Case No. 22-8023

In the

United States Court of Appeals

for the

Tenth Circuit

STEVEN DAKOTA KNEZOVICH; STEVEN L. KNEZOVICH; DEBORA M. KNEZOVICH, husband and wife; ANDREW M. TAYLOR; DENA DEA BAKER, husband and wife; RICHARD D. WRIGHT; DEONE R. WRIGHT, husband and wife; HOBACK RANCHES PROPERTY OWNERS IMPROVEMENT AND SERVICE DISTRICT, County of Sublette, State of Wyoming,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the District of Wyoming (Cheyenne), Case No. 2:21-cv-00180-ABJ · Honorable Alan B. Johnson, U.S. District Judge

APPELLANTS' OPENING BRIEF

Oral Argument Is Requested

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

There are no related cases currently pending in this Court.

JURISDICTIONAL STATEMENT

District Court. In the district court below, Appellants (Plaintiffs below) Steven Dakota Knezovich, Steven L. Knezovich, Debora M. Knezovich, Andrew M. Taylor, Dena Dea Baker, Richard D. Wright, Deone R. Wright, Hoback Ranches Property Owners Improvement and Service District ("the Roosevelt Fire victims" or "the victims") exhausted their administrative remedies, per 28 U.S.C. § 2675(a). They timely submitted their claims to the relevant federal agency, and the agency failed to act on the victims' administrative claims within six months of presentment. Therefore, the Roosevelt Fire victims' claims were ripe and justifiable upon filing in the court below.

The district court had subject matter jurisdiction over the action under the Federal Tort Claims Act (FTCA) pursuant to 28 U.S.C.A. § 1346(b)(1) because the action is on claims against the United States for money damages for injury or loss of property and personal injury caused by the negligent or wrongful act or omission of employees of the USDA Forest Service (USFS) while acting within the scope of their office or employment, under circumstances where the USFS, if a private

person, would be liable to the victims in accordance with the law of the State of Wyoming, the place where the act or omission occurred.

Finally, the discretionary function exception to the FTCA does not apply because the conduct at issue violated a federal statute, regulation, or policy and the USFS has no rightful option but to adhere to the directive.

Court of Appeals. This is an appeal from a district court's final judgment in an action seeking a money judgment for damages. The court of appeals, therefore, has jurisdiction under 28 U.S.C. § 1291.

Timeliness. Final judgment dismissing the Victims' complaint was entered on April 14, 2022. The filing of a notice of appeal was due 60 days later. 28 U.S.C. § 2107. The Notice of Appeal was timely filed on May 11, 2022.

Final Judgment. This is an appeal from a final order or judgment that disposes of all parties' claims.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court committed a prejudicial error of law when it determined that USFS fire managers have the discretion to

consider managing a human-caused fire for natural resource benefits in violation of codified USFS policy.

2. Whether the district court committed a prejudicial error of law when, on a motion for summary judgment, it resolved factual disputes for which conflicting evidence existed in favor of the moving party, Defendant-Appellee, United States of America.

STATEMENT OF THE CASE

The Roosevelt Fire victims filed this action with a Complaint and Request for Advisory Jury Trial on September 23, 2021. (App. Vol. I at 12-44.) The action's introduction states:

> 1. This is a civil action brought under 28 U.S.C. § 2671, et seq., the Federal Tort Claims Act (FTCA), to obtain a money judgment in compensation for negligence claims arising from Defendant United States of America's response to the Roosevelt Fire on the Bridger-Teton National Forest in Lincoln and Sublette Counties, State of Wyoming in mid-September of 2018. In this case, Defendant United States of America, acting through its agency, the United States Department of Agriculture Forest Service (Forest Service) chose not to suppress the Roosevelt Fire. Instead, it decided to use it as a restoration fire to achieve resource benefits, resulting in substantial personal injury, property damage, and special and general damages to Plaintiffs.
>
> 2. This Forest Service decision to use the Roosevelt Fire to achieve resource benefits violated federal policy, both the then applicable *Interagency Standards for Fire and Fire Aviation Operations (Interagency Standards* (January 2017)

> and the *Forest Service Manual* (August 2018), which specifically prescribed a different course of action for the Forest Service than was the course of action actually followed. The policy required that all human-caused fires must be suppressed "and must not be managed for resource benefits." The Forest Service had no rightful option but to adhere to this directive. It enjoyed no discretion in whether to adhere to the federal policy of suppressing human-caused fire. The Forest Service decision to use the Roosevelt Fire to achieve natural resource benefits directly violated its own non-discretionary policy.
>
> * * *
>
> 6. For these reasons, the discretionary function exception to the waiver of immunity set forth in the FTCA does not apply and does not immunize the Forest Service's wrongful acts and omissions. Therefore, the Forest Service is liable to compensate Plaintiffs for the personal injuries and property damage they suffered due to the Forest Service's negligent fire management decisions.

(App. Vol. I at 13-15.)

The United States filed a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). (App. Vol. I at 44-45.) The motion was supported by a principal brief, affidavits, and exhibits. (App. Vol. I at 46-255.) The testimony included a legal opinion by an expert witness that denied the USFS had any rules against using human-caused fires for resource benefits in general. (App. Vol. I at 71-75, 80-81.) The expert also opined that, as an issue of fact, the

Roosevelt Fire had not been used by local USFS officials to achieve resource management objectives. (App. Vol. I at 76-79.)

Tellingly, however, the USFS decision-makers who participated in the actual management decisions were not offered as affiants or tendered for depositions. The United States offered not a single first-hand witness—although all were available to it. The United States instead brought in opinion evidence to establish the decision-makers' true intent.

The Roosevelt Fire victims rejoined the United States' arguments on subject matter jurisdiction in two ways. First, they filed a Fed. R. Civ. P. 56(d) motion to allow additional discovery, with a principal brief and supporting affidavit. (App. Vol. I at 256-275.) They implored the district court to allow them to depose the witnesses the United States refused to tender simply. These included the fire managers who made the decisions, and first-hand witnesses to those decisions, instead of relying on the United States' expert witness opinion for the facts. They also responded with an opposition brief seeking to establish facts to support subject matter jurisdiction by resorting to their experts' affidavits. (App. Vol. II at 280-408.) The victims' expert affidavits

included substantial evidence that the Roosevelt Fire had been used for resource benefits.

After briefing of the competing motions was complete, the district court held a hearing on March 16, 2022, to consider oral arguments. At the close of the hearing, it took the matter under advisement and issued a written ruling on April 14, 2022. (App. Vol. II at 441-456.) In the order, the court converted the United States' motion from a motion to dismiss to one for summary judgment. (App. Vol. II at 449.) It then denied the victims' motion for depositions, granted the United States motion for summary judgment, and entered final judgment the same day, dismissing the action with prejudice. (App. Vol. I at 10.)

SUMMARY OF THE ARGUMENT

In this case, the district court fell into two errors that require reversal of its judgment and remand for further discovery and dispossession on the merits. First, the court erred in holding that the policy spelled out in the Forest Service Manual (FSM) at FSM 5130(8), which requires that response to a fire of human or unknown origin must be formulated "without consideration for resource benefits," is subject to fire manager discretion. On the contrary, the policy is binding and not

subject to discretionary analysis. The policy language allows for no consideration of alternatives, no weighing of factors, and no application of policy priorities bounded by practical concerns regarding the possible natural resource benefits of human-caused fire. Its consideration is simply forbidden. The language here leaves no latitude on the relevant consideration to the decision-maker's discretion on how best to respond to a fire.

Ultimately, while the policy does not give a directive for what precise actions the agency must execute, it does impose a clear and unequivocal proscription against what fire managers can never legally do under any circumstances, regardless of any relative advantage or disadvantage. Furthermore, it states the rule precisely: Fire managers can never consider resource benefits as part of their response to a wildfire of human or unknown origin. "Period. Full stop. No discussion." As a result, USFS had no legal option but to eschew all consideration for using the Roosevelt Fire for resource benefits, and if it is found to have done so, the discretionary function exception to the FTCA does not apply.

Tenth Circuit case law is consistent with subject matter jurisdiction over the Roosevelt Fire Victims' claims. *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1222 (10th Cir. 2016); *Elder v. United States*, 312 F.3d 1172, 1176-77 (10th Cir. 2002); *Tippett v. United States*, 108 F.3d 1194, 1197 (10th Cir. 1997); *Bell v. United States,* 127 F.3d 1226 (10th Cir. 1997).

