Tenth Circuit 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,	)
Plaintiff/Appellants,	)
v.	)
UNITED STATES OF AMERICA,	)
Defendant/Appellee.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

The Honorable Alan B. Johnson
United States District Court Judge

District Court No. 02:21-CV-00180-ABJ

BRIEF OF APPELLEE

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December 12, 2022

Oral Argument is Not Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRIOR OR RELATED APPEALS v

GLOSSARY v

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 10

ARGUMENT 11

I. The district court properly held that the wildland fire management decisions made by the United States Forest Service in response to the Roosevelt Fire were protected by the discretionary function exception to the Federal Tort Claims Act 11

II. The district court did not abuse its discretion in denying the request for additional discovery 23

CONCLUSION 30

CERTIFICATE OF COMPLIANCE 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 23

Aragon v. United States,
146 F.3d 819 (10th Cir. 1998) 13, 15, 20, 21

Ball v. United States,
967 F.3d 1072 (10th Cir. 2020) 11

Berkovitz v. United States,
486 U.S. 531 (1988) 12, 13, 15, 20-21

Clark v. United States,
695 F. App'x 378 (10th Cir. 2017) 18

Dalehite v. United States,
346 U.S. 15 (1953) 12

Domme v. United States,
61 F.3d 787 (10th Cir. 1995) 13

Ellis v. J.R.'s Country Stores, Inc,
779 F.3d 1184 23

Esquivel v. United States,
21 F.4th 565 (9th Cir. 2021) 19

Gutierrez v. Cobos,
841 F.3d 895 (10th Cir. 2016) 23

Hamric v. Wilderness Expeditions, Inc.,
6 F.4th 1108 (10th Cir. 2021) 23, 25

Hardscrabble Ranch, LLC v. United States,
840 F.3d 1216 (10th Cir. 2016 ..... 6, 17, 18, 19, 22,24

Herrick v. Garvey,
298 F.3d 1184 (10th Cir. 2002) 29-30

Lewis v. City of Ft. Collins,
903 F.2d 752 (10th Cir. 1990).....23

Miller v. United States,
163 F.3d 591 (10th Cir. 1998).....19

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 30

Ohlsen v. United States,
998 F.3d 1143 (10th Cir. 2021) 6, 19

Utah Animal Rts. Coal. v. Salt Lake Cnty.,
566 F.3d 1236 (10th Cir. 2009) 11

United States v. Gaubert,
499 U.S. 315 (1991) 14, 21, 22

United States v. S.A. Empresa de Viacao Aerea Rio Grandense
(Varig Airlines), 467 U.S. 797 (1984) 12, 15

Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.,
616 F.3d 1086 (10th Cir. 2010) 23, 26

Statutes

28 U.S.C. § 1346 ……..1

28 U.S.C. § 2671 ……..1

28 U.S.C § 2680 ..... 12, 15

Regulations

FSM Ch. 5130 Wildfire Resp, §5130.3 ..... 3, 4, 6, 10, 15, 16, 17, 19, 22, 24

Other Authorities

Fed.R.Civ.P. 12 3
Fed.R.Civ.P. 56 ..... 4, 23, 24, 25, 26, 29, 30
F.R.E. 901 26

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

GLOSSARY

FSM- Forest Service Manual

FTCA-Federal Tort Claims Act

USFS-United States Forest Service

WFDSS-Wildland Fire Decision Support System

STATEMENT OF JURISDICTION

Appellants filed this matter in the United States District Court for the District of Wyoming alleging claims under the Federal Tort Claims Act (28 U.S.C. § 2671, *et seq*. & 28 U.S.C. §1346). *See* Aplt. Appx. at 13, ¶1 & 18, ¶14 (Complaint). The district court dismissed them with prejudice, ruling there was a lack of subject matter jurisdiction. *See* Aplt. Appx. at 456 (Order Dismissing). Final judgment was entered on April 14, 2022, disposing of all claims. *See* Aplt. Appx. at 457 (Judgment). This timely appeal followed. *See id*. at 458-59 (Notice of Appeal (filed May 11, 2022)).

STATEMENT OF THE ISSUES[1]

I. Whether the district court properly held that the wildland fire management decisions made by the United States Forest Service in response to the Roosevelt Fire were protected by the discretionary function exception to the Federal Tort Claims Act.

II. Whether the district court abused its discretion in denying the request for additional discovery.

STATEMENT OF THE CASE

I. Nature of case, course of proceedings, and district court determinations

Appellants brought this action against the United States under the Federal Tort Claims Act (FTCA), claiming the United States Forest Service (USFS) was negligent in managing a wildland fire known as the Roosevelt Fire. *See* Aplt. Appx. at 13, ¶1 (Complaint). The paramount issue below, and now on appeal, is the discretionary function exception to the FTCA and its applicability to the decisions made by the USFS in managing that fire. If the discretionary function exception does apply, as the district court held, then the United States is immune from suit.

