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## Issues of Liability Surrounding Fire Management in the Greater Yellowstone Area

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## COMMENT

### ISSUES OF LIABILITY SURROUNDING FIRE MANAGEMENT IN THE GREATER YELLOWSTONE AREA

During the summer of 1988, national attention was centered on the great conflagration in Yellowstone National Park (YNP).<sup>1</sup> Based upon misleading news reporting, most of the nation mistakenly believed that our first National Park had been destroyed.<sup>2</sup> These fires had actually burned, to some extent, on a total area of 1.4 million acres in the Greater Yellowstone Area (GYA). The GYA encompasses 11.7 million acres of land in northwest Wyoming, southwest Montana and eastern Idaho. Many different fires were part of the total conflagration. The fires burned in YNP and on surrounding private and state owned lands within the GYA.<sup>3</sup> Of this total acreage, approximately 400,000 acres outside YNP's boundaries were touched by the fires.<sup>4</sup> Most of the communities along the Park's borders were either threatened or damaged by the fires.<sup>5</sup> Fire is viewed by most as a natural and productive occurrence for the wilderness areas in and around the Park.<sup>6</sup> However, the effects of fire on the developed areas bordering the Park are not usually considered beneficial by those who live and work in the surrounding area.

The GYA consists mainly of federally owned land controlled by the National Park Service (NPS) or the United States Forest Service (USFS).<sup>7</sup> The communities within the GYA are Cody, Jackson and Dubois, Wyoming and West Yellowstone, Silver Gate, Cooke City, Red Lodge and Gardiner, Montana. One major private land holder bordering the Park is the Church Universal and Triumphant (CUT), which owns a large ranch near Gardiner, Montana. During the 1988 fire season, several of these communities and the CUT ranch were threatened and damaged by the fires.<sup>8</sup>

The types of damages suffered as a result of the fires varied significantly. The fires caused damage to federal timber, grasslands, ranges and facilities within YNP and surrounding federal property.<sup>9</sup> The United

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1. Chris Elfring, *Yellowstone: Fire Storm over Fire Management*, BIOSCIENCE Vol. 39 No. 10, November 1989, at 670-71.

2. *Id.* at 671.

3. GREATER YELLOWSTONE COORDINATING COMMITTEE, THE GREATER YELLOWSTONE POSTFIRE ASSESSMENT (1989) [hereinafter *Assessment*], at 2.

4. ROBERT EKEY, *YELLOWSTONE ON FIRE 12* (1989).

5. *Id.* at 11.

6. *Assessment*, *supra* note 3, at 3. A burned forest is simply a forest in a different cycle of its existence. It is a cleansing of old and the birth of the new. The lodgepole pine, the most common tree in the GYA, actually needs fire to spread its seeds.

7. Paul Schullery, *The Fires and Fire Policy*, BIOSCIENCE, Vol. 39 No. 10, November 1989, at 686.

8. EKEY, *supra* note 4, at 21-28.

9. *Assessment*, *supra* note 3, at viii-ix.

States also spent \$120 million solely on suppression efforts.<sup>10</sup> The local communities suffered from poor air quality, forced evacuation, some destruction of private property, and a decline in local tourism which led to lost revenues for the local businesses.<sup>11</sup>

The fires of 1988 also stirred a heated debate concerning the proper fire management policy for YNP. Following the 1988 experience and the subsequent controversy, the United States Department of the Interior (USDI) and the United States Department of Agriculture (USDA) appointed a team of experts to assess the fires and to examine the YNP fire management plan. Following its investigation, the team reaffirmed that fire plays an important role in the management of public lands.<sup>12</sup> However, the team also made several recommendations to the USDI and USDA which would strengthen the fire management plan by creating better control of fires.<sup>13</sup> The team's efforts have resulted in a proposed Yellowstone National Park Wildland Fire Management Plan (hereinafter, new plan).

The new plan recognizes the ecological role of fire and would continue to permit certain fires to burn. Therefore, the risk of damage and injury still exists. In fact, the severity of the 1988 fires in Yellowstone is considered by some experts to be a normal periodic occurrence,<sup>14</sup> although fires the magnitude of 1988 are believed to occur only every 200-300 years.<sup>15</sup> Thus, given particular environmental conditions and the limited suppression efforts permitted by the new plan, the potential for damaging fire in the GYA still exists.<sup>16</sup>

This comment uses the 1988 fire season in the GYA and the new plan to analyze potential liability and remedies for damage caused by forest fires. The analysis will first focus on what legal theories are available to the federal government for recovery of damages caused to federal property by fires started by or the fault of non-federal parties. This discussion will then consider the remedies available to private parties or non-federal

10. EKEY, *supra* note 4, at 15.

11. *Assessment*, *supra* note 3, at viii-ix. A total of 8.8% fewer people visited the region during the summer of 1988. Private property damage was kept to a minimum because protection of private property was a priority in the suppression efforts. See Ekey, *supra* note 4, at 28.

12. Recommendations of the Fire Management Policy Review Team, 53 Fed. Reg. 51,196 (1988). [hereinafter *Recommendations*].

13. *Id.* The specific recommendations call for better inter-agency communication and cooperation, clearer standards for determining when suppression is needed, and straight forward understanding of the line of command.

14. Don G. Despain and William H. Romme, *Historical Perspective on the Yellowstone Fires of 1988*, BIOSCIENCE Vol. 39 No. 10, November 1989, at 695-699 [hereinafter Despain].

15. *Id.* at 698-99.

16. UNITED STATES DEPARTMENT OF INTERIOR, DRAFT WILDLAND FIRE MANAGEMENT PLAN AND ENVIRONMENTAL ASSESSMENT 48-49 (1991) (Summary at 56 Fed. Reg. 36,831 (1991)) [hereinafter *Management Plan*]. The new plan calls for minimum impact tactics when suppressing fires. This includes very limited use of heavy equipment, such as bulldozers. Many of the firefighters involved in the 1988 effort found the minimum impact tactics to be a hindrance to their success. See also EKEY, *supra* note 4, at 95.

entities for damages suffered due to fires which begin on federal land and are a result of some federal action or inaction. It will be concluded that neither side can easily obtain redress for forest fire damages, but that fire damage should be greatly reduced due to the new plan's more aggressive stance on suppression.

### BACKGROUND

Throughout YNP's first 100 years, fire was viewed as a destructive force and was met with full suppression efforts.<sup>17</sup> However, a 1963 report by A. Starker Leopold was influential in ending the era of full suppression. Leopold and several other ecologists were enlisted by the Secretary of the Interior to investigate wildlife management issues in our National Parks.<sup>18</sup> Leopold's report concluded that fire plays a role in shaping the biological diversity of YNP, and that fire could improve the health and diversity of YNP and its inhabitants.<sup>19</sup> Therefore, in 1972 the NPS instituted a natural fire management plan which allowed fires to burn in certain areas of the Park.

From 1972 to 1987, 235 fires were permitted to burn and all of these fires were extinguished naturally.<sup>20</sup> Very few of these fires grew larger than 40 acres or caused extensive damage.<sup>21</sup> Based upon this record, the first 16 years of the YNP natural fire policy was generally considered a success. This management plan remained in effect until the the 1988 fires.<sup>22</sup>

The basic approach of the 1972 plan was the prescribed fire system. This system allowed naturally ignited fires to burn under previously designated environmental conditions, called prescriptions.<sup>23</sup> Every fire was monitored from the time it was discovered. When a fire burned beyond its prescriptions (acceptable pre-determined environmental conditions and boundaries), it was classified as a wildfire and subject to full suppression.<sup>24</sup> When generating a prescribed natural fire plan the agency considered: the management objectives of the area, the history of fire occurrence in the area, the natural role of fire in the area, the expected fire behavior, the acceptable fire suppression techniques, the adequate buffer zones, smoke management, and any effects on adjacent land owners.<sup>25</sup> This system of fire management was

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17. Elfring, *supra* note 1, at 667.

18. Schullery, *supra* note 7, at 686.

19. *Id.*

20. *Id.* at 687-88.

21. *Id.* at 688.

22. *Management Plan*, *supra* note 17, at 8.