Perhaps most important for FTCA and discretionary function analysis in this case, the victims do not ask the Court to engage in any second-guessing of executive branch policymaking. The discretionary function exception to the FTCA serves a crucial role in the separation of powers. It protects policymaking by the executive and legislative branches of government from judicial "second-guessing." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). In this case, however, policymaking is not what the Roosevelt Fire victims request of the Court. The issue here is not whether it is good policy or bad policy to forbid agency fire managers from considering resource benefits in formulating responses to wildfires of human and unknown origin. For better or worse, this policy is codified in FSM 5130.3(8). Whether or not evidence and policy analysis

suggest that such fires should be considered for resource benefits, the codified policy must be deferred to. The Court should not consider whether it is a wise one or not. Such an analytical approach would amount to the very judicial second-guessing of USFS policy in which the courts should not engage. Under the FSM 5130.3(8) directive, no discretion is allowed. No consideration to resource benefits may be included in the formulation of human-caused wildfire response—none. This Court has no constitutional role in vetoing the reasonable and established USFS policy codified in FSM 5130.3(8).

The second error committed by the district court was its failure to account for substantial evidence in the record indicating the United States developed its response to the Roosevelt Fire with prohibited consideration of resource benefits. First, however, the moving party has an initial burden to show an absence of disputed material facts. If it fails to do so, as here, the nonmoving parties need to make no showing at all. In this case, the United States did not allow its decision-makers to testify in support of its arguments on summary judgment. It similarly refused to produce other eyewitnesses to the decision-making process or its results. Given the rigors of the missing evidence doctrine,

the absence of the available percipient witnesses gives rise to an adverse inference.

So, even though the United States did produce an expert witness who was willing to restate its unfounded factual assertions about the fire managers' decision-making, the law presumes the fire managers who were actually involved in managing the Roosevelt Fire—since their testimony was withheld—would contradict the United States' expert if they were allowed to testify. In such circumstances, the Supreme Court has instructed that "[t]he production of weak evidence when strong is available can lead ***only*** to the conclusion that the strong would have been adverse." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 59 S. Ct. 467, 83 L. Ed. 610 (1939) (emphasis added). "Silence then becomes evidence ***of the most convincing character***." *Id.* (emphasis added). With evidence of this most compelling nature weighing in the initial summary judgment balance, the United States' own evidence is sufficiently equivocal that the motion fails on factual grounds without any response from the victims. Since the non-percipient expert witness, who was never at the fire, drew his facts only from documentation and

did not talk to witnesses, his testimony alone was insufficient, as a matter of law, to shift the burden to the nonmoving victims.

The United States also failed to show how the Roosevelt Fire victims' evidence is insufficient to support subject matter jurisdiction. A reasonable inference is that the USFS decided and intended, as it stated at the time, to use the Roosevelt Fire "on the landscape to reintroduce fire in its natural role," which purpose it had no rightful option to pursue. This arises from two sources. First, agency officials told it to the news media. It also arises from the circumstances of the case, as analyzed by the victims' two expert witnesses, who both opined that the evidence indicates that the Roosevelt Fire was used for natural resource benefits. In short, a variety of evidence supports a finding that USFS fire managers decided to employ "monitoring" on the Roosevelt Fire with a management goal of using it to "reintroduce fire in its natural role" rather than pursue "fire suppression." The agency public information officer told the public fire managers were using the Roosevelt Fire to reintroduce fire in its natural role—which amounts to forbidden natural resource benefit consideration. The Wildland Fire Decision Support System (WFDSS) states that USFS's chosen course of

action to "monitor" the fire rather than suppress it is not allowed under USFS policy. The Bridger-Teton National Forest, the local arm of USFS, published its intent to manage "unplanned fire" for "achiev[ing] resource objectives." USFS's September 16, 2018, news release is consistent with the use of the Roosevelt Fire as a "restoration wildfire." In short, with this evidence in hand and their expert opinion analysis, the victims met their burden, "if that be the appropriate word," to identify specific facts posing genuine issues of material fact. The district court, therefore, committed reversible error in discounting the credibility of the Roosevelt Fire victims' evidence to determine summary judgment.

THE ARGUMENT

1. USFS had no legal option but to eschew all consideration for using the Roosevelt Fire for resource benefits, and if it is found to have done so, the discretionary function exception to the FTCA does not apply.

A. Standard of review.

The Court of Appeals reviews the applicability of the discretionary-function exception *de novo*. *Ball v. United States*, 967 F.3d 1072, 1077 (10th Cir. 2020).

B. FTCA liability and the discretionary function exception.

It is well settled that the United States, as a sovereign entity, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit." *Lehman v. Nakshian,* 453 U.S. 156, 160, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981) (quoting *United States v. Testan,* 424 U.S. 392, 399, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976) (internal quotation omitted)). Thus, a suit against the United States can be entertained when Congress has expressly waived the United States' immunity. *See Id.* Furthermore, such waiver of sovereign immunity cannot be implied; it must be unequivocally expressed. *See Franconia Assocs. v. United States,* 536 U.S. 129, 141, 122 S. Ct. 1993, 153 L. Ed. 2d 132 (2002) (citing *United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969)).

The FTCA is a limited waiver of the United States' sovereign immunity. The FTCA's waiver of immunity is limited to causes of action against the United States arising out of certain torts committed by federal employees acting within the scope of their employment. *See United States v. Orleans,* 425 U.S. 807, 813, 96 S. Ct. 1971, 48 L.

Ed. 2d 390 (1976), abrogated on other grounds by *United States v. Olson,* 546 U.S. 43, 126 S. Ct. 510, 163 L. Ed. 2d 306. Because the FTCA is only a limited waiver of the United States' sovereign immunity, it is subject to some exceptions. *See, e.g.,* 28 U.S.C. §§ 1346(b) and 2680; *Orleans,* 425 U.S. at 813. These exceptions are "strictly observed and exceptions thereto are not to be implied." *Lehman,* 453 U.S. at 161 (quoting *Soriano v. United States,* 352 U.S. 270, 276, 77 S. Ct. 269, 1 L. Ed. 2d 306 (1957)).

One of the exceptions to the jurisdiction granted by the FTCA is the "discretionary function exception," 28 U.S.C. § 2680(a). *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 809-10 (1984). The burden is on injured persons to prove their claims are not based upon actions immunized from liability under the discretionary function exception. *See Elder v. United States,* 312 F.3d 1172, 1176 (10th Cir. 2002). The discretionary function exception precludes the imposition of liability against the United States for conduct "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 employee of the United States, whether or not the

discretion involved be abused." 28 U.S.C. § 2680(a). This exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Elder,* 312 F.3d at 1176 (internal quotations and citation omitted). The exception applies regardless of whether the government agent was negligent in his duties, so long as his duties were discretionary. *See Dalehite v. United States,* 346 U.S. 15, 32 (1953), partially overruled on other grounds by *Rayonier Inc. v. U.S.*, 352 U.S. 315, 319 (1957); *Lopez v. United States,* 376 F.3d 1055, 1057 (10th Cir. 2004).

Courts employ a two-part test to determine the discretionary function exception's applicability. *See United States v. Gaubert,* 499 U.S. 315, 322–23 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). First, a court must determine whether the challenged conduct involved a matter of judgment or choice. *See Berkovitz,* 486 U.S. at 536. The discretionary function exception does not apply if a "federal statute, regulation, or policy specifically ***prescribes*** a course of action for an employee to follow" and "the employee has ***no rightful***

option but to adhere to the directive." *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536) (emphasis added).

The standards set forth by federal statute, regulation, or policy will bar the application of the discretionary function exception where such standards are both "specific and mandatory." *Aragon,* 146 F.3d at 823. The nature of the conduct is at issue, not whether the conduct may have been negligent. *Gaubert,* 499 U.S. at 321. To make this determination, courts "must first consider whether the action is a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. Although a statute or regulation may charge an agency with responsibility in general terms, such a statute does not negate the agency's discretion in how it must fulfill its responsibility absent specific directives. Cf., *Domme v. United States*, 61 F.3d 787, 790 (10th Cir. 1995) (concluding that a regulation that provides that an agency must "provide and maintain a safe workplace" did not negate the agency's discretion as to how it fulfilled that charge). The Tenth Circuit has interpreted the first *Berkovitz* prong as requiring that a statute or regulation must "specify the ***precise manner***" in which the agency must

act in order to negate the agency's discretion. *Domme*, 61 F.3d at 790 (emphasis added).