In the complaint, appellants alleged the USFS allowed the Roosevelt Fire to burn in order to achieve natural resource benefits on the ground. *See* Aplt. Appx. at 13-14, ¶2 (Complaint). They alleged this violated USFS policy, and that initiating full fire suppression was the only option available. *See id.* (appellants claiming USFS

[1] The United States' *Statement of the Issues* combines the issues raised in both briefs of the various Appellants.

"policy required all human-caused fires must be suppressed . . . [USFS] enjoyed no discretion in whether to adhere to the federal policy of suppressing human-caused fire"). They further claimed that failure to immediately suppress the fire caused their injuries. *See id.* at 13, ¶1.

In lieu of filing an answer, the United States moved to dismiss under FED.R.CIV.P. 12(b)(1). *See* Aplt. Appx. at 44-45. In its memorandum in support thereof, the United States demonstrated USFS wildland fire managers had discretion in how to manage the fire, as evidenced by the language from relevant USFS policy. *See, generally,* Aplt. Appx. at 46-68 (Memo. in Supp. of Mot to Dismiss).

Specifically, the United States cited the Forest Service Manual (FSM) which expressly includes, among other items, weighing firefighter safety and public safety when developing a plan to manage a human-caused fire. *See* Aplt. Appx. at 59 *quoting* Aplt. Appx. at 104 (FSM Ch. 5130-Wildfire Response §5130.3(8)) ("Human-caused fires and trespass 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.") (Emphasis added).

The plain meaning of the language in the FSM was corroborated by the declaration of Francisco Romero, a wildland fire management expert who has worked for the USFS since 1985. *See* Aplt. Appx. at 69-70, ¶¶1-4. Mr. Romero

explained USFS policy "does not mandate that [a human-caused] fire be controlled (fully suppressed), but requires the actions be directed toward minimizing cost and negative consequences, giving highest consideration toward the protection of human life, including the safety of firefighters, and without consideration for achieving resource benefits." Aplt. Appx. at 74, ¶15.

Because USFS policy provides wildland fire managers with discretion and because the discretion used in managing the Roosevelt Fire was of the kind the discretionary function exception was designed to protect, the United States asserted it was immune from suit. *See* Aplt. Appx. at 48.

In response, appellants filed both an opposition to the United States' motion to dismiss and a motion under FED.R.CIV.P. 56(d) for leave to conduct discovery. *See* Aplt. Appx. at 280 (Opp. to Mot. to Dismiss) & Aplt. Appx. at 256 (Mot. for Discovery). In opposing the motion to dismiss, appellants focused on the phrase at the end of the sentence in FSM policy §5130.3(8) which states a human-caused fire will be managed "without consideration to achieving resource benefits." *See* Aplt. Appx. at 291-92. Appellants speculated the USFS decided to use the Roosevelt Fire for resource benefits, and they posited that if that were true, it would violate the USFS policy, making the discretionary function exception inapplicable. *See id*. at 292. Finally, they sought conversion of the motion to dismiss into a motion for summary judgment based upon the argument that the applicability of the

discretionary function exception was intertwined with the merits of the case. *See id*. at 292-96.

The appellants' separate motion for discovery sought permission to obtain testimony from multiple USFS officials about their decisions in managing the Roosevelt Fire, purportedly to establish the USFS used the fire for resource benefits. *See* Aplt. Appx. at 259-71. This request was made despite the fact that in support of its motion to dismiss, the United States provided the official USFS documents which embody those officials' decisions, and which conclusively demonstrate resource benefits were not considered in managing the fire.[2] *See* Aplt. Appx. 146-202 (9/16/2018 WFDSS Decision & 9/18/2018 WFDSS Decision).

On March 16, 2022, the district court held a hearing on both the United States' motion to dismiss and appellants' motion for leave to conduct discovery. *See* Aplt. Appx. at 440; *see also* Aplee. Supp. Appx. 00011-00054. Upon conclusion, the motions were taken under advisement. *See* Aplt. Appx. at 440.

On April 14, 2022, the district court issued its decision granting the United States' motion to dismiss, after converting it to a motion for summary judgment. Aplt. Appx. at 441-56. Specifically, the district court held that "the purpose of the FSM is to outline considerations for the Forest Service but leave enough discretion

[2] These official decisions are captured in the Wildland Fire Decision Support System (WFDSS). *See* Aplt. Appx at 77, ¶24 ("WFDSS documents are the official [USFS] decisions on how managers intended to respond to the fire").

for it to appropriately respond to forest fires of human-caused or unknown origin." Aplt. Appx. at 454.