23. Chris Bolgiano, *Yellowstone and the Let-Burn Policy*, AMERICAN FORESTS Jan.-Feb. 1989, at 23.

24. Schullery, *supra* note 7, at 687. A wildfire is simply a fire which has either burned beyond its "prescriptions" or is unwanted, which must be immediately suppressed.

25. *Recommendations*, *supra* note 12, at 51,199. Each "prescribed fire" had to be conducted under two conditions, (1) by qualified personnel who had precise written

used during the 1988 fire season in the GYA.

*Proposed Yellowstone National Park Wildland Fire Management Plan*

During the summers of 1989 and 1990, the NPS suppressed all fires in the GYA pending the issuance of a new management plan. In June of 1991, the USDI published its proposed plan for fire management in YNP. Under the new plan, the basic objectives of fire management in YNP remain unaltered.<sup>26</sup> The objectives of the new management plan are to: "protect human life and property," suppress wildfires economically and environmentally, "allow fire to play its ecological role in the park" as much as possible, maintain a fully qualified fire management staff, and "maintain an effective system of informing the public of the ecological benefits of fire to YNP."<sup>27</sup> Thus, the new plan emphasizes the same policy of prescribed fires, while also stressing better management and tighter controls to protect against a repeat of 1988.

The new plan includes three basic strategies. First, a Suppression strategy is employed for all wildfires, which are defined as free burning and unwanted fires or fires which have burned beyond their prescriptions. Second, a Management-Ignited Prescribed Fires strategy provides that fires may be intentionally ignited as a management tool to reduce fuel accumulations around developed areas and communities near the Park boundaries.<sup>28</sup> During the period in which a prescribed fire is permitted to burn the NPS continuously monitors the fire. If these management ignited prescribed fires exceed their prescriptions, then they will be declared wildfires and subject to full suppression. Third, a Prescribed Natural Fire strategy identifies those lightning caused fires which will be allowed to burn within certain pre-determined prescriptions.

Pre-determined prescriptions are set according to three environmental conditions, the burning index, the energy release component, and the drought index.<sup>29</sup> A prescribed fire, whether natural or man-

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"prescriptions", and (2) each fire was monitored to assure they remained within their "prescriptions." *Id.*

26. Final Report and Recommendations of the Fire Management Review Team and Summary of Public Comments, 54 Fed. Reg. 25,660 (1989) [hereinafter *Final Recommendations*].

27. *Management Plan*, *supra* note 16, at 12.

28. *Id.* at 13. Fuels are defined as, "vegetative material that is capable of sustaining fire, such as grass, duff, needles, leaves, logs, shrubs, brush, snags, and trees." *Id.* at 64.

29. *Id.* at 55. These three elements, burning index, energy release component, and drought index are all measures which indicate the potential for fire in the forest. Each one of these indices must be below a certain level to permit a prescribed fire to burn. The levels are different for the two different zones where prescribed fires are allowed. Also considered when determining whether to allow a fire to burn is the availability of adequate fire management personnel and equipment. *Id.* at 53.

agement ignited, will be permitted to burn if certain environmental conditions are all within a certain pre-set level. However, once a fire escapes the zonal boundaries or the burning conditions exceed the acceptable levels the fire will be classified as a suppressible wildfire.<sup>30</sup> Prescribed natural fires will be continually monitored by qualified personnel from ignition until they are extinguished.<sup>31</sup>

The limits of each prescribed natural fire must be developed by the fire management officer in YNP.<sup>32</sup> This officer is responsible for writing prescribed burn plans and carrying out approved prescribed burns.<sup>33</sup> Prescribed fire plans must then be approved by the superintendent and the fire management committee of YNP. However, the superintendent of YNP has final authority over all fire management decisions in YNP under the new plan.<sup>34</sup> The new plan also divides the park lands into three different zones according to which strategy will be used. First, there is the suppression zone where all fires will be immediately suppressed. The lands in this zone are developed areas outside YNP, and a buffer zone just inside the park boundaries. Second, is the conditional zone where some prescribed natural fires will be permitted to burn within limited prescriptions. The prescribed natural fires in this area have more conservative prescriptions than those set in the prescribed natural fire zone. The lands included in the conditional zone are the areas 1.5 miles inside the park boundary and some backcountry campgrounds and cabins. Third is the prescribed natural fire zone where naturally started and management started fires will be allowed to burn to their pre-determined prescriptions. However, all non-management man-made fires in any zone will be declared wildfires and subject to immediate suppression.<sup>35</sup>

The foregoing has been a cursory look at the new plan, which includes additional detailed guidelines beyond the scope of this comment. The new plan delegates management responsibilities, discusses interagency coordination, creates a fire prevention program, and sets out many other important guidelines.<sup>36</sup> Because the new plan continues to use fire as a management tool, the potential for damage and liability still exists. There remains a risk of a controlled fire growing beyond its prescriptions and damaging persons or property and causing subsequent losses to the local economy.<sup>37</sup> Although the new plan

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30. *Id.* at 12-13.

31. *Id.* at 54. The NPS has set a certain level of qualification needed for this task.

32. *Id.* at 32-33.

33. *Id.*

34. *Id.* at 36, 39.

35. *Id.* at 13-15.

36. *Id.* at 30-50. For example, particular NPS employees are given specific responsibilities throughout the fire season, particularized training is required for those involved in the process, and specific decisions must be made according to given conditions. Such conditions are, moisture level, amount of available fuels, the potential for lightning activity, and available suppression resources. *Id.*

37. JOSEPH L. SAX, *Ecosystems and Property Rights in Greater Yellowstone: The Legal System in Transition*, in THE GREATER YELLOWSTONE ECOSYSTEM 79 (Robert B.

sets stronger standards for fire managers to follow, any neglect creates a potential for liability.

### DISCUSSION

#### *Actions and Remedies Available to the Federal Government*<sup>38</sup>

In analyzing this issue it is helpful to use the North Fork fire of 1988 as an example. The North Fork Fire of 1988 was started outside the boundaries of YNP in Targhee National Forest by four private citizens who were cutting wood. This fire was one of several large fires which burned in the GYA in 1988. It affected approximately 490,200 acres.<sup>39</sup> It is unlikely that a fire approaching this magnitude will occur in the GYA anytime in the near future because, historically, similarly sized fires occur only every 200-300 years.<sup>40</sup> However, the risk of fire spreading to unwanted areas is inherent in any wildland fire management plan because of the dangerous nature of fire.<sup>41</sup> Therefore, even under the new plan there is still potential for unnaturally and naturally ignited fires to cause significant damage to resources inside and outside the park.

#### Federal Statutory Relief

Federal law provides limited relief to the federal government for injury caused by fires started by non-federal entities. Two federal criminal statutes impose sanctions for this type of fire.<sup>42</sup> The first one provides, "whoever, willfully and without authority, sets on fire any timber, underbrush or grass . . . upon the public domain . . . shall be fined under this title or imprisoned not more than five years or both."<sup>43</sup> This statute appears to apply only when the fire is actually started on federal domain and not when the fire spreads from private property. However, in *United States v. Alford* the United States Supreme Court interpreted the statute to apply to fires built near federal land as well as those fires ignited on federal land.<sup>44</sup> Therefore, a non-federal party might violate this statute if he or she built a fire upon

Keiter and Mark S. Boyce eds., 1991).

38. Norman J. Wiener, *Uncle Sam and Forest Fires: His Rights and Responsibilities*, 15 ENVTL. L. 623 (1985). This YNP fire management comment is organized into sections which are similar to Mr. Wiener's excellent essay.

39. *Assessment*, *supra* note 3, at 105. The North Fork fire burned mainly in the northwest quadrant of YNP and affected the towns of West Yellowstone and Gardiner, Montana.

40. Despain, *supra* note 14, at 695-99.

41. *Final Recommendations*, *supra* note 26, at 25,660.

42. 18 U.S.C. §§ 1855, 1856 (1988).

43. 18 U.S.C. § 1855 (1988).

44. 274 U.S. 264 (1927). The defendant had built a fire on private land but near inflammable grass which was on the public domain. The defendant's demurrer was sustained below but the United States Supreme Court reversed the demurrer because the statute applied to the defendant's activity. *Id.* at 266.

his or her own property and subsequently the fire spread to federal land.