C. USFS has "no rightful option" in managing a wildfire of unknown or human origin: it must respond "without consideration to achieving resource benefits."

(i) *The FSM proscribes all consideration of resource benefits in responding to a wildfire of human or unknown origin.*

USFS approved revisions to the *Forest Service Manual* (FSM) on August 16, 2018. (App. Vol. II at 354.) The changes, promulgated with W.O. Amendment No. 5100-2018-1, became effective on August 21, 2018. It affected Chapter 5130 of the FSM and reads, in relevant part:

> All or a portion of a wildfire originating from a ***natural ignition*** may be managed to achieve Land and Resource Management Plan objectives when initial and long-term risk is within acceptable limits as described in the risk assessment.
>
> ***Human-caused fires*** and trespass [*sic*] will be managed to achieve the lowest cost and fewest negative consequences with primary consideration given to firefighter and public safety ***and without consideration to achieving resource benefits.***

(App. Vol. II at 358 (emphasis added).)

Thus, this standard is stated in such a "precise manner" that it could not be plainer. Given this strictly expressed mandate, USFS had

no rightful option: fire manages were forbidden from giving any consideration to the Roosevelt Fire as a tool for achieving resource benefits. This is supported not just by the regulatory scheme but by expert analysis. (See App. Vol. II at 324-325 (Declaration of Darrel Schulte), and 391-92, ¶ 8 (Declaration of Larry and Carolyn Eppler).) In other words, USFS had no rightful option even to consider managing the Roosevelt Fire for such use. If, for any material length of time, the fire managers considered not suppressing the fire or if they decided, even preliminarily, to use the Roosevelt Fire for resource benefits—as its public information officer was reported to have announced to the news media—the Court has subject matter jurisdiction to impose liability for state law torts committed by USFS in its management of the Roosevelt Fire.

The district court disagreed with this analysis. It held that the Forest Service Manual's command that "[h]uman-caused fires and trespass [*sic*] will be managed to achieve the lowest cost and lowest negative consequences with primary consideration given to firefighter and public safety ***and*** without consideration to achieving resource benefits" amounts to no more than mere guidance, with no mandatory

elements. (App. Vol. II at 452-453.) In its ruling, the lower court ruling focused on the first clause in the policy statement: "the language is too general and provides a weighing of values which is clear discretionary language." (App. Vol. II at 453.) The court erred, however, because it ignored the second clause in the policy mandate. The second clause states that fires shall be responded to "without consideration for resources benefits." This directive leaves no discretion for fire managers to include this issue in their calculations.

The court's omission amounts to legal error—because it is the second clause in question here. If fire managers decide to suppress fires of human or unknown origin "***with*** consideration for resources benefits," as with the Roosevelt Fire, they are unequivocally in direct violation of policy spelled out in the Forest Service Manual. Plainly, fire managers are given discretion in the guidance in the first clause concerning firefighter and public safety, cost, and the like. However, one aspect of the policy is expressed in a "precise manner." Managers shall not, under any circumstances, take into account resource benefits in applying their discretion on the other issues. On this final question, discretion is simply withheld.

(ii) ***The FSM policy proscribing the consideration of human-caused or unknown cause wildfire for natural resource benefits is a binding proscription upon which fire managers enjoy no discretion.***

Finally, Chapter 5130 of the FSM functions is no mere guideline. It is a binding "policy." Yet, the district court held otherwise, ruling that the FSM expresses no prohibitions of any kind as a matter of law. "Overall, the purpose of the FSM is to outline considerations for the Forest Service but leave enough discretion for it to appropriately respond to forest fires of human-caused or unknown origin." (App. Vol. II at 454.) This is a misapprehension of the nondiscretionary nature of the policy forbidding considerations of natural resource benefits in the case of human-caused wildfire. The prohibition against any consideration of resource benefits in response to a human-caused wildfire is found in FSM 5100, "Fire Management." (App. Vol. I at 103.) It is ensconced further in FSM 5130, "Wildfire Response." (App. Vol. I at 103.) The prohibition, finally, is located in FSM 5130.3(8) as a statement of what the FSM calls "Policy." (App. Vol. I at 103-04.) The FSM defines "Policy" at FSM 5130.5:

> The structure and procedures used to put doctrinal principles into action. The Forest Service Directive System consists of ***Forest Service Manuals*** and Handbooks ***that***

> ***codify the agency's policy***. Manuals and Handbooks contain legal authorities, objectives, policies, responsibilities, instructions, and guidance needed by the Forest Service Line Officers and primary staff to plan and execute assigned programs and activities.

(App. Vol. I at 113.) The policy stated in FSM 5130.3(8), prohibition is, therefore, a "codification" of Forest Service policy, consisting of a mandate that "specifically prescribes a course of action for an employee to follow," and "the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. at 536.

The first part of the *Berkovitz* analysis asks whether the conduct itself is "a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. Thus, the First Circuit Court of Appeals has ruled that "[i]t is elementary that the discretionary function exception does not immunize the government from liability for actions proscribed by federal statute or regulation." *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009). The policy here requires fire managers to eschew consideration of resource benefits in the otherwise broad exercise of their discretion. Upon careful examination, the policy language at issue allows for no consideration of alternatives, no weighing of factors, and no application of policy priorities bounded by practical concerns regarding the possible

natural resource benefits of human-caused fire. See, *Clark v. United States*, 695 F. App'x 378, 385-86 (10th Cir. 2017); *Tolbert v. Gallup Indian Med. Ctr.*, 555 F. Supp. 3d 1133, 1171 (D.N.M. 2021). The language leaves no latitude, on the relevant consideration, to the decision-maker's discretion on how best to respond to a fire. Ultimately, while the policy does not give a directive for what precise actions the agency must execute, it does impose a clear, unequivocal, and precise proscription against what fire managers can never legally do under any circumstances, regardless of any relative advantage or disadvantage. Furthermore, it states the rule precisely. Thus, fire managers can never consider resource benefits as part of their response to a wildfire of human or unknown origin.

It may be said that fire managers have discretion in determining whether a fire is naturally occurring, giving them discretion in deciding whether any fire may be considered for resource benefits. Nevertheless, such a gambit should not be allowed to prevail. As the Ninth Circuit Court of Appeals has observed: "***An otherwise mandatory policy does not become discretionary because it applies only in certain specified circumstances*** or because it has clearly laid out exceptions." *Gonzalez*

v. United States, 814 F.3d 1022, 1039 (9th Cir. 2016) (emphasis added). If it did, then ***no*** "federal statute, regulation, or policy" *Berkovitz*, 486 U.S. at 536, 108 S.Ct. 1954, ***would survive*** the discretionary function exception; ***every such proscription is limited to described circumstances, and the responsible employees have to decide whether those circumstances obtain."*** Id. (emphasis added). Thus, folding the discretion to consider human-caused fires for resource benefits into the discretion to determine the fire's origin is no safe harbor for the United States.

In sum, "the discretionary function exception requires that an inquiring court focus on the specific conduct at issue." *Limone*, 579 F.3d at 101 (citing *Berkovitz*, 486 U.S. at 546–47 and *Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1484 (5th Cir.1989)). The "specific conduct at issue" here is whether a fire manager may ever legally give any consideration to resource benefits in determining how to respond to a wildfire of human origin. If the evidence shows that the fire managers on the Roosevelt Fire ***did*** consider resource benefits in formulating their response, then the first prong of the *Berkovitz* test is unsatisfied, and the discretionary function exception does not apply.

D. Tenth Circuit case law supports subject matter jurisdiction over the Roosevelt Fire victims' claims.

The precisely stated prohibition, in this case, makes it distinguishable from, for example, *Elder v. United States*, 312 F.3d 1172, 1176-77 (10th Cir. 2002). In *Elder*, it was held that the regulatory language was not "specific and mandatory." This is because the directives were worded as guidelines, leaving plenty of room for interpretation and the application of policy-based judgment. *Elder*, at 1177. The Tenth Circuit has held that this guidance did not satisfy the specificity required under the first prong of *Berkowitz*. *Id.* at 1177-78. "In short, the N.P.S.–50 [regulation at issue] does not remove Zion employees' choice or judgment regarding what measures to take." *Id.* at 1178. "It does not 'specifically prescribe[ ] a course of action for an employee to follow.'" *Id.*

This analysis is similar to another case cited by the district court, *Tippett v. United States*, 108 F.3d 1194, 1197 (10th Cir. 1997). In that case, the guidance in question stated broadly, ["t]he saving of human life will take precedence over all other management actions." It did not specify how the manager was to execute the saving of human lives, nor were any actions specifically proscribed because, for example, a prior

evaluation of an unacceptable risk to human life. Thus, the *Tippett* court held that the "directive [is] too general to remove the discretion from [the manager's] conduct."

