfire. See Martha Bellisle & Claire Rush, *How Trump's Mass Layoffs Raise the Risk of Wildfires in the US West, According to Fired Workers*, AP NEWS, <https://apnews.com/article/fired-federal-workers-wildfires-season-trump-west-d915e8ea272b7265912d7eafdbf7420a> (last updated Feb. 21, 2025); Isabelle Crow, *Wide U.S. Forest Service Layoffs Leave Projects Delayed*, FIRE & SAFETY J. AMS. (Feb. 24, 2025), <https://fireandsafetyjournalamericas.com/wide-u-s-forest-service-layoffs-leave-projects-delayed>.

We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.