It further held that USFS management decisions on wildfire suppression were the type of decisions the discretionary function exception was designed to protect. *See* Aplt. Appx. at 453-54 *quoting Ohlsen v. United States,* 998 F.3d 1143, 1163 (10th Cir. 2021) ("[d]ecisions about whether and when to distribute limited resources . . . are informed by policy considerations such as public and firefighter safety, suppression costs, environmental risks, and the availability of resources"). Accordingly, the district court concluded the "actions by the Forest Service fall within the discretionary function exception" to the FTCA and it dismissed the case for lack of subject matter jurisdiction. Aplt. Appx. at 456.

As a part of that order, the district court also denied appellants' request for discovery. *See* Aplt. Appx. at 449-52. It found appellants failed to demonstrate how the information "would change the outcome when applying the discretionary function exception." *Id.* at 451. As the district court recognized, the "existence of some mandatory language" in FSM §5130.3(8) regarding resource benefits, "does not eliminate discretion when the broader goals sought to be achieved necessarily involve an element of discretion." Aplt. Appx. at 454, quoting *Hardscrabble Ranch, LLC v. United States*, 840 F.3d 1216, 1222 (10th Cir. 2016). Accordingly,

information on whether USFS officials considered resource benefits was not material.

Finally, the district court held that "even if [appellants'] 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." Aplt. Appx. at 454. Much to the contrary, the official WFDSS documents evidenced the USFS did not consider resource benefits in managing the Roosevelt Fire, and the paltry evidence presented by appellants in disputing that fact was insufficient to create a genuine dispute. Aplt. Appx. at 450 ("Aside from one news article, all other information, including the database which outlines the Forest Service's official actions, points to the Forest Service not considering resource benefits in their decisions regarding the Roosevelt Fire").

The district court entered the Final Judgment in favor of the United States that same day (April 14, 2022). *See* Aplt. Appx. at 457. This appeal followed. *See* Aplt. Appx. at 458-59.

II. Relevant Facts

On September 15, 2018, at approximately 1:00 p.m., the Roosevelt Fire was detected. *See* Aplt. Appx. at 205, ¶ 7 (Sidebottom Decl.). It was already a busy day for the USFS, the National Park Service, and Sublette County, Wyoming because multiple fires were burning in the region and fire suppression resources were limited.

See Aplt. Appx. at 204-05, ¶ 6 & at 206, ¶13. Crews were also working on suppressing a lightning-caused fire which was started the day before. *See* Aplt. Appx. at 204-05, ¶6. That fire was named the Lead Creek Fire, and it was eight miles away from where the Roosevelt Fire started. *Id.*; *see also* Aplt. Appx. at 76, ¶21 (Romero Decl.). Despite the proximity of the lightning-caused Lead Creek Fire to the Roosevelt Fire, the cause of Roosevelt Fire was initially listed as "unknown." Aplt. Appx. at 76, ¶21.

Firefighters attempted to respond to the Roosevelt Fire on September 15, 2018. *See* Aplt. Appx. at 205, ¶8. However, "[i]t became evident the fire would not be quickly accessible by road, due to the remote backcountry location." *Id.* Suppression of the fire was not an option at that time because it was not safe for firefighters and resources were limited. *See id.*

Because the area of origin of the Roosevelt Fire was inaccessible by road, a Type 3 helicopter was requested to observe the fire and assess strategy options. *See id*. Apparently, the local helicopter was already committed to a fire in Grand Teton National Park, so dispatch reached out to another jurisdiction. *See id.* A helicopter from Pocatello, Idaho responded to evaluate the fire. *Id.* The response team observed the fire burning about 25 acres, with moderate spread potential. *See id.* The fire was located "in rough, remote terrain surrounded by heavy timber, and the winds were strong/gusty causing tree touching and spotting." *Id.* While in flight, the team looked

for visitors in the area and determined no one was in immediate danger. *Id.* A second flight occurred later in the evening to reevaluate the fire. *See id*., ¶ 9.

Consistent with USFS policy, the initial decision on the Roosevelt Fire was to continually assess it, protect firefighters, and notify hunters and campers in the area. Aplt. Appx. at 170 (WFDSS (9/16/18)). There was no decision to let the fire burn for resource benefits. *See* Aplt. Appx. at 77, ¶ 26; *see also* Aplt. Appx. at 206, ¶10 ("initial [USFS] decision was to assess values at risk, notify the public, and monitor the fire").

On September 17, 2018, "the fire exhibited rapid growth throughout the day." Aplt. Appx. at 206, ¶ 12. On September 18, 2018, the conditions on the ground had changed. "The change in circumstances, both from the fire's continued spread and the fire managers' increased understanding of the prevailing threats and opportunities to intervene, warranted a change in fire management strategy." Aplt. Appx. at 79, ¶ 29.

Accordingly, there was a second WFDSS issued (two days after the initial decision). *See* Aplt. Appx. at 171 (WFDSS 9/18/18). This decision "changed the strategy from monitoring to 'full suppression' on the east side of the planning area and in the Upper Hoback River to protect life as well as private land and structures." Aplt. Appx. at 78-79, ¶28. Like the first WFDSS publication, the second publication did not state the Roosevelt Fire was being used for resource purposes. *See id*.

