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The Tension Between Transparency and Public Appeasement in the Formulation of Wildfire Management Strategies and the Use of Wildfire as a Restoration Tool

Rachael E. Salcido

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THE TENSION BETWEEN TRANSPARENCY AND PUBLIC APPEASEMENT IN THE FORMULATION OF WILDFIRE MANAGEMENT STRATEGIES AND THE USE OF WILDFIRE AS A RESTORATION TOOL

Rachael E. Salcido

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I. INTRODUCTION

Fire is both creative and destructive. Its dual nature poses unique restoration potential and significant risks. A great range of values are implicated, as forests in the United States serve numerous purposes. Wildfire challenges our public land managers and other policymakers with a myriad of economic, environmental and social issues as we pursue the construction of a cohesive national wildland fire policy. Wildfires are predicted to increase in a changing climate, thus, the urgency of such a policy is evident.

† Author Bio: Professor of Law, University of the Pacific, McGeorge School of Law.

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1. Economic issues can be divided into many parts. There is the undesired destruction of property, chattels and tree stands by fire. See generally Karen Bradshaw, A Modern Overview of Wildfire Law, 21 FORDHAM ENVTL. L. REV. 445, 466–75 (2010) (identifying losses such as tree stumpage and infrastructure damage). The economic challenge of funding fire management is also an issue, either in terms of the cost of fuels reduction projects, prescribed burning, and the cost of fire suppression. Environmental issues encompass air quality concerns, flora, and fauna including wildlife and habitat impacts terrestrial and aquatic. Id. See Michael P. Dombek et al., Wildfire Policy and Public Lands: Integrating Scientific Understanding with Social Concerns Across Landscapes, 86 CON. BIOL. (Aug. 2004).

2. For a discussion of global trends see Yongqiang Liu, John Stanturf & Scott Goodrick, Trends in Global Wildfire Potential in a Changing Climate in Adaptation of

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In the past few years, hundreds of thousands of acres have burned in western states like California, Colorado, New Mexico, Utah, and Texas. While some of those fires were prescribed burns, intended to mimic natural patterns of fire on fire-adapted landscape, many others were not. Wildfires that have blackened skies, destroyed homes and caused human casualties have increased public scrutiny of the management of forests, and placed a corresponding high burden of accountability on land managers to keep the public safe from wildfire dangers. Moreover, incidents like the prescribed burn in Bandelier National Monument that got out of control in 2000 also drew attention to the risk posed by prescribed burns intended to reduce the danger of catastrophic wildfires to communities living adjacent to forested public lands by eliminating vegetation that fuels large fires.

We have now had several years of progress in exploring the risks and rewards of wildfire through renewed legislative, administrative, public land agency and stakeholder attention. Although the picture is somewhat hazy, some of the contours of the developing strategies are clear. Striking a balance between transparency on the part of public land managers and their competing desire to appease various public constituents may impede robust wildfire restoration. Will it be possible—from the standpoint of public acceptance—to let wildfires do their work?

Wildfire restoration is significantly defined by how much people rely on natural processes or choose to reject them in favor of pursuing competing goals. With significant anthropogenic changes to the environment, including a growing population in the Wildland-Urban Interface (“WUI”), it is politically infeasible to allow the reintroduction of wildfire prior to other fire management tools, and perhaps not at all.


4. See generally Jerry Williams, Reconciling Frictions in Policy to Sustain Fire-Dependent Ecosystems, Vol. 65 No. 4 FIRE MGMT. TODAY 4 (Fall 2005).

in places where fire would pose intolerable risk to people and private property. Whether we will shift to a wildfire policy that employs a science-based, case-by-case decisionmaking process that helps replicate natural forest conditions will depend in part on the success of efforts to build a wildfire restoration constituency.