A finding of guilt under this statute permits a fine of up to \$250,000 for individuals and \$500,000 for organizations.<sup>45</sup> Clearly the limits set on these fines would prevent the government from recovering all of its losses from a large fire. The North Fork fire suppression costs alone were \$25,000,000.<sup>46</sup> Additionally, it is unlikely that an individual will have access to funds sufficient to pay the maximum fine. If recoverable these fines might cover the costs for smaller fires which cause less damage and are more easily contained.

The second applicable federal criminal statute sets a maximum fine of \$500 and a maximum sentence of six months imprisonment.<sup>47</sup> It provides,

Whoever, having kindled or caused to be kindled, a fire in or near any forest or timber, or other inflammable material upon any lands owned, controlled or leased by . . . the United States, leaves said fire without totally extinguishing the same, or permits or suffers said fire to burn or spread beyond his control, or leaves . . . said fire to burn unattended, shall be fined not more than \$500 or imprisoned not more than six months, or both.<sup>48</sup>

This statute exists as punishment to the perpetrator, but with a maximum fine of \$500 it is obviously not intended as a remedy for federal losses.

The Ninth Circuit Court of Appeals, in *United States v. Laundner*,<sup>49</sup> interpreted this statute to include an element of criminal intent. The defendant built a signal fire when he became lost in the national forest and left the fire unattended only after it got out of control. His conviction under this statute was reversed because the prosecution failed to prove the necessary criminal intent.<sup>50</sup> The court stated that a showing of a willful act or failure to act would be sufficient to prove the required criminal intent.<sup>51</sup>

It is well established that federal criminal statutes designed to prevent forest fires are constitutionally valid.<sup>52</sup> The federal government's authority over the public domain is also broad enough to allow regulation of conduct on adjacent non-federal land,<sup>53</sup> as long as the

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45. 18 U.S.C. §§ 3571(b)(3), (c)(3) (1988).

46. ROSS W. SIMPSON, *THE FIRES OF '88* 26 (1989). Despite the massive suppression effort, extinguishment of the North Fork fire did not occur until the fall snows.

47. 18 U.S.C. § 1856 (1988).

48. *Id.*

49. 743 F.2d 686, 690 (9th Cir. 1984).

50. *Id.* at 690.

51. *Id.* at 689.

52. *United States v. Alford*, 274 U.S. 264, 267 (1927); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979).

53. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).



regulation is reasonably necessary to protect federal property.<sup>54</sup>

The Ninth Circuit Court of Appeals, in *United States v. Lindsey*, reversed a dismissal of charges for violating a federal law that prohibited building fires without a permit.<sup>55</sup> The defendants were charged with violating USDA regulations which require a permit to camp and build fires on a portion of land surrounded by national forest.<sup>56</sup> The defendants had camped and built a fire while on a raft trip down the Snake River in Idaho. All of the land surrounding the river campsite was owned by the United States, but the area where the defendants camped was state owned.<sup>57</sup> Despite the fact that the river was owned by Idaho, the statute was held to be applicable against the defendants.<sup>58</sup>

The NPS has an additional statutory provision available for recovery of forest fire damage.<sup>59</sup> The Park System Resource Protection Act provides, "any person who destroys, causes the loss of, or injures any park system resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury."<sup>60</sup> This act defines both response costs and park system resource very broadly. Response costs clearly include all suppression costs spent in an effort to put out a fire, and park system resource includes any living or nonliving resource that is in the park system.<sup>61</sup> A party will also be liable for any injury to a park resource caused by an instrument under the party's control.<sup>62</sup> This statute provides affirmative defenses, such as: an act of God, acting with due care, or that the activity which caused the damage was authorized by law.<sup>63</sup>

Clearly the NPS could have invoked this statute against the four loggers responsible for the 1988 North Fork fire. Whether the loggers would have been held liable is uncertain since the NPS opted not to proceed against them. The loggers caused damage to park system resources by carelessly discarding lighted cigarettes in the dry forest next to YNP. Had an action been brought against the loggers under this statute, they would likely have argued that the wind was an act of God which intervened and relieved them of liability. However, since the Park System Resource Protection Act has not been construed in the court system, the outcome would be speculative.

Federal statutory law provides limited relief to the federal gov-

54. *Lindsey*, 595 F.2d at 6.

55. *Id.* at 6.

56. 36 C.F.R. § 261.52(a) (1990) (prohibits using a campfire without a permit).

57. *Lindsey*, 595 F.2d at 6.

58. *Id.*

59. Park System Resource Protection Act, 16 U.S.C. §§ 191j to 191j-4 (1991).

60. 16 U.S.C. § 191j-1.(a) (1991).

61. 16 U.S.C. §§ 191j(c), (d) (1991). Some examples of resources in YNP are, timber, wildlife, geothermal pools and geysers, plant life, waters and NPS facilities.

62. 16 U.S.C. § 191j-1.(b) (1991).

63. 16 U.S.C. § 191j-1.(c)(1), (2), (3) (1991).

ernment for fires which are started by private individuals or organizations, whether started in YNP or outside it. The NPS, through the Park System Resource Protection Act, has a clear avenue for recovery when its resources are damaged due to another's negligence. However, the USFS does not have this explicit remedy and the NPS's recovery may be blocked by specifically enumerated defenses within the act. As a result the federal government may have to look beyond the federal statutes in an attempt to recover losses caused by forest fires in the GYA.

### State Statutory Relief

Both Montana and Idaho have statutes which authorize civil actions when property is damaged due to fire.<sup>64</sup> Wyoming however, does not have a similar civil liability statute. Generally, when the federal government opts to proceed under one of these state laws it wears the same shoes as an injured landowner.<sup>65</sup> Thus, like any injured party suing for damages under a statute, the United States must prove all the elements of the cause of action.

The Montana statute states that,

Any person who shall upon any land within this state . . . set or leave any fire that shall spread and damage or destroy property of any kind not his own shall be liable for all damages caused thereby, and any owner of property damaged or destroyed by such fire may maintain a civil action for the purpose of recovering such damages.<sup>66</sup>

The Montana Supreme Court in *Whitehawk v. Clark*, read into this statute an element of intent.<sup>67</sup> In *Whitehawk*, a private rancher's son set fire to the rancher's land to clean irrigation ditches.<sup>68</sup> The fire spread onto neighboring private land and destroyed three buildings. The injured adjacent landowners brought suit under this statute, alleging strict liability and negligence per se. The trial court refused to instruct the jury that the statute was not limited to when there was "intentional burning of *excess forest material*,"(emphasis added) and held for the defendants.<sup>69</sup> The Montana Supreme Court reversed because the instruction should have been given. The Montana Supreme Court stated that the statute is limited to those situations where there has been an "intentionally" ignited fire, but the statute is not limited to the burning of "*excess forest materials*."(emphasis added).<sup>70</sup> The

64. MONT. CODE ANN. § 50-63-103 (1990); IDAHO CODE § 38-107 (1988).

65. *United States v. Denver & Rio Grande Western R. Co.*, 547 F.2d 1101, 1104 (10th Cir. 1977); *United States v. Boone*, 476 F.2d 276, 278 (10th Cir. 1973).

66. MONT. CODE ANN. § 50-63-103 (1990).

67. 776 P.2d 484, 486 (Mont. 1989).

68. *Id.* at 484.

69. *Id.* at 485.

70. *Id.* at 487.

court also held that a violation of this statute is negligence per se, leaving the plaintiff to prove proximate cause, the amount of damages, and to disprove any affirmative defenses.<sup>71</sup>

The construction of the Montana statute was also at issue in *Montana Department of Natural Resources and Conservation v. Clark Fork Logging*, where a fire was accidentally ignited by a chain saw spark.<sup>72</sup> The Montana Supreme Court upheld a summary judgment for the defendants because the fire was not intentionally started by defendant's employees.<sup>73</sup>

Given the facts surrounding the start of the 1988 North Fork fire, this Montana statute probably would not have applied to the four loggers. They were careless in leaving their cigarettes, but likely did not intentionally start the fire. The NPS would not get the benefit of negligence per se because it could not show violation of this statute and it would alternatively have to prove all the elements of a common law tort action.