Both these holdings differ starkly with the specificity included in the prohibition at issue here: "without consideration for resource benefits." This is not ambiguous in the sense that it may have more than one reasonable meaning. It is not even subject to deliberation, let alone the exercise of judgment, experience, or discretion. Instead, the policy amounts to a plainly stated prohibition. Considerations of "resource benefits" are to play no part in the exercise of discretion in response to a human-caused wildfire. The matter is simply off the table.

Thus, this case differs from other precedents. For example, here, "resource benefits" are not, as in *Elder*, one of a laundry list of priorities or conditions that must be balanced in an application of professional judgment or experience. This mandate, moreover, does not involve, as in *Tippett*, a statement of principle under which other decisions, tempered by judgment, are merely guided. In short, no considerations for resource benefits, regardless of objective merit, may be included in deciding

whether and how to manage, suppress or otherwise respond to a non-naturally occurring wildfire. "Period. Full Stop, End of discussion."

Finally, a careful comparison between this case and a leading wildfire case from the Tenth Circuit, *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1222 (10th Cir. 2016), brings this case into more precise focus. *Hardscrabble Ranch* involved a naturally occurring wildfire ignited by lightning. The policy involved in *Hardscrabble Ranch* is described by the Court as follows:

> As part of the 2008 amendment process, the U.S.F.S. completed an Environmental Assessment ("E.A.") to evaluate the proposal of changing from a model where all wildfires are fully suppressed to one where, under certain conditions, lightning-ignited fires could be used to accomplish resource management objectives. 8 Aplt. App. 000884–95. Specifically, the E.A. noted that "[t]he purpose of this action is to reintroduce, where desirable and feasible, the natural role of fire in maintaining the proper functioning and health of natural communities and to reduce the long-term threat of catastrophic wildfires. The proposed action may allow some naturally ignited fires to reduce fuel loading and reintroduce lower-intensity fires back into forest and grassland ecosystems." *Id.*

Hardscrabble Ranch, L.L.C., 840 F.3d at 1218–19. Thus, under the relevant regulations, natural resource benefits of fire were expressly a valid consideration that could be taken into account in responding to a wildfire of natural origin. The Court ruled that regardless of any

disaster, death or other destruction that might result from Forest Service choices in managing such a wildfire, because resource benefit considerations were expressly allowed to be considered by fire managers, the discretionary function exception would apply to deprive the federal courts of subject matter jurisdiction and the injured parties of relief.

Careful analysis is in order here. This case differs materially from *Hardscrabble Farm*. In that case, the Court focused on the many considerations to which fire managers were required to apply judgment. "We quote from the Incident Decision not as a substitute for the Checklist, but to illustrate the ***various considerations*** necessary in answering the questions posed by the Checklist." *Id.* at 1221 (emphasis added). "Those considerations, ***and their weighing***, are inherently discretionary." *Id.* (emphasis added). In sum, consideration for resource benefits remained expressly one of the elements that fire managers were required to factor or weigh into their judgment. Contrast this with the current case. The proscription from considering resource benefits in responding to a fire of human or unknown origin is "removed from U.S.F.S. employees' choices or judgment regarding what

measures to take." *Id.* Thus, in this case, the discretionary function exception does not apply.

The Tenth Circuit's decision in the *Bell* case presents an excellent example of how this principle applies. *Bell v. United States,* 127 F.3d 1226 (10th Cir. 1997). The facts involved a claim that the Bureau of Land Management "negligently failed to ensure that the work on Ute Reservoir was done according to the Bureau's specifications, as contained in the K.N.C.–Commission contract." *Id.* at 1226. "Specifically, [the plaintiffs] assert that the Bureau's construction engineer, Donald Barron, was negligent in failing to follow the Bureau's design specifications as they related to the pipeline." *Id.* The basis of the claim did not involve the alleged violation of "a statute, regulation or agency policy requiring the Bureau to relocate the pipeline." Instead, plaintiffs asserted, "such a duty was assumed by the Bureau when it agreed with New Mexico to supervise the project's compliance with the specifications the Bureau had itself prepared." *Id.* at 1229. Instead, the plaintiffs contended "that the Bureau was contractually obligated to ensure that K.N.C. moved the pipeline from the borrow area, and thus that the government lacked discretion to leave the bench in its final and

hazardous location." To resolve the claim, the district court needed to interpret and apply the underlying contract to determine whether the Bureau's engineer had discretion in ensuring the pipeline did not breach the Bureau's own specifications. It ruled that he did and dismissed the case for lack of subject matter jurisdiction.

On appeal, the Tenth Circuit of Appeals reversed. In doing so, it instructed that the standard involved was the same one at issue here: "[C]onduct cannot be discretionary unless it involves an element of judgment or choice." *Id.* "Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* (citation omitted). In such a situation, "the employee has ***no rightful option*** but to adhere to the directive." *Id.* (emphasis added). The Court of Appeals, reviewing *de novo*, held that the Bureau's engineer had no discretion on the merits. "Because the specifications, read as a whole, ***prohibited*** Mr. Barron from leaving the raised bench in the borrow area, 'there is no discretion ... for the discretionary function exception to protect,'" and the discretionary function exception did not apply. *Id.* at 1230 (quoting *Berkovitz,* 486 U.S. at 536).

The same applies here, if in a slightly different way. In *Bell*, the nondiscretionary feature arose from a contract rather than, as here, a government policy. Nevertheless, in *Bell*, as here, the issue was not a prescription but a proscription. The government agent was "prohibited" from taking a particular action, although his affirmative steps were subject to discretion. Id. "It is true, as the district court noted, that the specifications gave the project construction engineer considerable discretion to determine the location and extent of excavation within the borrow pit." *Id.* at 1220. But, "the specifications presumed that the pipeline would have to be removed, at least temporarily, to facilitate excavation." *Id.* In replacing the pipeline, the government agent was proscribed from leaving the surface of the excavation. Yet, the agent violated the proscription and left "a bench area that rose between four and eight feet off the bottom of the borrow pit to within a few inches of the surface of the final water level." Since this condition was clearly proscribed, or "prohibited," the discretionary function exception did not apply.

Similarly, a wildfire of human or unknown origin is proscribed from consideration for us in achieving resource benefits. According to

the United States' own expert, a wildfire of unknown origin is to be treated, like those of human origin, "without consideration for achieving resource benefits." (App. Vol. I at 74, ¶ 15.) In other words, USFS fire managers were simply "prohibited" from considering the use of the Roosevelt Fire for resource benefits, such as to "restore the natural role of fire on the landscape."

E. This case does not involve the second-guessing of executive branch policymaking by the judicial branch.

The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). Among those activities encompassed by the discretionary function exception are "the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Id.* at 813–14. "The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, [or] the execution of a Federal project...." *Id.* at 810 (quotation omitted). Thus, the discretionary function exception to the FTCA serves a crucial role in

the Constitutional separation of powers. It protects policymaking by the executive and legislative branches of government from judicial "second-guessing." *Id.* at 814.

Moreover, second-guessing policy is expressly not what the Roosevelt Fire victims ask of the Court in this case. The issue here is not whether it is good policy or bad policy to forbid agency fire managers from considering resource benefits in formulating responses to wildfires of human and unknown origin. That policy decision has already been taken. For better or worse, it has been promulgated and codified in FSM 5130.3(8). A judicial officer may believe this is poor policy. Evidence and cogent policy analysis may suggest that such fires should be considered for resource benefits. But this analytical approach would amount to judicial second-guessing of USFS's policy preference reflected in the plain meaning of FSM 5130.3(8). This Court has no proper constitutional role in vetoing reasonable and established USFS policy. *C.f., National Cable & Telecommunications Ass'n v. Brand X Internet Services (Brand X)*, 545 U.S. 967 (2005) (courts defer to agency policy choice even when doing so means overruling preexisting and governing statutory interpretation); *Chevron, U.S.A., Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837 (1984) (courts defer to agency policy choices, so long as that choice is reasonably consistent with the legislative scheme).