In this essay I explore how the Healthy Forests Restoration Act 2003 (“HFRA”) and development of a National Cohesive Wildland Fire Management Strategy pursuant to the Federal Land Assistance, Management and Enhancement Act 2009 (“FLAME”) purchased peace with WUI landowners. These laws emphasized “fire-adapted communities” and potentially signaled acceptance of (or normalizing) development in areas of high fire danger. By emphasizing risk reduction narrowly, we may have missed an opportunity to advance broader restoration objectives connected to bringing fire back to fire-adapted landscapes.

II. AN ABBREVIATED HISTORY OF WILDFIRE ON PUBLIC LANDS

Fire is a natural part of forest ecology. Many of the Western Forests are “fire-adapted” forests, meaning the environment responds to fire, and some elements are dependent on fire disturbances. The National Forest Service was long under the misguided impression that active management could continue to yield lumber and healthy forests. Obviously fire is a threat to the commodity view of forests, and thus early policy prescriptions identified fire as a threat to multiple uses of our forests.

In the 1960s-70s there was a shift in thinking about wildfire, with greater understanding that it was a natural part of forest ecology. Both the Forest Service and National Park Service allowed “prescribed natural fire” (also known as the “let burn” policy) in the 1970s, but following the 1988 Yellowstone lightning ignited fire those

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6. This is highly dependent on the particular forest, as some are adapted to low frequency, high intensity; some to high frequency, low intensity fires. Some burn in a mosaic pattern. This, what may be considered natural is dependent on the specific physical conditions, types of trees, vegetation, weather and altitude, among other factors. STEPHEN F. ARNO & STEVEN ALLISON-BUNNELL, FLAMES IN OUR FOREST: DISASTER OR RENEWAL? 65-88 (2002). Regarding social issues see Jerry Williams, Reconciling Frictions in Policy to Sustain Fire-Dependent Ecosystems, Vol. 65 No. 4 FIRE MGMT. TODAY 4, (2005) (noting the need for more understanding of social and political perspectives relating to wildfire).

7. Throughout this essay I discuss forests without differentiating between National Forests, National Parks, or other public lands such as those managed by the Bureau of Land Management. However most attention is focused on actions of the National Forest Service.

8. See generally PAUL HIRT, A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR TWO (1994) (Under this assumption, the Forest Service gave far too much weight in management decisions to logging trees.).

9. Id. at 235 (noting it took a while for the Forest Service to come around to this way of thinking).
policies were ended. Then, until about the 1990s, the forests were actively managed to eradicate fire from the landscape. Fire suppression efforts by land managers have contributed to a decline in forest health, with actions to eradicate fire often more environmentally harmful than fire itself. But it would be remiss not to note that multiple human intrusions have also degraded environmental conditions in the forests, such as pollution impacts, patterns of development that fragmented wildlife habitat, grazing, logging, intensive recreation, in addition to invasive species, disease and insect infestations. Other factors, such as extreme weather conditions, past grazing and logging patterns should not be ignored as influences on the severity of wildfires in recent years. It is widely believed that fire suppression efforts contributed to the risk of catastrophic wildfires as land managers sought to eradicate even low intensity fires from the landscape, and fuels built up on the public lands. Much work to improve the health of forests is ahead of us, and this will necessarily occur in a shifting climate that adds further uncertainties.

In 1995, the Federal Wildland Fire Management Policy acknowledged the important role of fire as “a critical natural process” which would be integrated into land and resource management on a landscape scale. Public land laws have not entirely caught up to the new ecological knowledge regarding the potential utility of wildfire in our forests. The National Forest Management Act (“NFMA”) and other environmental laws such as the National Environmental Policy Act (“NEPA”) that facilitate public comment are not directly useful to overcoming public resistance to the wildfire restoration agenda, al-