The Idaho statute bases liability on a finding of willfulness or negligence by the party who started the fire.<sup>74</sup> However, liability is limited to the costs which the state or an authorized agency incur while extinguishing the fire. The statute does not provide for recovery of property damage. Therefore, if the NPS sought the actual damages, it would have to plead further relief based on a different cause of action. The NPS would likely bring a common law tort action to recover the actual damages to the resources or proceed under the Park System Resource Protection Act.

Assuming that the four loggers ignited the fire in Idaho instead of Montana, and they were found to be negligent or to have acted willfully under the Idaho statute, the defendants could have been liable for the entire cost of \$25,000,000 for suppression. However, these four defendants likely do not have the financial resources to satisfy a judgement. If the loggers were employed by a large lumber company and working in that capacity, the potential for full recovery would be greater.

Wyoming does not provide a statutory cause of action similar to Montana and Idaho. The Wyoming criminal code does include sanctions for negligently burning woods and failing to extinguish or contain fire in woods or on the prairie.<sup>75</sup> However, violations are misdemeanors, and therefore, the fine cannot exceed \$750. Additionally, any fine imposed under Wyoming law would go into the state treasury not to the NPS. Thus, if a fire were to be started in Wyoming which then

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71. *Id.* A possible defense would be contributory negligence.

72. 646 P.2d 1207 (Mont. 1982).

73. *Id.* at 1209.

74. IDAHO CODE § 38-107 (1988).

75. WYO. STAT. §§ 6-3-105, 106 (1977). "Criminal negligence" is required for a finding of guilt under this statute and is defined at WYO. STAT. § 6-1-104(a)(iii) (1977).

burned into YNP, the NPS would have to rely on common law tort actions or the Park System Resource Protection Act to recover either costs or damages.<sup>76</sup>

### Common Law Remedies

Because the NPS likely will not be fully reimbursed for all the costs and damages resulting from a fire begun by other parties under federal or state statutory law, common law actions can be utilized as a supplement. Potential common law theories are negligence, nuisance, trespass and strict liability.<sup>77</sup> Under these common law theories, the defendant may be culpable if he or she acted negligently in starting the fire or in failing to adequately control the fire.<sup>78</sup>

*Negligence.* Actions grounded in a common law theory of negligence for the unreasonable use of fire have a long history.<sup>79</sup> Under the common law, a party may be liable for damages from a fire's spread if he or she did not act as a reasonably prudent person under the circumstances.<sup>80</sup> In *United States v. Andrews*, the court found the use of an acetylene torch in a field of dry grass on an arid day to be unreasonable.<sup>81</sup> The court held that the defendant should have been more cautious. The court stated that the defendant should have cleared a small area of the dry grass around the work area and provided a readily available means to extinguish a potential fire.<sup>82</sup>

An owner of property may also be held liable for not taking reasonable precautions to prevent the spread of a fire which passes through or originates on his or her property.<sup>83</sup> In *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, the Eighth Circuit Court of Appeals held that it was unreasonable not to employ a night watchman at a building where the defendant had highly flammable materials stored.<sup>84</sup> During the early morning a fire began in a group of buildings that the defendant had been demolishing. The fire then spread to the plaintiff's property and caused extensive damage. The court held the defendants liable for failing to protect against a known fire danger.<sup>85</sup> The court suggested that the defendant would still be culpable if the

76. 16 U.S.C. §§ 191j to 191j-4 (1988).

77. See generally RESTATEMENT (SECOND) OF TORTS §§ 821D, 821E, 822, 158, 165 (1977) [hereinafter RESTATEMENTS].

78. *Martin v. Union Pacific Railroad Co.*, 474 P.2d 739 (Or. 1970); *Chesapeake & O. Ry. Co. v. United States*, 139 F.2d 632, 633 (4th Cir. 1944).

79. *Vaughn v. Menlove*, 3 Bing (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837); see generally R. EPSTEIN, C. GREGORY, H. KALVEN, CASES AND MATERIALS ON TORTS 122-24 (4th ed. 1984).

80. *United States v. Andrews*, 206 F. Supp. 50, 51 (E.D. Idaho 1961).

81. *Id.* at 52.

82. *Id.*

83. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d. 179 (8th Cir. 1972) cert. denied, 410 U.S. 930 (1973).

84. *Id.* at 183-84.

85. *Id.* at 183.

fire originated elsewhere because the negligence was the failure to protect against a known fire danger and not for keeping flammable materials on the premises.<sup>86</sup> Therefore, when a fire starts without any affirmative actions by a landowner, if the landowner knows of the fire, he may still be found negligent for failing to take reasonable steps to prevent the fire from spreading.

A common practice in negligence actions is to allege negligence per se. In *United States v. Burlington Northern, Inc.*, the federal government sued for fire suppression costs spent while fighting a fire started by the defendant.<sup>87</sup> The federal government claimed that there was a showing of negligence per se because the defendant had violated a Washington statute requiring the clearing of slash and debris from the defendant's logging operations.<sup>88</sup> The United States failed to request the proper instructions as to negligence per se at the trial level. Therefore, the issue was not preserved for the Ninth Circuit Court of Appeals and the verdict for the defendant was affirmed.<sup>89</sup> Had the negligence per se been properly argued and instructed, the statutory violation might have resulted in negligence per se. This doctrine shifts the burden to the defendant to refute the presumption of negligence.<sup>90</sup> Negligence per se does not alleviate the plaintiff's burden of showing proximate cause.

Regulations exist which, if violated, might invoke negligence per se in a common law action for recovery of fire damage. The NPS has enacted regulations which govern the use of fire in the park system.<sup>91</sup> These regulations prohibit using fire in non-designated areas, using fire in a way that threatens park property or resources, leaving a fire unattended, and throwing lighted material in a manner that threatens or causes damage.<sup>92</sup> However, these regulations only apply to activities within YNP. Therefore, the four loggers responsible for the 1988 North Fork fire, because they were outside of YNP, would not have violated the regulations.

The federal government and all three states within the GYA have forest protection statutes.<sup>93</sup> These statutes increase the opportunity for the government to argue negligence per se because of the number of possible statutory violations. Each jurisdiction has established general regulatory provisions in order to protect the forests. For example, Montana has made both the failure to extinguish a campfire and

86. *Id.*

87. 500 F.2d 637, 638 (9th Cir. 1974).

88. *Id.* at 638. "Slash" is the excess material that remains following a logging operation.

89. *Id.* at 639.

90. *Id.* at 640. For example, an excuse might be that an emergency existed or the violation occurred due to reasons beyond the defendant's control.

91. 36 C.F.R. § 2.13 (1990).

92. 36 C.F.R. §§ 2.13(a)(1), (3), (4), (5) (1990).

93. 16 U.S.C. § 554 (1988); WYO. STAT. §§ 35-9-101 to 304 (1977); MONT. CODE ANN. §§ 76-13-101 to 601 (1990); IDAHO CODE §§ 38-101 to 138, 38-401 to 411 (1988).

throwing a lighted cigarette on forest materials a misdemeanor.<sup>94</sup> Investigation following the 1988 fires shows the four loggers were guilty of throwing lighted cigarettes into forest materials. Showing a violation of one of these statutes can create negligence per se, which then makes the burden of proving the negligence action easier.

Causation can be a difficult hurdle in a fire case because of the nature of fire and weather. Experts in fire behavior were unable to predict the behavior of fires forty-eight hours in advance during the 1988 fires.<sup>95</sup> In *Silver Falls Timber Co. v. Eastern & Western Lumber Co.*, the defendant lawfully started a fire which was then spread by a sudden unexpected and extraordinary wind.<sup>96</sup> The Oregon Supreme Court relieved the defendant of liability because the wind was an intervening cause.<sup>97</sup> Other possible causation problems such as contributory negligence and comparative negligence could limit or preclude recovery.

The federal government could have sued the four loggers who ignited the North Fork fire of 1988 based upon a common law negligence theory. The start of this fire occurred under similar conditions as the fire in *Andrews*. The GYA suffered through an unprecedented dry spell during the summer of 1988.<sup>98</sup> The loggers dropped lit cigarettes into dry underbrush in the Targhee National Forest.<sup>99</sup> These actions would likely be found unreasonable under the circumstances, as in *Andrews*.