2. Substantial evidence in the record indicates the agency developed its response to the Roosevelt Fire with prohibited consideration of resource benefits, foreclosing summary judgment in favor of the United States.

A. Standard of review.

In deciding the motion to dismiss under Rule 12(b)(1), the district court ruled that the jurisdictional issue was intertwined with the merits and converted the motion to a summary judgment motion. (App. Vol. II at 449.) This aspect of the district court's ruling was not subject to cross-appeal by the United States. This Court, therefore, reviews de novo the district court's grant of summary judgment, applying the same standard as the district court. *Ohlsen v. United States*, 998 F.3d 1143, 1153 (10th Cir. 2021).

B. Summary judgment is inappropriate where plaintiffs can show material facts in dispute by evidence that—if believed by a fact finder—makes the question of jurisdiction more likely than not.

Summary judgment is never apt unless "there is no genuine dispute as to any material fact and the movant is entitled to judgment

as a matter of law." Fed. R. Civ. P. 56(a). A dispute of fact is genuine if a reasonable fact finder could resolve the disputed fact in favor of either side. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is material if, under substantive law, it is essential to the proper disposition of the claim. *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir.1998). When the Court considers the evidence presented by the parties, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor." *Anderson*, 477 U.S. at 255.

"An issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Sally Beauty Co. v. Beautyco, Inc.,* 304 F.3d 964, 972 (10th Cir. 2002) (quoting Anderson, 477 U.S. at 248). "We construe the evidence and the reasonable inferences drawn therefrom in the light most favorable to the nonmovant." *Id.*

On summary judgment, the moving party bears the initial burden of showing an absence of a genuine issue of material fact. *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002), as amended on denial of reh'g (January 23, 2003). "In our circuit, '[t]he

moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment.'" *Id.* (quoting *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir.1991). Only if this burden is met does Rule 56(e) require the nonmoving party to set forth specific facts showing there is a genuine issue for trial. Id. "Even when, as here, the moving party does not have the ultimate burden of persuasion at trial, it has both the initial burden of production on a motion for summary judgment and the burden of establishing that summary judgment is appropriate as a matter of law." *Id.* (citing *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir.2000). The moving party may carry its initial burden either by (a) producing affirmative evidence negating an essential element of the nonmoving party's claim or (b) by showing that the nonmoving party does not have enough evidence to carry its burden of persuasion at trial. *Id.*

Nevertheless, if the moving party "fails to carry its initial burden of production, the nonmoving party has ***no obligation*** to produce anything, ***even*** if the nonmoving party would have the ultimate burden of persuasion at trial." *Id.* (emphasis added, string citation omitted). "'In such a case, the nonmoving party may defeat the motion for

summary judgment ***without producing anything***.'" *Id.* (quoting *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir.2000) and citing other federal circuit decisions, emphasis added).

If, but only if, the moving party satisfies this initial burden, does any burden fall upon the nonmoving party. If the moving party can carry its burden, the nonmoving party need only support the contention that a genuine dispute of material fact exists. To do so, it can make such a showing by merely (1) citing particular materials in the record or (2) showing that the materials cited by the moving party do not establish the absence of a genuine dispute. See *Id.* To overcome a summary judgment motion, the nonmoving party need only "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When considering a motion for summary judgment, the court's role is not to weigh the evidence and decide the truth of the matter, but rather to determine whether a genuine dispute of material fact exists for trial. *Anderson*, 477 U.S. at 249. Credibility determinations are the

province of the factfinder on a full trial on the merits, not on summary judgment. *Id.* at 255.

Finally, the Roosevelt Fire victims acknowledge that federal courts, as courts of limited jurisdiction, can presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction. *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 551 (10th Cir.1992), cert. denied, 507 U.S. 951 (1993) (citing *Penteco Corp. Ltd. Partnership v. Union Gas Sys. Inc.*, 929 F.2d 1519, 1521 (10th Cir.1991)). Since the United States has challenged jurisdiction, the burden falls to the victims to show it by a preponderance of the evidence. *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir.1994). The Court must therefore view the evidence "through the prism of the substantive evidentiary burden." *Anderson,* 477 U.S. at 254. The inquiry is based on "the quality and quantity of evidence required by the governing law" and "the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant." *Id.* Accordingly, the victims must show material facts in dispute by a preponderance of the evidence. They meet this burden by

setting forth evidence that—if believed by a fact finder—makes the question of jurisdiction more likely than not.

C. The United States failed to establish grounds for summary judgment as it has not met its burden of going forward, and even if it did, the evidence is sufficient to support subject matter jurisdiction.

(i) *The United States failed to either offer evidence to negate subject matter jurisdiction or demonstrate that the Roosevelt Fire victims' evidence is insufficient to support subject matter jurisdiction.*

An adverse inference arises when a party fails to present available evidence or witnesses. In such circumstances, the Supreme Court has instructed that "[t]he production of weak evidence when strong is available can lead ***only*** to the conclusion that the strong would have been adverse." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (emphasis added). "Silence then becomes evidence ***of the most convincing character***." *Id.* (emphasis added). "[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *Ready Mixed Concrete Co. v. N.L.R.B.,* 81 F.3d 1546, 1552 (10th Cir. 1996) (quoting *International Automated Machs., Inc.*, 285 N.L.R.B.

1122, 1123, 1987 WL 89960 (1987), enf'd, 861 F.2d 720 (6th Cir.1988)). *See, United Auto Workers Int'l Union v. N.L.R.B.,* 459 F.2d 1329, 1339 (D.C.Cir.1972) (decision whether to draw the adverse inference lies with the fact finder). This "missing evidence rule" provides that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of America (U.A.W.) v. N.L.R.B.*, 459 F.2d 1329, 1336 (D.C.Cir.1972). The idea is that "all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case." *Id.* at 1338.

In this case, the United States offered the district court only the opinion testimony of a non-percipient expert witness, Francisco Romero, for the proposition that fire managers gave no consideration to using the Roosevelt Fire for resource benefits. (App. Vol. I at 69-81) Expert Romero, however, offered no foundation for his testimony in personal knowledge gained from participating in the Roosevelt Fire management. (Generally, (App. Vol. I at 69-81.) The basis for his opinion he drew entirely from the initial, September 16, 2018, Wildland

Fire Decision Support System (WFDSS) report. (App. Vol. I at 77-79; 146-147.) This report, grounded strictly in hearsay, was created by USFS officials. Their names are Paul Hutta (co-author), Don Kranendonk (co-author and approver), Michael Johnson (editor and reviewer), and Tobin Kelley (editor and reviewer). (App. Vol. I at 148.) The function of a WFDSS is explained in detail in ¶ 7 of and Ex. C to the declaration of one of the victims' experts, Darrell Schulte. (App. Vol. II at 320-21; 336-352.) In short, the purpose of the WFDSS, and "decision documents" generated from the WFDSS software application, is to inform and document agency decision-making in its fire response. (App. Vol. II at 339-340.)

There is, however, no testimony to authenticate the document relied upon by Expert Romero, and the United States included no foundation for it to be admitted into evidence in the event of trial. Furthermore, no testimony was offered to allow it to satisfy one of the hearsay objections at trial. Furthermore, Romero's opinions are based on his analysis of this inadmissible document which he concedes is incomplete. "***Typically***, when resource benefit objectives are pursued, a description of the benefit being sought is provided in 'Benefits.' See *id.*

at 14. In the 9/16/18, 'Benefits' was ***left blank***, leaving no indication that resource benefit were being pursued." (App. Vol. I at 77-78, ¶ 27) (emphasis added).

More important, in reaching his sworn opinions, Expert Romero does not divulge whether he interviewed any of the people who personally participated in creating the WFDSS. These include, as listed above, Messrs. Hutta, Kranendonk, Johnson, and Kelley. (App. Vol. I at 148.) Similarly, Expert Romero did not inform the Court of whether he interviewed anyone else who might know the decision-making process, such as the author of a press release regarding the Roosevelt Fire, Public Information Officer (PIO) Mary Cernicek. (App. Vol. I at 253-254.) This is particularly telling in that Expert Romero acknowledged the "media sources" where the PIO is reported to have told the news media: " [The Roosevelt Fire] is being used on the landscape to reintroduce fire in its natural role." (App. Vol. I at 77, ¶ 24.) He drew his conclusions about PIO Cernicek's sources and conclusion without bothering to talk to her.