SUMMARY OF THE ARGUMENT

Elemental to management of wildland fires in national forests is the need for the USFS to have discretion. Fire managers and responders need it to best decide how to minimize risk to firefighters, the public, natural resources, and other values to be protected. To that end, USFS policy acknowledges fire management decisions necessarily involve considerations about the values at risk, the resources available, the probabilities of success for various strategies, and costs. Appellants fail to demonstrate the existence of any federal statute, regulation, or USFS policy that removes that discretion.

The decisions made by the USFS in this case were entirely consistent with the broad discretion given under USFS policy and they included considerations of the type that the discretionary function exception was designed to protect. Accordingly, the United States is immune from suit under the discretionary function exception to the FTCA.

Further, the district court properly denied appellants' request to question several USFS officials on whether those officials considered resource benefits in the overall management plan for the Roosevelt Fire because the answer to that question is immaterial. The language in FSM §5130.3(8) restricting "resource benefits" from the list of factors to be considered does not remove discretion from the USFS in managing wildland fires. Even if that language "was the type of mandatory language

removing discretion, [appellants did] not sufficiently assert[ ] that the Forest Service considered resource benefits." Aplt. Appx. at 454. Indeed, the WFDSS contains "the official decision regarding the fire [and it] specifically excludes resource benefits." Aplt. Appx. 451.

In the end, the USFS did not violate a statute, regulation, or policy in managing the Roosevelt Fire, and the USFS's exercise of judgment or choice in managing fires is the kind of decision-making the discretionary function exception was designed to protect. Accordingly, this Court should affirm the decision and judgment of the district court.

ARGUMENT

I. The district court properly held that the wildland fire management decisions made by the United States Forest Service in response to the Roosevelt Fire were protected by the discretionary function exception to the Federal Tort Claims Act.

A. Standard of Review

This Court reviews the applicability of the discretionary function exception *de novo*. *Ball v. United States*, 967 F.3d 1072, 1077 (10th Cir. 2020). Summary judgment decisions are also reviewed *de novo*, applying the same legal standard as the district court. *Utah Animal Rts. Coal. v. Salt Lake Cnty.*, 566 F.3d 1236, 1242 (10th Cir. 2009) (citation omitted).

B. The Discretionary Function Exception

The FTCA constitutes a limited waiver of sovereign immunity. With its passage in 1948, Congress "waived sovereign immunity from suit for certain specified torts of federal employees." *Dalehite v. United States*, 346 U.S. 15, 17 (1953). This waiver of immunity, however, is subject to statutory exceptions, including one set forth in 28 U.S.C § 2680(a) which provides that "the provisions of this chapter and section 1346(b) of this title shall not apply to . . . (a) Any claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

This statutory provision, commonly referred to as the discretionary function exception to the FTCA, "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). Its purpose is 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." *Berkovitz v. United States,* 486 U.S. 531, 536-37 (1988) (quoting *Varig Airlines*, 467 U.S. at 814).

Because it defines the scope of the government's waiver of sovereign immunity, the discretionary function exception represents a limit on the subject matter jurisdiction of federal district courts. "If the discretionary function exception applies to the challenged government conduct, the United States retains its sovereign immunity and the district court lacks subject matter jurisdiction to hear the suit." *Domme v. United States*, 61 F.3d 787, 789 (10th Cir. 1995). The exception "poses a jurisdictional prerequisite to suit, which the plaintiff must ultimately meet as part of his overall burden to establish subject matter jurisdiction." *Aragon v. United States,* 146 F.3d 819, 823 (10th Cir. 1998) (citations omitted).

The legal framework for applying the discretionary function exception is well established. In *Berkovitz*, the Supreme Court set forth a two-part test. Under the first prong, the Court must determine whether the challenged conduct contained an element of discretion.

> If a federal statute, regulation or policy imposes specific, mandatory directives, conduct pursuant to those directives is not discretionary since "the employee has no rightful option but to adhere to the directive." However, if the employee's conduct involves "a matter of choice" or judgment, then the action is discretionary, and [the Court] proceeds to the second prong of [its] analysis.

Aragon, 146 F.3d at 823, quoting *Berkovitz*, 486 U.S. at 536.

Under the second prong of the *Berkovitz* test, the Court "must determine whether the exercise of judgment or choice at issue 'is of the kind that the discretionary function exception was designed to shield.'" *Id*. (quoting *Berkovitz*,

486 U.S. at 537). "Because the purpose of the exception is 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, when properly construed, the exception protects only governmental actions and decisions based on considerations of public policy." *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (citations omitted).

The Supreme Court has explained that in applying the second prong of the *Berkovitz* test, "the very existence" of a regulation that allows the employee discretion "creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Gaubert,* 499 U.S. at 324. "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Id*. Moreover, in determining whether the second *Berkovitz* prong is satisfied, "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id*. at 325.