Connecting the negligence of the loggers to the total amount of damage resulting from the North Fork fire however, may be more difficult. Unusually high winds persisted throughout the GYA during that summer.<sup>100</sup> August 20, 1988 was declared "black Saturday" because 150,000 additional acres burned in the entire GYA due to high winds.<sup>101</sup> These winds appear to have been sudden and unexpected, creating an intervening cause, as in *Silver Falls*.

*Trespass.* A person is guilty of trespass if he or she intentionally causes a thing to enter land in possession of another or fails to remove from the land a thing which he or she is under a duty to remove.<sup>102</sup> A

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94. MONT. CODE ANN. §§ 76-13-123 to -124 (1990).

95. JOHN D. VARLEY AND PAUL SCHULLERY, *Reality and Opportunity in the Yellowstone Fires of 1988*, in *THE GREATER YELLOWSTONE ECOSYSTEM* 112 (Robert B. Keiter and Mark S. Boyce, eds., 1991) [hereinafter Varley]. Predicting fire behavior weeks in advance is impossible for many of the same reasons why predicting weather is so difficult. April and May of 1988 were extremely wet in the GYA. The National Weather Service predicted normal precipitation for the area as late as July 1988, but the precipitation never arrived. *Id.* at 111.

96. 40 P.2d 703, 713 (Or. 1935).

97. *Id.* at 713.

98. Elfring, *supra* note 1, at 667.

99. SIMPSON, *supra* note 46, at 24.

100. Elfring, *supra* note 1, at 667.

101. SIMPSON, *supra* note 46, at 27.

102. RESTATEMENTS, *supra* note 77, § 158.

finding of trespass will follow if the act that caused a fire did, with substantial certainty, cause the fire to enter the land.<sup>103</sup> The comments to the Restatements (Second) of Torts give the example of a dam being built which backs up water onto another's land. An uncontrolled fire started on adjacent land which spreads onto another's land is analogous the water hypothetical given in the comments.

In *Martin v. Union Pacific Railroad Company*, the Oregon Supreme Court found that the spread of fire from the defendant's railroad right of way onto the plaintiff's rangeland, constituted trespass.<sup>104</sup> The fire originated on the defendant's property and then was negligently permitted to spread onto the plaintiff's land. The court also reasoned that since the spread of the fire resulted from the defendant's negligent conduct, then that was sufficient to constitute trespass.<sup>105</sup> Therefore, trespass can arise when a landowner negligently starts a fire and it then spreads onto another's land.

Use of trespass to recover fire damages is generally reserved to those situations where a fire has spread from one owner's land to another's. Most of the land in the GYA is federally owned. Thus, the occurrence of fires moving onto federal land from non-federal land is unlikely because there is very little non-federal land from where fire might spread. In fact, none of the fires of 1988 started on non-federal land.<sup>106</sup> The federal government can argue and allege the trespass, but it may not be necessary to the success of a suit brought by the federal government to recover forest fire losses. Instead the federal government could rely on a negligence action and argue negligence per se based upon any of the statutes potentially governing fire activity.<sup>107</sup>

*Nuisance.* A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of his or her land.<sup>108</sup> Only those parties who have property rights and privileges in the use and enjoyment of the land affected may recover for a private nuisance.<sup>109</sup> A party will be subject to liability for a private nuisance only when his or her conduct is a legal cause of the invasion of another's private use and enjoyment of the land and the invasion is intentional and unreasonable.<sup>110</sup>

The federal government can, like any private land holder, sue based on common law theories.<sup>111</sup> The Oregon Supreme Court in *Mar-*

103. *Id.* comment (i).

104. 474 P.2d 739, 740 (Or. 1970).

105. *Id.* at 740.

106. See generally GEORGE WUENTHER, *YELLOWSTONE AND THE FIRES OF CHANGE* 62-63 (1988).

107. As with all parties to litigation the federal government must be careful to avoid filing frivolous claims in violation of the rules of civil procedure. See FED. R. CIV. P. 11.

108. RESTATEMENTS, *supra* note 77, § 821D.

109. *Id.* § 821E.

110. *Id.* § 822.

111. *Boone*, 476 F.2d at 278.

*tin*, recognized that a nuisance action can arise when one's property is intentionally, negligently or recklessly invaded by fire.<sup>112</sup> The *Martin* court based its decision on trespass however, not on nuisance.

A nuisance action is intended to apply when there has been a nontrespassory invasion of the use and enjoyment of a person's land. The federal government might bring a nuisance action when a fire adjacent to federal land is ruining the purpose of the federal land. For example, an adjacent landowner may burn his or her property, for whatever reason, and the smoke from the fire destroys the public's ability to recreate on the federal land. No cases exist where the federal government sued another for fire damages based upon a private nuisance theory. It appears that nuisance actions would be limited to particular facts, like smoke interference, because once the fire moves onto another's land the invasion constitutes a trespass.

*Strict Liability.* Strict liability for fire, because it is an "abnormally dangerous activity," is another potential theory for the federal government to consider. Whether an activity is "abnormally dangerous" is generally determined by considering: the degree of risk, the likelihood of harm, the inability to avoid the risk, common usage of the activity, location where the activity occurs, and the value to the community.<sup>113</sup>

In *Koos v. Roth*, the Oregon Supreme Court found a particular fire to be "abnormally dangerous." Thus, the responsible parties were held to be strictly liable for a trespass and for damages caused by the trespass due to the spread of the fire.<sup>114</sup> The court stated that a fire is only "abnormally dangerous" if set under unreasonably dangerous conditions. In *Koos*, the defendant had permitted a fire to grow to 55 acres on open land which was susceptible to winds. A strong wind spread the fire onto neighboring private land causing damage to the property. The defendants had taken the precautions of plowing a border around the perimeter of the field before it burned and providing mobile water tanks to douse the fire. Despite the protective measures, the court considered the burning to be an "abnormally dangerous" condition and imposed strict liability.<sup>115</sup>

The NPS might run into difficulties with several of these determinative factors of strict liability. First, the use of fire as a range management tool is likely a common usage in the GYA. Many ranchers in the arid western states have traditionally used fire for a variety of purposes.<sup>116</sup> The NPS, itself, under its new plan authorizes man-made prescribed fire to alleviate the forest of unwanted fuels.<sup>117</sup> Thus, there

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112. *Martin*, 474 P.2d at 740.

113. RESTATEMENTS, *supra* note 77, §§ 519-520.

114. 652 P.2d 1255, 1267-68 (Or. 1982).

115. *Id.* at 1267.

116. Varley, *supra* note 95, at 108.

117. *Management Plan*, *supra* note 16, at 50-51.



is a good argument that fire as a range and forest management tool is customary in the GYA. Second, the value of ranching and timbering to communities in the GYA may be strong enough to outweigh the dangerous attributes of fire.

The Restatements (Second) of Torts states: "In west Texas, a dry land whose livestock must have water, such a reservoir is regarded as a natural and common use of the land. The same conclusion has been reached by many of the western states as to irrigation ditches."<sup>118</sup> By analogy, it could be argued that clearing ditches with fire is a natural and common use of the land. Therefore, basing an argument solely on a theory of "abnormally dangerous activity" and strict liability could be a risky endeavor.

Fires started by private parties will continue to exist in the GYA. The NPS has many viable theories to recover losses caused by these fires. However, due to the high costs of fighting forest fires, the limited funds of many potential defendants and the difficulties of proving causation, the federal government may often be forced, or choose, to absorb the losses.<sup>119</sup> When a fire is of smaller size, however, it may be prudent for the federal government to bring an action.

#### *Remedies Available to Non-Federal Parties Injured by Fires Permitted to Burn on NPS Land*

Inevitably, under the new plan a prescribed fire, whether natural or man made, will burn beyond its prescriptions and cause damage to private entities. Because mother nature is so unpredictable, even the best preparations cannot ensure against a fire spreading beyond its desired bounds. Human beings cannot always control fire, no matter how much they wish; "the raw, unbridled power of these fires cannot be overemphasized."<sup>120</sup>

Using the new plan and the 1988 experience in the GYA, the next part of this discussion will analyze how a non-federal party might seek relief for losses due to fires ignited on or passing through federal lands. The discussion focuses on three potential theories of relief to these non-federal parties: first, the Federal Tort Claims Act (FTCA) which governs all tort claims brought against the federal government,<sup>121</sup> second, an action for inverse condemnation which remedies an unconstitutional taking, and third, a potential political remedy will be briefly examined.