Equally compelling was Expert Romero's silence about whether the witnesses with the first-hand knowledge were unavailable to

recount their experiences to him. He does not mention whether he even attempted to contact them. He does not testify that neither he nor the United States knows their current contact information or how they might be reached for an interview. In other words, essential witnesses, specifically, the people who personally participated in making the decisions on the Roosevelt Fire—are silent on this record. The people who could have told the district court their thought processes, their discussions, the facts they considered in making their decisions, the goals they were seeking to achieve as to whether or how to suppress the Roosevelt Fire and, ultimately, whether and to what extent they gave consideration to achieving resource benefits in their decision-making processes, are simply mute.

The production of this weak and secondary evidence from Expert Romero, when strong evidence—in the form of eyewitness testimony—is available, "can lead ***only*** to the conclusion" that the eyewitness testimony "would have been adverse." *Interstate Circuit, Inc.*, 306 U.S. at 226 (emphasis added). Here, then, the "silence" of the eyewitnesses should have been considered by the district court as "evidence of the most convincing character." *Id.* From this silence, a fact finder could

reasonably conclude that the eyewitnesses would be adverse to the United States' contentions and that, in fact, they did give consideration to using the Roosevelt Fire for resource benefits. This adverse inference, however, the district court declined to accept. (Generally, App. Vol. II at 454-455 (district court did not address the gaps in the Romero evidence).) The district court, therefore, failed to consider the effect of the "missing evidence rule" on the issue of whether the United States made out a prima facie case that would require the victims to produce any counterevidence in opposing the summary judgment motion.

This failure was legal error. The possibility of this reasonable inference defeats the first prong of the summary judgment attack—the burden of which lies with the ***moving*** party. *Trainor*, 318 F.3d at 979. The United States failed to show "affirmative evidence that negates an essential element of" subject matter jurisdiction *Id.* To be specific, the negative inference arising under the missing evidence rule defeats the motion for summary judgment as a matter of law. This is because the evidence propounded by Expert Romero and sponsored by the United States is negated by the absence of the eyewitness testimony to which the United States had access. Thus, the United States cannot even get

to the threshold. Its own evidence creates a disputed material fact as to what extent the silent decision-makers ***considered*** resource benefits in their response to the Roosevelt Fire. Since the adverse inference from the silence of the people who made and participated in the decisions and events contradicts the Romero testimony, the United States did not make a sufficient showing to shift the burden of persuasion to the Roosevelt Fire victims. Its entire summary judgment campaign must, therefore, fail. In other words, the United States fails to meet its burden of going forward, and the Roosevelt Fire victims bear "no obligation to produce anything." *Trainor*, 318 F.3d at 979. In sum, on the first alternative for summary judgment, the victims defeat the United States' motion without producing a single shred of evidence. *Id.*

Here, the United States has made no effort or argument on the second alternative for shifting the burden to the Roosevelt Fire victims. It has failed to identify, let alone analyze or criticize, the Roosevelt Fire victims' evidence as to whether it is sufficient to establish the essential elements of subject matter jurisdiction. The United States is laser-focused on the first alternative, attempting to show with its weak evidence that subject matter jurisdiction is defeated by the

discretionary function exception to the FTCA The Roosevelt Fire victims meanwhile have an identified witness, who is the duly authorized PIO for USFS, who is reported to have said, in her official capacity, that the Roosevelt Fire was being used on the landscape to benefit resource management objectives. In other words, in violation of explicit policy prohibitions. (See Section 1 above.) The Roosevelt Fire victims should be allowed to conduct discovery to track down and depose PIO Cernicek, to seek whether she made the inculpating statement to the press, and, if so, why and on what basis. The Roosevelt Fire victims should be allowed to follow up with the deposition of any other witnesses that the PIO might identify. The same goes for the witnesses who participated in the management decision-making on the Roosevelt Fire, including, without limitation, the eyewitnesses identified in the WFDSS (Hutta, Johnson, Kelley, and Kranendonk).

The United States has failed to either offer evidence to negate subject matter jurisdiction or demonstrate that the Roosevelt Fire victims' evidence is insufficient to support subject matter jurisdiction. The motion, which the district court treated as seeking summary judgment, should not have been allowed. It was legal error to do so.

(ii) ***A reasonable inference is that fire managers decided and intended, as it stated at the time, to use the Roosevelt Fire "on the landscape to reintroduce fire in its natural role," which purpose it had no rightful option to pursue.***

(a) **A variety of evidence supports a finding that fire managers decided to employ "monitoring" with a management goal of using the Roosevelt Fire to "reintroduce fire in its natural role" rather than pursue "fire suppression."**

The Tenth Circuit Court of Appeals addressed summary judgment standards in *Lake Hefner Open Space Alliance v. Dole*, 871 F.2d 943, 944–45 (10th Cir.1989). In response to the defendant's motion for summary judgment, the plaintiff rested on its brief and the administrative record. The district court imposed a burden of proof on the plaintiff and was reversed:

> When a defendant files a motion for summary judgment, he has to show that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. The opposing party has no "burden of proof," as such; however, in resisting the motion for summary judgment, [the nonmoving party] may not rely on mere allegations or denials contained in its pleadings or briefs. Rather, [the nonmoving party] must set forth specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegations.

> If [the nonmoving party] had filed a motion for summary judgment, it would have had to show that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law. And, of course, if this case had gone to trial, [the nonmoving party] would have had the plaintiff's usual "burden of proof." But in resisting defendants' motion for summary judgment, [the nonmoving party] only has a "burden," if that be the appropriate word, to identify specific facts posing genuine issues of material fact.

Id. at 945 (citations omitted). This ruling remains good law. *Trainor*, 318 F.3d at 980. Accordingly, assuming the initial burden had been met—which the Roosevelt Fire victims contest—it would be necessary for the Court to assess the record to determine whether the Roosevelt Fire victims, as the nonmoving parties, have shown the presence of a genuine issue of material fact precluding summary judgment. In so doing, the Court must view the evidence in the light most favorable to the victims and draw all reasonable inferences in their favor.

A wide variety of evidence points to a decision to use Roosevelt Fire to benefit natural resources. It is conceded that most of the evidence is circumstantial, but circumstantial evidence is as sufficient as direct evidence to establish facts. *Murrell v. Frank*, 332 F.3d 1102,

1117 (7th Cir. 2003) ("Circumstantial evidence is of equal probative value to direct evidence and in some cases is even more reliable.").

(b) The agency public information officer told the public USFS was using the Roosevelt Fire to reintroduce fire in its natural role—which amounts to forbidden natural resource benefit consideration.

According to local news media, on or about September 16, 2018, Bridger-Teton National Forest PIO Mary Cernicek told reporters: "That [Roosevelt] fire is being used on the landscape to reintroduce fire in its natural role." (App. Vol. II at 292.) Because of this information, the Roosevelt Fire victims' complaint states, at ¶ 28, that "a duly authorized Forest Service public information officer (PIO) told local news media: 'The [Roosevelt] fire is being used on the landscape to reintroduce fire in its natural role.'" (App. Vol. I at 22, ¶ 28.) The United States has offered evidence denying the fire managers used the Roosevelt Fire on the landscape to achieve resource benefits. (App. Vol. I at 55, 61-63.) Nevertheless, nowhere in the United States' material does it dispute the allegation in the complaint that the PIO told the press USFS was using the fire on the landscape to reintroduce fire. The

reasonable inference is that the PIO, who was in an excellent position to know, was correct in her disclosure.

USF silence, moreover, is telling. Silence in the face of an accusatory statement is admissible in evidence under Fed. R. Evid. 801(d)(2). See, Admissions by conduct: (b) Silence, 2 *McCormick On Evid.* § 262 (8th ed.). Under the Federal Rules of Evidence, "[a] statement is not hearsay if ... [t]he statement is offered against a party and is ... a statement of which he has manifested his adoption or belief in its truth." Fed. R. Evid. 801(d). The United States' submissions in support of its motion include some 200 pages of materials. Yet, it offers nothing, whether in its brief or in its supporting materials, to contradict the allegations of ¶ 28 of the complaint—and it has had every opportunity to do so. The Court may therefore consider the statement by the PIO in considering the United States' motion.

(c) The Wildland Fire Decision Support System (WFDSS) states that USFS's chosen course of action to "monitor" the fire rather than suppress it is not allowed under USFS policy.