"Discretionary conduct is not confined to the policy or planning level." *Id.* "[I]t is the nature of the conduct, rather than the status of the actor, that governs

whether the discretionary function exception applies in a given case." *Varig Airlines*, 467 U.S. at 813. In addition, the exception can apply "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). If the exception applies, subject matter jurisdiction cannot exist.

C. The conduct of the USFS contained elements of discretion, thereby satisfying the first prong of the *Berkovitz* test.

If "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," the government conduct is not discretionary. *Berkovitz,* 486 U.S. at 536. To remove discretion, the statute, regulation, or policy must prescribe a course of action in terms that are both "specific and mandatory." *Aragon*, 146 F.3d at 823. Appellants have failed to identify any statute, regulation or policy meeting these requirements.

1. The FSM provides the USFS discretion in managing human-caused fires.

In the complaint, appellants alleged USFS "policy required all human-caused fires [to] be suppressed" and that the USFS "enjoyed no discretion in whether to adhere to the federal policy of suppressing human-caused fire." *See* Aplt. Appx. at 14, ¶2. They further claimed that instead of suppressing the Roosevelt Fire, the USFS improperly let it burn for resource benefits. *See* Aplt. Appx. at 13, ¶1. In their opening brief to this Court, appellants rely upon FSM policy Ch. 5130-Wildfire

Response §5130.3(8) for support of those allegations. *See Op. Br. of Aplt*. at 17-23.[3] However, section 5130.3(8) states:

> Human-caused fires and trespass 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.

Aplt. Appx. at 104.

Glaringly, nowhere in the text of FSM § 5130.3(8) does it state the USFS is required to suppress a human-caused fire. Rather, it lists a number of factors to consider when developing any wildland fire management plan. It describes firefighter safety and public safety as being weighed more heavily in the decision-making process. Further, the language restricting "resource benefits" from the list of factors to be considered does not somehow require decision-makers to forsake the other "primary considerations" listed in that same sentence.

Nowhere in that policy, or in any other USFS policy, does it state a human-caused wildland fire is required to be immediately suppressed, and nowhere in USFS policy does it state that a decision on how a human-caused fire should be managed must be divorced from weighing other important policy considerations such as firefighter and public safety.

[3] Unless otherwise noted, reference to the O*pening Brief of Appellants* will be to document 010110751886.

This case is almost identical to the *Hardscrabble Ranch* case—binding precedent which appellants refused even to acknowledge in the district court. *See Hardscrabble Ranch*, 840 F.3d 1216. In that case, Hardscrabble Ranch asserted that the USFS was required to complete a "Checklist" before responding to the wildland fire at issue there, and that had it done so, the Checklist would have required the USFS to immediately pursue a suppression-oriented approach. *Id.* at 1220-21.

This Court disagreed. It found that the need to balance various factors in the Checklist, like "the threat to life, property, and public and firefighter safety[,]" demonstrated the USFS retained discretion. *Id.* at 1221. Importantly, this Court held the USFS maintained its discretion because "neither the Checklist nor other procedures identified by Hardscrabble explicitly told the Forest Service to suppress the fire in a specific manner and within a specific period of time." *Id.* at 1222 (citation omitted). This Court further held that the "existence of some mandatory language does not eliminate discretion when the broader goals sought to be achieved necessarily involve an element of discretion." *Id.*

The same analysis applies here. Nothing in FSM § 5130.3(8) required the USFS to suppress the Roosevelt Fire in a "specific manner and within a specific period of time." Further, the seemingly mandatory language regarding resource benefits does not eliminate discretion because the broader goal of managing a wildfire involves elements of discretion, like consideration of firefighter safety,

public safety, and the minimization of costs. *See Hardscrabble*, 840 F.3d at 1222 ("existence of some mandatory language does not eliminate discretion when the broader goals sought to be achieved necessarily involve an element of discretion") (citations omitted); *see also Clark v. United States*, 695 F. App'x 378, 385 (10th Cir. 2017) ("the mere use of verb forms that indicate mandatory action is insufficient as a matter of law for us to infer a non-discretionary function . . . . Where the regulatory language 'mandates' the consideration of alternatives, the weighing of factors, or the application of policy priorities bounded by practical concerns, the language leaves to the decisionmaker's discretion how best to fulfill such 'mandatory' priorities.") This Court's holding in *Hardscrabble Ranch* is thus determinative in this case.

For the first time on appeal, appellants argue that the USFS was only deemed to have maintained its discretion in *Hardscrabble Ranch* because that fire was naturally occurring, and resource benefits could thus be considered. *Aplt. Op. Br.* 26-27. But that argument misconstrues the relevant holdings. Nowhere in *Hardscrabble Ranch* did this Court even insinuate that the USFS maintained its discretion solely because resource benefits was a factor the USFS could consider. Rather, discretion flowed from the various considerations necessary in developing a management plan, and the weighing of those considerations, not just one factor. *See Hardscrabble Ranch,* 840 F.3d at 1221 ("Those considerations, and their weighing, are inherently discretionary").