118. RESTATEMENTS, *supra* note 77, § 520 comment k.

119. SIMPSON, *supra* note 46, at 26. The cost of fighting the 1988 North Fork Fire amounted to approximately \$25 million and was started by four individuals who were never sued civilly by the federal government.

120. Elfring, *supra* note 1, at 671.

121. 28 U.S.C §§ 2671-2680 (1988).

### Federal Tort Claims Act (FTCA)

The 1946 FTCA made the United States liable for torts to the same extent as a private person in the same situation.<sup>122</sup> This waiver of sovereign immunity however, is fraught with limitations. For example, the United States can never be held liable for prejudgment interest or for punitive damages.<sup>123</sup> FTCA claims must be filed with the appropriate agency within two years of the action or omission.<sup>124</sup> More important is the limit set by the discretionary function exception. Under this exception, the United States retains immunity for an act or omission by an employee which involves certain types of discretion.<sup>125</sup>

*The Discretionary Function Exception.* Any discussion of the FTCA must begin with the discretionary function exception because a party will not have standing to bring the tort action if the responsible government employee was performing his or her duty within the exception. In *Defrees v. United States*, a private land holder sued the USFS, in the Federal District Court for Oregon, for failing to suppress and control a fire which started on USFS land.<sup>126</sup> The particular fire which caused Defrees' damage was one of twenty fires ignited during a single two hour period due to lightning strikes from a system of dry thunderstorms.<sup>127</sup> Because of the high incidence of fire and the lack of available equipment and trained personnel, the USFS had to prioritize its suppression efforts. Because the fire which eventually burned the Defrees' land was not an immediate threat to private property and appeared to be burning more slowly, the USFS decided to concentrate its efforts elsewhere.<sup>128</sup> The court held that the USFS actions addressing this situation were properly within the realm of actions intended to be protected by the discretionary function, and thus immunity was sustained.<sup>129</sup>

The *Defrees* court analyzed the discretionary function issue through a two step process. First, it asked whether the USFS had any discretion or choice in what actions to take. The court found that there was an element of choice because of the limited materials and personnel.<sup>130</sup> Had the court not found an element of choice, then the federal government would not have retained its immunity. Second, the court asked whether the USFS's discretion involved social, economic or political policies that were intended to be protected by the exception. The court held that the decisions, establishing priorities

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122. 28 U.S.C. § 2674 (1988).

123. *Id.*

124. 28 U.S.C. §§ 2675(a), 2401(b) (1988).

125. 28 U.S.C. § 2680 (1988).

126. 738 F. Supp. 380 (D. Or. 1990).

127. *Id.* at 381.

128. *Id.* at 381-82.

129. *Id.* at 385.

130. *Id.*

and assigning personnel and equipment, involved these protected policies.<sup>131</sup>

However, in *Rayonier, Inc. v. United States*, an earlier decision, the United States Supreme Court declared that the USFS would be liable for negligently fighting a forest fire, if under similar circumstances, a private party would be held liable under state law.<sup>132</sup> This case was decided 11 years after the enactment of the FTCA, but fails to mention the discretionary exception or whether it applied to USFS employees fighting fire.

The *Defrees* court, in interpreting *Rayonier*, said that this omission could be interpreted in one of two ways: first, that the discretionary immunity does not exempt forest service employees fighting fires, or second, that based on the particular facts of *Rayonier*, the exception did not apply.<sup>133</sup> The *Defrees* court opted for the latter interpretation because of the distinguishable facts in the two cases.<sup>134</sup> In *Rayonier*, the USFS had permitted a fire to smolder for forty days until strong winds caused the fire to spread. The USFS also had a sufficient supply of personnel and equipment to extinguish the fire.<sup>135</sup>

Based upon *Defrees* and *Rayonier* it appears that the discretionary function exception hinges on whether the federal agency has to make choices because it lacks the necessary equipment and personnel to extinguish a fire. Therefore, in a scenario similar to the fires of 1988, where the supplies and personnel were insufficient for the size of the conflagration, it appears that the discretionary function exception would apply.

In *Mandel v. United States*, the Eighth Circuit Court of Appeals applied a different formulation of the test for the discretionary function exception.<sup>136</sup> Mandel sued the United States for injuries he sustained in Buffalo River National Park. Based upon advice given to him from a park ranger as to the best place to swim, Mandel dived into the river and hit a rock with his head causing permanent paralysis.<sup>137</sup> The court based its discretionary function decision on a distinction between planning level decisions and operational level decisions. Planning level decisions grounded in social, economic or political policies are protected by the exception, but operational level decisions are not.<sup>138</sup> An operational level decision is one where the government employee is simply involved in the day-to-day management of an established policy.<sup>139</sup> The court held the failure to warn Mandel of the

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131. *Id.*

132. 352 U.S. 315 (1952).

133. *Id.* at 384.

134. *Defrees*, 738 F. Supp. at 384.

135. *Rayonier*, 352 U.S. at 317.

136. 793 F.2d 964, 967 (8th Cir. 1986).

137. *Id.* at 966.

138. *Id.* at 967-68.

139. *Ducey v. United States*, 713 F.2d 504, 515 (9th Cir. 1983).

known submerged rocks and the advice as to the best swimming hole were operational level acts and omissions and found that the United States was not immune.<sup>140</sup> Applying the *Mandel* analysis to fires in the GYA offers a higher prospect of success.

YNP's new fire plan has essentially completed the planning stages. Once the plan is finalized and approved, all which remains is to implement its standards and mandates. The plan, as it stands now, includes some very specific standards and guidelines governing the fire management process.<sup>141</sup> Once the NPS adopts this new plan the policy making based upon social, economic and political factors will be over. Thus, when an NPS employee fails to comply with the set guidelines, he or she will be involved in the day-to-day management under the new plan, which is at the operational level. Examples of operational level acts would be when an NPS employee fails to suppress a fire when the level of the environmental conditions exceed those set in the prescription or fails to suppress a fire which starts in the suppression zone. The NPS would then be open to an action against them under the FTCA.

There is a blurred line between which decisions are made at the operational level and which decisions are made at the planning level. Where a fire is ignited naturally or by management within the proper zones of the park and within the level of the environmental conditions set in the prescriptions for that zone, and the fire then becomes uncontrollable, a tort suit against the United States will likely be barred. In those circumstances, the NPS has followed the proper procedure and guidelines set by the new plan. The NPS has done nothing negligent in the day-to-day management, instead the new plan itself could arguably be at fault because its guidelines did not succeed. If private property was damaged by fire under these conditions, the owner could argue that the new plan was at fault, but the creation of the new plan is likely a planning level decision. Therefore, the suit would be barred by the discretionary exception to the FTCA.

A claimant should argue the unreasonableness of a particular employee's act or omission instead of asserting the unreasonableness of the new plan's guidelines. When a fire escapes federal land in the GYA and burns private property, the owner of that property should investigate the management of that particular fire. The party should ascertain if the NPS followed the precise standards set in the new plan. For example, a party could check to see if the fire started in either the conditional zone or the prescribed natural fire zone. A party could also inquire into the environmental conditions on the day that the fire started and during the time it was permitted to burn. If the

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140. *Mandel*, 793 F.2d at 968.

141. *Management Plan*, *supra* note 16, at 52. For example, the prescribed natural fire program provides a specific flow chart for NPS employees to follow. This flow chart gives the exact appropriate response when a fire begins under the new plan's jurisdiction. *Id.* at 53.

burning index, energy release component, or the drought index were above the level set in determining the prescription, then the fire should have been suppressed at the operational level. This information is available from the NPS and the USFS through the Freedom of Information Act.<sup>142</sup>

*Beyond the Discretionary Function Exception.* Proving that a tort action against the federal government is not excused due to the discretionary exception of the FTCA simply establishes standing. As was evident in *Defrees*, this is not a simple task. Given circumstances like *Defrees* or similar to the 1988 fires, a court is unlikely to find negligence by the fire fighting agency due to the extreme weather conditions and number of local fires. The court will likely be sympathetic with a federal agency's dilemma of priorities and limited resources.<sup>143</sup> However, where the guidelines are clearly established, as with the new plan, a court may be less sympathetic if the agency failed to properly consider the weather conditions and available personnel and equipment.