Expert Romero testifies that the decision to monitor the fire is consistent with a suppression goal. Yet, the course of action was "monitoring." Instead of fighting the Roosevelt Fire in a "fire

suppression" mode, USFS fire managers decided to monitor the fire. In the WFDSS, September 16, 2018, it was explained:

> *My decision is to manage the Roosevelt Fire with an initial emphasis on* ***monitoring*** *fire progression and visitor safety. The fire has a high probability of* ***remaining manageable*** *with a smaller organization due to few values at risk. The* ***primary values*** *are hunters that have been* ***removed and evacuated*** *from the area. The Forest Service [sic] has been the primary decision-makers in the decision process. Sublette County Fire and Sublette County Sherriff has been notified of the intended course of action. Additionally, the outfitters located in the area have been notified of the evolving situation. We have implemented a trail closure of the on the [sic]Upper Hoback Trail. Currently no area closure has been implemented. Additionally, signs are being posted at multiple potential entry points that provide access to the area. The Fire is burning in steep timbered terrain largely surrounded by rocky steep slopes. Monitoring fire progression and providing for visitor safety is the emphasis. [Management Action Plan]'s will guide future actions.*

App. Vol. I at 170.) According to Plaintiffs' expert Darrel Schulte, "Monitoring is not "fire suppression." It is on the polar-opposite end of the WFDSS strategy continuum. (App. Vol. II at 320, ¶ 7.)

According to the Interagency Standards for Fire and Fire Aviation Operations (Interagency Standards), co-authored by the Forest Service (January 2018):

> The purpose of "fire suppression" is to put the fire out in a safe, effective, and efficient manner. Fires are easier and less expensive to suppress when they are small. When the management goal is full suppression, aggressive initial attack is the single most important method to ensure the safety of firefighters and the public and to limit suppression costs. Aggressive initial attack provides the Incident Commander maximum flexibility in suppression operations. Successful initial attack relies on speed and appropriate force. All aspects of fire suppression benefit from this philosophy. Planning, organizing, and implementing fire suppression operations should always meet the objective of directly, quickly, and economically contributing to the suppression effort. Every firefighter, whether in a management, command, support, or direct suppression role, should be committed to maximizing the speed and efficiency with which the most capable firefighters can engage in suppression action. When the management goal is other than full suppression, or when conditions dictate a limited suppression response, decisiveness is still essential and an aggressive approach toward accomplishment of objectives is still critical.

(*Id.*, 318-319, ¶ 4.) Moreover, under its policies, USFS had no choice but to adopt a fire suppression strategy of some kind for the Roosevelt Fire. (*Id.*, ¶ 16.) ***How*** it suppressed the fire was a matter of discretion. ***Whether*** it did so was not. (*Id.*, ¶ 17.) Monitoring alone, which is what USFS decided to do with the Roosevelt Fire, is not a "fire suppression" strategy. Meanwhile, monitoring alone is consistent with using the fire

for resource benefits, which is also consistent with the PIO's disclosure to the news media. (*Id.*)

Expert Romero also glosses over the import of the news release of September 16, 2018. (App. Vol. II at 253-254.) It states that firefighters are "monitoring" the fire and assessing options for a "long-term management strategy." Nevertheless, the victims' experts, Larry and Carolyn Eppler, opine that "[l]ong term management strategies typically pertain to wildland fire use for resource benefit or restoration, but not to extinguish, confine, or control a fire." (*Id.*, 319-92, ¶ 8.) In other words, according to the Epplers, the term "long term management strategy" in USFS parlance means managing a fire with full consideration to the achievement of "resource benefits." This forbidden choice is the very one the evidence suggests USFS decided to take with the Roosevelt Fire. At least, if the Schulte and Eppler opinions are given any credence, a reasonable fact finder could reasonably so conclude. As a result, summary judgment is improper.

(d) ***The Bridger-Teton National Forest, the local arm of the Forest Service, published its intent to manage "unplanned fire" for the purpose of "achiev[ing] resource objectives."***

The statement attributed to PIO Cernicek is closely consistent with other public statements by the USFS's Bridger-Teton National Forest (BTNF). For example, the BTNF website states:

> ***Unplanned Fire***
>
> ***These fires are managed to achieve resource objectives.*** *The fires are* ***allowed*** *on lands with approved fire plans. A specific management strategy is implemented for each of these fires based on fuel, weather, fire conditions, and resources that might be endangered.*
>
> *Unplanned fires that pose a threat to human life or to resource values are suppressed.*
>
> *A management plan is required for each wildland fire. The course of action chosen considers public safety of firefighters, values at risk, cost of suppression, and resulting resource values.* ***As we understand fire's necessary role in the ecosystem, we must also accept its consequences such as hazy skies, patches of blackened landscape and the risk of a fire becoming too large.*** *Our warm and dry summers set the stage for large fires in the Greater Yellowstone Area. Although the buildup of fuels from 100 years of fire suppression might influence these fires, widespread large fires are natural occurrences in this area.* ***Our acceptance and understanding of the need for wildland fire will help return and sustain the Greater Yellowstone Ecosystem's natural ecological balance. Fire managers in the G.Y.A. work together to promote the integration of fires, both planned***

> ***and unplanned, to meet the social and ecological needs of the area.***

(App. Vol. II at 311-12.) Here, as defined by the FSM, "unplanned fire" included accidental human-caused fire and fire of unknown origin.[1]

(e) ***USFS's September 16, 2018, news release is consistent with use of the Roosevelt Fire as a "restoration wildfire."***

PIO Cernicek's statement is also consistent with the USFS press release dated September 16, 2018, in which it discussed "long-term management strategy" and the "option" of using the Roosevelt Fire as a "restoration wildfire":

> BIG PINEY, Wyo., September 16, 2018 – Firefighters from the Bridger-Teton National Forest responded to the Roosevelt Fire on the Big Piney Ranger District. The fire is located approximately three miles west of the Upper Hoback trailhead near Roosevelt Meadows.
>
> Hunters in the area reported the fire to Teton Interagency Dispatch on Saturday afternoon. The fire is approximately 80 acres, burning in heavy timber with group tree torching. Cause is unknown at this time.
>
> Firefighters are ***monitoring*** the fire from the ground and in the air and assessing ***options for long-term management strategy***. Fire personnel are contacting hunters in

[1] "Unplanned fire" is defined by the Forest Service Manual this way: "Unplanned ignition of a wildland fire (such as a fire caused by lightning, volcanoes, unauthorized, and ***accidental human-caused fires***) and escaped prescribed fires." (FSM 5130.5 at 15.)

> backcountry camps. The fire is in a remote area with steep rugged terrain.
>
> ***
>
> Wildfires burning under the right weather conditions and in appropriate locations can break up forest fuels and create landscapes that are more resistant to large, high-severity fires. A combination of **tools**, including ***the use of restoration wildfire***, can help managers reduce the risk of future mega-fires in the Bridger-Teton National Forest. Naturally ignited ***fires managed for restoration purposes can improve forest health and resilience and resistance to high-severity wildfires.***

(*Id.,* 312-13.)

(f) ***In resisting the United States' motion, the victims met their burden, "if that be the appropriate word," to identify specific facts posing genuine issues of material fact.***

In this case, there are two versions of the facts, one from the United States and one from the Roosevelt Fire victims. Whether the weight of the evidence, at this nascent stage, tended to support one version or the other, the presentation of conflicting evidence to the district court created questions that the fact finder should resolve after a trial on the merits. *See, e.g., Klein v. Grynberg*, 44 F.3d 1497, 1503–04 (10th Cir.1995); 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2726 at 443–48 (3d ed.1998). Thus, while the United

States asserted the weight of the evidence rests in its favor, "[s]ummary judgment concerns the sufficiency of the evidence to present an issue for trial, not the weight of such evidence." *Carey v. U.S.P.S.,* 812 F.2d 621, 623 (10th Cir.1987); *United States v. Hager*, 969 F.2d 883, 888 (10th Cir.1992) ("The credibility of a witness and weight of his testimony are for the trier of fact alone."), abrogated on other grounds by *Bailey v. United States*, 516 U.S. 137 (1995); *see also United States v. Great Salt Lake Council, Inc.*, No. 2:04–CV–604 TC, 2007 WL 189470, at *3 (D. Utah January 22, 2007) (noting that a "single sworn statement is sufficient to create an issue of fact precluding summary judgment" (citation omitted)).