The relevant holding in *Hardscrabble Ranch* is not anomalous either. This Court and the Ninth Circuit (another Circuit which includes states that frequently encounter wildland fires) have repeatedly ruled in favor of the USFS when it has asserted that fire management decisions are protected under the discretionary function exception to the FTCA. *See Ohlsen*, 998 F.3d at 1162–64 (finding the USFS's decisions on fire suppression were protected by the discretionary function exception); *Esquivel v. United States*, 21 F.4th 565, 574 (9th Cir. 2021) ("our precedent already establishes that claims involving how the government conducts fire suppression operations are generally barred by the discretionary function exception," citing *Miller v. United States*, 163 F.3d 591 (9th Cir. 1998)).

The USFS was not required to suppress the Roosevelt Fire by virtue of the language found in FSM § 5130.3(8). Nor was discretion removed by the limitation regarding resource benefits. At the end of the day, FSM § 5130.3(8), like the USFS Checklist discussed in *Hardscrabble Ranch*, "conferred discretion on the USFS decisionmakers." *Hardscrabble Ranch,* 840 F.3d at 1221.

2. Appellants provide no other statute, regulation, or USFS policy which could arguably demonstrate discretion was removed.

Appellants appear to argue that the *Interagency Standards for Fire and Fire Aviation Operations* (also known as "the Red Book") required the USFS to adopt "some kind" of suppression strategy for the Roosevelt Fire. *See* Aplt. Op. Br. at 51 (appellants' citation to their expert's opinion that USFS policy required fire

suppression, positioned immediately after a lengthy quote from the Red Book). However, as the district court found, "the Red Book merely provides guidance for the Forest Service and is not mandatory." Aplt. Appx. at 453.

In their opening brief, appellants fail to contest or acknowledge the district court's holding in this regard, nor do they even affirmatively state that the Red Book is actually binding on the USFS. The implication simply hangs in the ether. Accordingly, appellants' argument is undeserving of serious consideration. Regardless, the reality is that the Red Book is mere "guidance", and such non-mandatory "guidance" does not remove discretion. *See* Aplt. Appx. at 332 (Red Book advising "this document provides guidance" for the USFS); *see also Aragon,* 146 F.3d at 824 ("if the agency did not intend the manual to be mandatory, but rather intended it as a guidance or advisory document," then it does not remove discretion).

Further, even assuming the Red Book was binding on the USFS, it acknowledges that discretion is provided to the USFS in deciding how to manage a human-caused wildfire in the same way the FSM provides for it. *See* Aplt. Appx. 334 (text from the Red Book stating: "Initial action on human-caused wildfire will be to suppress the fire *at the lowest cost with the fewest negative consequences with respect to firefighter and public safety*") (emphasis added).

Appellants have failed to identify "a federal statute, regulation, or policy [that] specifically prescribes a course of action for an employee to follow[.]" *Berkovitz*,

486 U.S. at 536. Certainly, they have failed to identify one that prescribes a course of action in terms that are both "specific and mandatory." *Aragon*, 146 F.3d at 823. Accordingly, the conduct of the USFS contained an element of discretion, thereby satisfying the first prong of the *Berkovitz* test.

D. The exercise of judgment or choice in managing wildland fires is the kind of decision-making the discretionary function exception was designed to protect.

In the district court, the appellants did not contest the notion that fire management decisions meet the second prong of the *Berkovitz* test. *See, generally,* Aplt. Appx. 280-317; *see also* Aplt. Appx. 453 (district court decision) ("With little argument from the parties, the action here also meets the second prong of the *Berkovitz* test). Although appellants do not appear to challenge it in front of this Court either, a brief discussion of *Berkovitz's* second prong is appropriate.

"Because the purpose of the exception is 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, when properly construed, the exception protects only governmental actions and decisions based on considerations of public policy." *Gaubert*, 499 U.S. at 323 (citations omitted). The Supreme Court has explained that in applying the second prong of the *Berkovitz* test, "the very existence" of a regulation that allows the employee discretion "creates a strong presumption that a discretionary act authorized by the regulation involves

consideration of the same policies which led to the promulgation of the regulations." *Id*. at 324.

"When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Id*. Moreover, in determining whether the second *Berkovitz* prong is satisfied, "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id*. at 325.

Again, the *Hardscrabble Ranch* case guides this analysis. Simply stated, considerations of firefighter safety, public safety, and minimization of costs "are susceptible to a policy analysis grounded in social, economic, or political concerns." *Hardscrabble*, 840 F. 3d at 1222. The balancing of the factors listed in FSM § 5130.3(8) and addressed by the published WFDSS documents "are precisely the kind of social, economic, and political concerns the discretionary function exception was designed to shield from 'judicial second guessing.'" *Hardscrabble*, 840 F. 3d at 1223 (citation omitted). Accordingly, because the conduct of the USFS also satisfies the second prong of the *Berkovitz* test, the discretionary function exception to the FTCA applies and the United States is immune from suit.