Once in court, a plaintiff must then prove all the elements of the underlying cause of action. The law of the place where the act or omission occurred governs the federal government's liability.<sup>144</sup> Thus, in the GYA a claimant would rely upon the statutory or common law of Wyoming, Montana, or Idaho.

An FTCA action against the United States must seek damages for injury or loss of property.<sup>145</sup> In *Oregon v. United States*, Oregon was trying to recover the cost of suppressing a fire that was set by the USFS and then burned out of control and onto state property. The Ninth Circuit Court of Appeals held that the state action could not be maintained under the FTCA because the action did not contain a claim for damage due to injury or loss of property. Instead, the state was trying to recover the cost of suppressing the fire based upon an Oregon statute which provides for recovery of suppression costs.<sup>146</sup> Therefore, a cause of action under the FTCA must be for damages due to injury from a fire, not for suppression costs.

All common law defenses available to a private party are also available to the federal government when sued under the FTCA. For example, in *Mandel* that court applied the theory of comparative negligence.<sup>147</sup> In *Wenzel v. United States*,<sup>148</sup> a private party sued the USFS for damages which occurred when the USFS entered the plain-

142. 5 U.S.C. § 552 (1988).

143. *Defrees*, 738 F. Supp. at 385.

144. 28 U.S.C. § 1346(b) (1988); *Mandel*, 793 F.2d at 968.

145. *Oregon v. United States*, 308 F.2d 568, 569 (9th Cir. 1962) *cert. denied*, 372 U.S. 941 (1963).

146. *Id.* at 569.

147. *Mandel*, 793 F.2d at 968-69. The court apportioned fault based upon an Arkansas statute because that is where the Buffalo River National Park is located.

148. 225 F. Supp. 726 (D. Idaho 1964).

tiff's land to fight a forest fire. In applying the common law doctrine of necessity, the court relieved the USFS of liability for the trespass because the fire had to be fought to avoid its spread.<sup>149</sup>

Negligence has been established and liability imposed on the United States for forest fire damage. In *Maloof v. United States*,<sup>150</sup> the federal government was found negligent for starting a fire through an independent contractor during hazardous weather conditions. The contractor had ignited a fire during a period of low humidity, high winds, and without equipment available to prevent the spread of the fire.<sup>151</sup>

The weather conditions during the 1988 fire were even more severe than the conditions that existed in *Maloof*. In 1988, the region was in the midst of an unprecedented drought and the dangers of dry thunderstorms were prevalent.<sup>152</sup> The entire GYA is normally dry and windy during the critical summer months. It receives most of its annual moisture in the form of snow during the colder months.<sup>153</sup> It therefore seems unreasonable for a prudent person to ever permit a fire to burn during the summer months in the GYA if the *Maloof* analysis is used. However, the fact that *Maloof* occurred in a densely populated eastern state and because the fire in *Maloof* was ignited by an independent contractor employed by the federal government, these two situations are distinguishable. YNP is located in a sparsely populated area far removed from any major urban population. Therefore, a court would be more likely to find a prescribed fire system reasonable in the GYA. However, if a fire is permitted to burn after the new plan is implemented, under environmental conditions similar to those existing in *Maloof*, then it is likely that the new plan would be violated. The environmental criteria established in the new plan would likely mandate suppression.

*Damages: Lost Profits to Local Businesses.* Until this point the discussion has focused on the recovery of general property damages. Following the 1988 fire there has been concern over potential damage done to the tourist economy in the GYA.<sup>154</sup> Therefore, the potential for recovery of lost tourism dollars will be examined.

In specific circumstances courts have recognized the potential for recovery of lost profits due to the negligent act of another. The Ninth Circuit Court of Appeals in *Union Oil Company v. Oppen*, held that a group of fishermen could recover lost profits due to an oil spill if they

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149. *Id.*

150. 242 F. Supp. 175, 183 (D. Md. 1965).

151. *Id.* at 179.

152. SIMPSON, *supra* note 46, at 20.

153. Schullery, *supra* note 7, at 688.

154. *Fires May Have Jeopardized Yellowstone Tourism in the Longrun*, LARAMIE DAILY BOOMERANG, March 8, 1989, at 10. In a survey commissioned by the Wyoming and Montana Travel Commissions, it was suggested that, because of the belief by most that the Park had been destroyed a number of people would never come to visit. *Id.*

could prove the losses.<sup>155</sup> The oil spill covered much of the area that the fishermen used for commercial fishing purposes and the fishermen wanted recovery for the alleged reduction in the commercial fishing potential. The Ninth Circuit's analysis focused on two theories. First, the court reasoned that the defendants should have reasonably foreseen that this injury to the fishing industry would result from a negligent oil spill of this magnitude. The killing of fish is widely understood as a natural result of an oil spill, reasoned the court. Second, the court found the oil company to be the "best cost-avoider" under an economic theory.<sup>156</sup> That is, the oil company was in the best position to have avoided the accident with proper measures. The holding limited recovery to the commercial fishermen only and conditioned recovery on the plaintiff's ability to provide proof of the losses with reasonable certainty.<sup>157</sup>

Those businesses which suffered lost profits from the 1988 fire in the GYA might make a similar argument as the one recognized in *Union Oil*. It seems to be reasonably foreseeable that a large fire in the GYA will keep some tourists from traveling to the area. As a direct result, the businesses which depend heavily on the traffic coming into the area will suffer losses. The federal government also seems to be the "best cost-avoider" because it has the personnel, training and equipment to avoid a large fire. However, these businesses will have difficulty in proving the lost profits with any certainty because the losses due to decreased visits to YNP may have been recouped during the fire by sales to the fire fighting crews dispatched to the area.<sup>158</sup>

### Inverse Condemnation

Where the United States physically enters private land and ousts the owner, the owner then has the right to bring an action in inverse condemnation to recover the value of the land on the date of the intrusion by the government.<sup>159</sup> The ultimate test in an inverse condemnation suit is whether the government action deprives the owner of all or most of his or her interest in the property.<sup>160</sup> The claimant must show that the government's direct act caused the invasion of the private property but a party does not have to prove that the government

155. *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

156. *Id.* at 569. The "best cost-avoider" analysis was created by Professor Calabresi as a means of apportioning loss. The "best cost-avoider" is the party who could have most easily prevented the accident. *Id.*

157. *Union Oil Co.*, 501 F.2d at 570.

158. *Western Wyoming Boomed as Yellowstone Burned*, CASPER STAR TRIBUNE, February 19, 1989, at A-3. The four western Wyoming counties closest to YNP realized an overall increase in sales taxes of 7.9% during the summer of 1988.

159. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984); U.S. CONST. amend. V. Inverse condemnation is an action in which a property owner sues to recover just compensation for a taking of his or her property when a government has not used the condemnation process.

160. *Foster v. United States*, 607 F.2d 943, 950 (Ct. Cl. 1979).

intended to invade or take.<sup>161</sup> Therefore, the necessary elements for an inverse condemnation action are: (1) physical entry upon private land by the government, (2) a deprivation of all or most of the uses of the land, and (3) an action by the government which causes the invasion. However, the question of whether there has been a constitutional taking is analyzed in a case by case approach.<sup>162</sup>

An inverse condemnation action can also arise when the government acts and the action works a temporary taking. In *First English Evangelical Lutheran Church v. Los Angeles City*, the United States Supreme Court held that when a zoning regulation works a temporary taking of all the use of private property, a cause of action for inverse condemnation may arise.<sup>163</sup> In this case, a California zoning regulation made it illegal for a church to rebuild certain structures which had been destroyed in a flood. The United States Supreme Court remanded the case to the California Supreme Court for a determination of whether *all* uses had been taken. The state court ruled against the church because the regulation did not affect all the possible uses.<sup>164</sup> The United States Supreme Court's ruling before remand indicates that a temporary taking may be actionable if it deprives the owner of all uses for the property.