D. The district court committed reversible error in discounting the credibility of the Roosevelt Fire victims' evidence.

The victims presented competent evidence to the district court that, if believed, could lead a reasonable fact finder to infer that the Roosevelt Fire was managed "***with*** consideration to achieving resource benefits." Since it did not have a rightful option to pursue such an object, the victims met their burden, "if that be the appropriate word," to identify specific facts posing genuine issues of material fact concerning whether the Court has subject matter jurisdiction.

Lake Hefner Open Space Alliance, 871 F.2d at 944–45. The United States' motion, therefore, should have been denied.

The district court fell into error, however, in making credibility findings on a motion for summary judgment. For example, it found, "Beyond a news article ***and expert opinions which simply restate Plaintiffs' unfounded assertions***, Plaintiffs have not provided evidence and have not pursued open records to show the Forest Service considered resource benefits." (App. Vol. II at 454 (emphasis added).) First, there is no evidence in the record as to any "open records" investigation. Neither party raised it. But even if the United States had, so what? Open records requests do not yield eyewitness interviews. Furthermore, the court did not explain why and how it made the credibility finding on the "unfounded" expert testimony. This it declined to outline even though the opinions it rejected entailed, all told, eighty pages of analysis and documentation. (App. Vol. II at 318-408.)

Despite the short shrift given by the district court, the victims' experts tendered opinions that fire managers used the Roosevelt Fire for natural resource benefits. If believed by a fact finder, the following facts would be established:

> 1. [Expert] Romero . . . provides general explanation about a monitoring strategy for a wildland fire and states there was no indication resource objectives were being sought.
>
> ***However, he neglects to mention that the Forest Supervisor made a public statement in a News Release on 9/16/2018 that firefighters are "monitoring" the fire and assessing options for a "long-term management strategy." Long term management strategies typically pertain to Wildland Fire Use for resource benefit or restoration, but not to extinguish, confine, or control a fire***. No Initial attack.
>
> He also neglects to mention the fact that the Forest used the term "monitoring" for "fire-use" which is highlighted u1 the Forest's 2018 Annual Fire report.
>
> Additionally, Mr. Romero appears to intentionally ignore the fact that the few weeks prior to and on the start date of the 2018 Roosevelt fire NOAA records do not show any lightning strikes in the area of the fire. He insists there is no policy that requires a suppression response.
>
> He neglects to disclose the fact that the Forest's Land and Resource Management Plan clearly states in its known non-discretionary standard in the Forests' L.R.M.P., page 195 and the Forest's Fire Management Plan (F.M.P.) 3.1.1.,page 6 (as mentioned previously):
>
> > "Human-caused fires (either accidental or arson) are unwanted wildland fires and will be suppressed."

(App. Vol. II at 391-92.)

> 2. "Monitoring" is not "suppression." The two are polar opposites. For example, within the WFDSS application, they occupy the extreme opposite ends of the strategy slider bar

> "continuum." (See, An Author's Guide to WFDSS Decision Making, attached as Ex. C, p. 10 "The Strategy slider bar can be used to describe how the incident will be managed on the continuum from Monitor to Suppression.") ***As a response to wildfire, monitoring is the negative image of suppression.*** An illustrated example of the monitoring/suppression continuum can be found on page 23 of the September 18, 2018, WFDSS for the Roosevelt Fire. (See, e.g., Doc. 15-1 at 126.)

(App. Vol. II at 320-21.)

> 3. The September 16, 2018, WFDSS for the Roosevelt Fire. It does not reflect a fire suppression goal. The "course of action," to "monitor" the fire, is consistent with a management goal of using the fire for resource benefits. It contains ambiguity, however, in that it does not list "benefits" as it ought to. In that sense, the WFDSS is deficiently constructed.

(App. Vol. II at 321.)

> 4. In view of the BTNF's public statement, the omission of the "benefit" narrative from the September 16, 2018 WFDSS, reflects either incompetence by the authors and reviewers or willful intent to omit important information related to the course of action and rationale.

(App. Vol. II at 322.)

The district court had no authority to ignore this testimony when it concluded, "However, even if Plaintiffs' argument was true and this was the type of mandatory language removing discretion, they have not sufficiently asserted that the Forest Service considered resource benefits. As the government argued, the WFDSS provides the Forest

Service's official actions." (App. Vol. II at 454.) Instead, it was obliged, as is this Court, to refrain from evaluating credibility in considering summary judgment. See *Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are fact finding functions, not to be resolved on a motion for summary judgment). Neither Expert Romero nor the victim's experts have testified in open court or been subject to the rigors of cross-examination. It is not only improper but impossible to judge credibility at this stage, and the district court committed prejudicial legal error in doing so.

Finally, the victims acknowledge that the district court adopted the United States' argument that the WFDSS establishes all the relevant facts as a matter of law. Such talismanic treatment of official government documents is not warranted and amounts to legal error. First, the United States offered no foundation for its WFDSS exhibit, whether or not the hearsay would be admissible under a hearsay exception. Since at least one section of the WFDSS ("benefits") is perfectly blank, this document's foundation is not a frivolous issue. (See App. Vol. I at 160.) As Expert Schulte testified, this is an error by fire

managers in their preparation of the document (App. Vol. II at 321, ¶ 8; 322, ¶ 10), and "benefits" is the key contested factual issue. There is no basis for adopting as "dispositive fact" a government document that erroneously has left out crucial facts for the case.

According to Schulte, the "benefits" section of the WFDSS should not have been left blank. (App. Vol. II at 322, ¶ 10.) At best, Schulte found it ambiguous. (App. Vol. II at 321, ¶ 8.) As such, its construction requires an explanation by the document's authors, whom the United States refused to tender. No factual finding can arise from it otherwise. This is especially true given the missing evidence doctrine, which indicates that the witnesses withheld by the United States would testify against the position of the United States. Such testimony would undermine the district court's treatment of the WFDSS as authoritative on all issues of fact regardless of ambiguity or other evidence.

Drawing all reasonable inferences in favor of the victims, as the Court must, there is sufficient evidence that a fact finder could find—after an opportunity for civil discovery and cross-examination—that the fire managers considered resource benefits in violation of

nondiscretionary policy directives. See, *Sally Beauty Co.,* 304 F.3d at 980 (reversing district court's summary judgment ruling). If such a finding were made, the managers' actions would violate a mandatory policy under which they have no discretion. Such a result would confer subject matter jurisdiction on the district court. Therefore, the error in the district analysis is prejudicial and should be reversed.

CONCLUSION

Accordingly, the Court is requested to reverse the district court's decision to dismiss the case for lack of subject matter jurisdiction, and to remand the case for adjudication on the merits.

RESPECTFULLY SUBMITTED this 11th day of October, 2022.

RHOADES & ERICKSON PLLC

By: /s/ *Quentin M. Rhoades*
Quentin M. Rhoades
Attorney for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument. Oral argument is necessary to address the novel aspects of this case. Undersigned is not aware of another case in any Circuit in which strong evidence exists that USFS fire managers used a fire of human origin for the purposes of resource benefits. It is therefore factually unique. Undersigned is similarly unaware of any past cases involving a violation of the USFS rule barring use of human caused fire for resource benefits.

/s/ *Quentin M. Rhoades*
Quentin M. Rhoades

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of Feb. R. App. P. 32(a)(7)(B). The word count function of undersigned's Microsoft Word word-processing application reports a word count of 12,846.

/s/ *Quentin M. Rhoades*
Quentin M. Rhoades

CIR. R. 32.3(B) CERTIFICATE OF COUNSEL

Separate briefs are necessary because Appellants Andrew M. Taylor and Dena Dea Baker, after the notice of appeal was filed, secured new appellate counsel. Appellants Taylor and Baker expressed material differences with their co-Appellants in the appellate legal strategies they wish to pursue. Undersigned and counsel of record for Appellants Taylor and Baker, Marc John Randazza, have coordinated to reduce the parties' differences as much as reasonably possible and to submit a single brief for all parties. Besides the issues and arguments addressed in the principal brief prepared by undersigned for the other Appellants, Appellants Baker and Taylor wish to address whether the district court's denial of their motion filed pursuant to Fed. R. Civ. P. 56(d) constitutes an abuse of discretion. Their separate brief is designed to address that issue.

/s/ *Quentin M. Rhoades*
Quentin M. Rhoades