II. The district court did not abuse its discretion in denying the request for additional discovery.

A. Standard of Review

A motion brought under Rule 56(d) is reviewed for an abuse of discretion. *See Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1096 (10th Cir. 2010). The party requesting deferral of judgment shoulders the burden of demonstrating an abuse of discretion." *Gutierrez v. Cobos*, 841 F.3d 895, 908 (10th Cir. 2016) (alterations, citation, and internal quotations omitted).

Fundamental to a request for additional discovery is the assumption the information sought is material to the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment"). A "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.* (emphasis in original).

Further, "allowing a non-moving party to seek additional discovery before disposition on a motion for summary judgment 'is not a license for a fishing expedition.'" *Hamric v. Wilderness Expeditions, Inc.*, 6 F.4th 1108, 1119 (10th Cir. 2021), quoting *Lewis v. City of Ft. Collins*, 903 F.2d 752, 759 (10th Cir. 1990), and also citing *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1207–08 (10th Cir.

2015) (affirming denial of Rule 56(d) motion where additional discovery sought was speculative).

B. Evidence regarding the consideration of resource benefits was not material to the question of whether the discretionary function exception applies.

Appellants sought discovery from "managers, supervisors, directors, and/or anybody else responsible for approving the [Forest] Service's response to the Roosevelt Fire in order to gain a full understanding of the decisions that were made and the reasoning behind them." Aplt. Appx. 263, ¶13 (Appellants' Rule 56(d) motion). The claimed purpose was to develop evidence that the USFS decided to use the Roosevelt Fire for resource benefits. *See id.* at 263, ¶15. Appellants posited that if resource benefits were considered, that would be a violation of USFS policy, making the discretionary function exception inapplicable. *See id.* at 292.

However, the sought-after information was not material to the outcome of the case. As discussed above, the language in FSM §5130.3(8), restricting resource benefits from the list of factors to be considered, does not remove discretion from the USFS. The broader goal of managing wildland fires with "primary consideration given to firefighter and public safety" is not magically trumped by that limiting language. FSM §5130.3(8). *See Hardscrabble Ranch*, 840 F.3d at 1222 ("existence of some mandatory language does not eliminate discretion when the broader goals sought to be achieved necessarily involve an element of discretion").

Accordingly, whether the USFS considered resource benefits "is not material to resolution of the primarily legal question" of whether the USFS has discretion in managing fires. *Hamric*, 6 F.4th at 1125 (affirming district court's denial of a Rule 56(d) motion because the factual dispute was not material); *see also* FED.R.CIV.P. 56 ("court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"). As the district court properly held, appellants failed to demonstrate how the requested information "would change the outcome when applying the discretionary function exception." Aplt. Appx. at 451.

C. Information on the USFS's decision-making was already available to the appellants by virtue of the published WFDSS documents and they establish the USFS did not use the Roosevelt Fire for resource benefits.

Appellants' motion for additional discovery fails for an additional and independent reason. The actual decisions made by the USFS, and the reasoning behind them, were captured in the published WFDSS documents.

As an initial matter, appellants claim that the WFDSS documents were not authenticated and that "the United States included no foundation for [them] to be admitted into evidence in the event of trial." Op. Br. of Aplt. At 40. Appellants are wrong. First, there was testimony providing authentication. The USFS's expert witness on wildland fire operations testified the attached "WFDSS documents are the official [USFS] decisions on how managers intended to respond to the fire."

Applt. Appx. 77, ¶24. *See* F.R.E. 901(b)(1) (testimony of a witness with knowledge "that an item is what it is claimed to be" satisfies the authentication requirement). Second, the decisions were published. *See* Aplt. Appx. at 77, ¶25 ("first WFDSS decision published on 9/16/18"); Aplt. Appx. at 78, ¶28 ("[o]n September 18, 2018, a second WFDSS decision was published"); F.R.E. 901(b)(7)(A) (a document recorded or filed in a public office as authorized by law satisfies the authentication requirement). Finally, appellants do not even assert the documents relied upon by the district court were altered from the originals. Appellants' contention in this regard is groundless.

Accordingly, appellants' request for additional discovery was unwarranted because information on the decision-making of USFS officials was already available to them by virtue of the official WFDSS decisions. *See Valley Forge Ins. Co.*, 616 F.3d at 1096 ("party seeking to defer a ruling on summary judgment under Rule 56(f) must provide an affidavit explaining why facts precluding summary judgment cannot be presented") (citation and internal quotations omitted). Further, these published WFDSS documents conclusively demonstrate the USFS officials did not consider resource benefits.