The Just Compensation Clause of the United States Constitution requires the government to pay the landowner the value of the use of his or her land during the period of the temporary taking.<sup>165</sup> Value is measured by the landowner's loss at the time of the taking, not the value of the benefit to the government.<sup>166</sup> The taking occurs when the government actually intrudes.<sup>167</sup> In *First English Evangelical Lutheran Church*, had a taking been found, the compensation would have been measured from the time the zoning ordinance went into effect until it was repealed.

During the summer of 1988, the communities of Silver Gate and Cooke City, Montana were repeatedly threatened by the Storm Creek Fire.<sup>168</sup> On September 4-5, 1988, these two communities were evacuated by the federal government due to the proximity of the Storm Creek Fire. The Storm Creek fire began in a "wilderness" area and was not subject to immediate suppression because the existing management policy permitted naturally ignited fires to burn in that re-

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161. *Sheldon v. United States*, 19 Cl. Ct. 247,251-52 n.6 (1990).

162. *Agins v. Tiburon*, 447 U.S. 255 (1980).

163. 482 U.S. 304, 322 (1987).

164. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1374 (1989).

165. *First English Evangelical Lutheran Church*, 482 U.S. at 319.

166. *United States v. Causby*, 328 U.S. 256, 261 (1946).

167. *Kirby Forest Industries, Inc.*, 467 U.S. at 5.

168. SIMPSON, *supra* note 46, at 28. The Storm Creek fire was ignited by lightning on June 14, 1988 in the Absoroka-Beartooth Wilderness area north of YNP's northeast entrance. The fire burned in a total area of 95,000 acres before it was extinguished by the fall snows. *Id.* at 21.



mote area.<sup>169</sup>

In this very specific factual circumstance, where the USFS or the NPS affirmatively decides to permit a natural fire to burn which later becomes uncontrollable and thus forces evacuation of or damages private homes and businesses, an inverse condemnation action might be a means to seek redress. The government's failure to take action forced a physical invasion and temporary taking of private land and all its uses. If successful under this theory, a claimant could recover for the loss of use of the property during the temporary taking. Had the property been damaged, the temporary taking may have been longer than the evacuation period. If the property had a business on it, then the owner or operator might recover business losses during the taking's duration. However, this compensation would only compensate for lost business over the period in which the occupant was denied his or her use.

#### Special Remedies Made Available for the 1988 Fires.

In 1990, the United States Congress directed the USFS to settle all the damage claims for private property injured by the 1988 GYA fires. Funds were provided in an emergency appropriations act passed on May 25, 1990.<sup>170</sup> The relevant section directs the USFS to negotiate and reach a compromise on claims resulting from 1988 fires which began as prescribed fires and later became wildfires. The act gave the claimant ninety days to file a claim and permitted claims already settled under the FTCA to be reconsidered.<sup>171</sup> Evidently, Congress felt compelled to make this money available because the USFS was not willing to admit negligence for these prescribed fires in 1988.<sup>172</sup> This act did not provide funds for damages caused by the 1988 North Fork fire because the North Fork fire did not start as a prescribed fire. The Storm Creek Fire, which threatened the towns of Cooke City and Silver Gate did begin as a prescribed fire and is covered by the 1990 act. This act did not guarantee compensation for any alleged damage, it only directs the USFS to negotiate and provide the funding. Approximately 106 claims totalling 7.2 million dollars were filed as of July 1990.<sup>173</sup>

Methods of recovery from the federal government for private parties injured by future fires beginning in YNP are very limited. The federal government can escape liability through the discretionary ex-

169. *Final Recommendations*, *supra* note 26, at 25,663.

170. Emergency Supplemental Appropriations for Disaster Assistance, Food Stamps, Unemployment Compensation Administration, and Other Urgent Needs, and Transfers, and Reducing Funds Budgeted for Military Spending Act of 1990, Pub. L. No. 101-302, 104 Stat. 213, 230-231 (1990) [hereinafter *Disaster Act 1990*].

171. *Id.*

172. *Yellowstone Fire Claims Now Total \$11 Million*, CASPER STAR TRIBUNE, July 24, 1990, at B1.

173. *Id.*

ception, by proving the existence of an intervening cause or by the two year FTCA statute of limitations. Perhaps the injured property owners could use the political process by petitioning Congress to pass legislation as they did in 1990. The national media attention and the severity of the 1988 fires however, likely contributed to Congress's decision to settle claims. Other Congressmen viewed the supposed devastation of YNP through the media and might have seen this appropriation as politically necessary because their constituents also saw the media reports. Seeking redress through the Takings Clause is reserved for specific situations. The inverse condemnation argument discussed above is untested and unique, but it might be a method for compensation due to forest fire damage. The NPS seems to be substantially shielded from liability during normal fire years if it follows the mandates of the new plan because of the discretionary exception under the FTCA and the limitations of an inverse condemnation action.

#### CONCLUSION

The new plan for YNP appears sound in principle and in law. The new plan successfully incorporates the benefits of fire in promoting ecological diversity and protects against harm to YNP buildings, visitors and YNP's neighbors. A reoccurrence of the 1988 fire season is unlikely in the near future. Based upon scientific data, a conflagration of that intensity is believed to repeat itself only every 200-300 years.<sup>174</sup> The new plan sets more stringent standards for the allowance of prescribed fire. Therefore, YNP and the GYA will not likely face the massive damages of 1988 during the lifetime of this new management plan.

It is likely that the federal taxpayer will continue to foot most of the cost of forest fires in the GYA. The NPS can avail themselves of a number of theories for recovery when a fire is the fault of another. However, state actions using these theories vary from state to state. The amount of recovery, in both state and federal actions, is limited by most statutes and by the defendant's ability to pay. If 1988 is any indication of how the federal government will deal with these actions then we will see very few civil suits against individuals who cause fires in YNP. This may be an acceptable burden on the taxpayer if the NPS is as successful in its campaign promoting the benefits of natural fire as it was in promoting the suppression of all forest fires with "Smokey the Bear."<sup>175</sup>

The potential for suits against the United States for forest fire damage to private property has increased since the days of immediate

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174. Despain, *supra* note 14, at 698-99.

175. *Management Plan*, *supra* note 16, at 40. The USDI proposes to inundate the public with information about the new plan. The NPS proposes to use pamphlets, posters and interpretive talks to explain the role of fire in the GYE. *Id.*

suppression. The new plan and the geographical location of YNP, however greatly decrease the risk of liability. When there is a clear violation of the new plan's standards by a NPS employee, a successful FTCA claim may follow. If the NPS employees follow the operational level mandates of the new plan, then it is unlikely that a court will find the NPS negligent for fire damage to private property or business losses.<sup>176</sup> Additionally, most of the lands surrounding YNP are federally owned, and therefore, the number of potential claimants is significantly reduced.

It is important for people to be aware of inverse condemnation as a potential remedy when the government encroaches on private property. This remedy is available only in specific circumstances and may be limited to actions where fire causes a deprivation of all the uses of the property. Inverse condemnation is a cause of action that may be arguable in a wide variety of fact situations, from the actual physical removal of the owner from private property to the effect of zoning ordinances on private property. Inverse condemnation often fails however, because the plaintiff fails to prove a taking of all or most uses.

The USDI and USDA have been very careful and thorough in their creation of this new plan. The USDI and USDA enlisted the assistance of a group of experts to investigate the 1988 fires and the old plan. They then utilized the team's advice to draft a new plan and an environmental assessment. A repeat of fires in the GYA that occurred in 1988 is not likely in the near future due to the careful new plan and the cyclical nature of forest fires, but the potential for small damaging fires still exists. Therefore, the federal government and private parties must be prepared to possibly compensate others for losses due to forest fires.

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176. SAX, *supra* note 37, at 81. Sax suggests that land owners in the GYA will increasingly see the scope of their private property right shrunk by the modern view of YNP as an entire ecosystem. He analogizes this with the limits placed on private property rights by zoning legislation in large urban areas. *Id.*