The first WFDSS decision, published on 9/16/18, shows the initial response was to assess the fire, protect firefighters, and notify hunters and campers in the area. *See* Aplt. Appx. at 170. There was no mention of resource benefits, at all. To the

contrary, "when resource objectives are pursued, a description of the benefit being sought is provided in 'Benefits.'" Aplt. Appx. at 77, ¶ 27, citing Aplt. Appx. at 160 (WFDSS (9/16/18)). In the 9/16/18 decision, however, "Benefits" was left blank, indicating no resource benefit was being pursued. *Id*.

If a resource benefit were being pursued, the "Incident Objective List" would also contain a discussion on it. *See* Aplt. Appx. at 77-78, ¶ 27, citing Aplt. Appx. at 161. The "Incident Objectives List" does not contain any discussion regarding resource benefits. *See id*. Finally, it is clear the Roosevelt Fire was not used for resource benefits because neither the "Course of Action" nor the "Rationale" sections indicate any consideration of such "benefits". *See* Aplt. Appx. at 78, ¶ 27, citing Aplt. Appx. at 165-70.

Appellants have never disputed this reality. Rather, their response has been to assume the USFS must have somehow incompetently omitted a discussion about the resource benefits in the WFDSS documents. Appellants' hired expert stated, "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." Aplt. Appx. at 322, ¶10. However, as the district court stated at the hearing, appellants' argument in this regard is "made up of whole cloth." *See* Aplee. Supp. Appx. at 41-42 (Hrg. Trans.) (31:1-32:15).

Appellants' speculation is based upon a USFS press release taken out of context, and an alleged statement made by a public information officer to a local newspaper. As to the press release, appellants implied that the use of the phrase "restoration fire" in a USFS press release indicated the USFS may have used the Roosevelt Fire for resource benefits. *See* Aplt. Appx. at 22, ¶28. Even a cursory review of the actual press release, however, demonstrates appellants' out-of-context quote is misleading. *See* Aplt. Appx 253-54 (USFS press release (September 16, 2018)). The portion of the press release describing "use of a restoration fire" was referring to tools available for managing wildfires generally, not to any decision made by the USFS in managing the Roosevelt Fire specifically. *See id*. Further, when actually referencing the Roosevelt Fire, the release states, "[f]irefighters are monitoring the fire and assessing options for long-term management strategy." *Id*.

The district court was rightfully dismissive of appellants' unreasonable interpretation of that press release. *See* Aplee. Supp. Appx. at 00042 ("I've read that press release. That's not what it -- you know, that comment is made in a press release, but it does not say that the decision has been made to let this fire burn for resource protection. It doesn't say that"). Appellants' continued reliance upon that press release without discussing or acknowledging the district court finding is rather telling. Regardless, it certainly does not substantiate a challenge to the accuracy of the WFDSS documents warranting additional discovery.

The appellants' reference to the *Jackson Hole News and Guide* as justification for additional discovery is equally deficient. In the complaint, appellants alleged a "public information officer told local news media: 'The [Roosevelt] fire is being used on the landscape to reintroduce fire in its natural role.'" Aplt. Appx. at 22, ¶28. The United States disputes the statement was actually made by that USFS employee. However, more importantly, it does not create a "genuine dispute" as to the actual decisions made by USFS officials. *See* FED.R.CIV.P. 56 ("court shall grant summary judgment if the movant shows that there is *no genuine dispute* as to any material fact") (emphasis added).

Mr. Romero, a wildland fire management expert with almost 40 years of experience with the USFS testified that the "WFDSS documents are the official [USFS] decisions on how managers intended to respond to the fire, not media sources such as the Jackson Hole News & Guide[.]" Aplt. Appx. at 77, ¶24. As the district court found, "[a]side from one news article, all other information, including the database which outlines the Forest Service's official actions, points to the Forest Service not considering resource benefits in their decisions regarding the Roosevelt Fire." Aplt. Appx. at 450.

Appellants' scant showing was simply insufficient to defeat a motion for summary judgment. *See Herrick v. Garvey*, 298 F.3d 1184, 1190 (10th Cir. 2002) ("mere existence of a scintilla of evidence in support of the nonmovant's position is

insufficient to create a dispute of fact that is genuine") (citation and internal quotation marks omitted); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("opponent must do more than simply show that there is some metaphysical doubt as to the material facts"). As the district court held, appellants had "no reasonable evidence" to demonstrate the USFS "published misrepresentations in the WFDSS" documents. Aplt. Appx. at 45-452. Accordingly, it was not an abuse of discretion to deny appellants' motion for additional discovery under Rule 56.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision and judgment of the district court.

DATED this 12th day of December 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Rule 32(g), Fed. R. App. P., I certify that this brief is proportionally spaced in Times New Roman font size 14 and contains 7,217 words. I relied on my word processor and Microsoft Word 2016 software to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2022, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served electronically through the court's ECF system upon the following:

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