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13. U.S. GEN. ACCT. OFF., WESTERN NATIONAL FORESTS: A COHESIVE STRATEGY IS NEEDED TO ADDRESS CATASTROPHIC WILDFIRE THREATS 5 (1999). Explaining why there has been an increase in the number of very large fires on national forest lands, the report notes that “scientists and agency officials believe that this increase in large, intense, uncontrollable, and catastrophically destructive wildfires is in large part the result of the Forest Service’s decades-old policy of putting out wildfires on national forests. This policy disrupted the historical occurrence of frequent, low-intensity fires in many areas of the interior West.” Id. Other factors, such as extreme weather conditions, past grazing and logging patterns should not be ignored as influences on the severity of wildfires in recent years. See Rebecca K. Smith, War on Wildfire: The U.S. Forest Service’s Wildland Fire Suppression Policy And Its Legal, Scientific, and Political Context, 15 U. BALTIMORE L. 25, 38 (examining various factors impacting cause of recent large wildfires in U.S.).
though they do set a minimum standard for agency transparency.\textsuperscript{14} Mostly, reforms have reinforced the negative cast on wildfire as singularly harmful and an enemy to attaining objectives of public lands policies.\textsuperscript{15}

In 1999, the Government Accounting Office highlighted dangers from catastrophic wildfires in the Western Forests, touching off significant scrutiny of federal wildfire policies. In response to public concern for safety, Congress narrowly addressed the issue as an unhealthy buildup of “fuels” in the forest. The Healthy Forests Restoration Act 2003 (“HFRA”) clearly supported community collaboration in the development of wildfire management strategies, such as promoting the preparation of Community Wildfire Protection Plans (“CWPPs”).\textsuperscript{16} It also reformed applicable laws impairing challenges to logging projects cast in the management objective of “fuels reduction.”\textsuperscript{17} HFRA does contain some restrictions on the scope and size of the projects allowed. For example, it authorizes no more than 20 million acres of public land for fuel treatment, and it also sets acre limits within projects. Moreover, it applies to National Forests and BLM multiple-use lands, but not wilderness areas or wilderness study areas, National Parks or otherwise protected lands. Nonetheless, HFRA dramatically oversimplifies the issues to be confronted if we are to actually achieve “healthy forests.” It reflects only minor support for a return of fire to the landscape. A related program was carried forth by the administration of President George W. Bush, which created the Healthy Forest Initiative targeting administrative, procedural delays to fuel reduction projects.\textsuperscript{18} Much of this initiative has been blocked or invalidated by litigation.

In 2009 Congress adopted the Federal Land Assistance, Management and Enhancement Act (“FLAME”).\textsuperscript{19} The act addressed how to finance emergency wildfire activities on Department of the Interior

\begin{itemize}
  \item \textsuperscript{15} Smith, \textit{supra} note 13, at 43 (crediting the capitalization on public fear for HFRA passage).
  \item \textsuperscript{16} A CWPP must be developed collaboratively, gain approval from city or county government, local fire departments and the state entity responsible for forest management. 16 U.S.C. 6511 (3)(A). A CWPP must also identify and prioritize “areas for hazardous fuel reduction treatments” and “recommends the types and methods of treatment on Federal and non-Federal land that will protect 1 or more at-risk communities and essential infrastructure”. . . . 16 U.S.C. § 6511(3)(B).
  \item \textsuperscript{18} \textsc{Off. of the President, Healthy Forests: An Initiative for Wildfire Prevention and Stronger Communities} (2002). \textit{See also} P. Lynn Scarlett, Assistant Sec’y of the Interior for Policy, Mgmt. and Budget, \textit{Healthy Forests and Wildfire Policy: An Update, Trends, ABA Section of Environment, Energy, and Resources Newsletter} , Mar.–Apr. 2003, at 14.
\end{itemize}
and National Forest System Lands. It also provided beneficial funding treatment when the government fights fires on private land. Moreover, the Act required that the agencies (DOI and Agriculture) collaborate to prepare and submit to Congress a comprehensive strategy for wildland fire management.

The Cohesive Wildland Fire Management Strategy, spurred by FLAME, created a collaborative process across jurisdictions to address the growing threats from wildfires. The Wildfire Leadership Council (“WFLC”), a collaboration among federal, state, local and tribal governments, was renewed with an April 2010 Memorandum of Understanding (“MOU”) among the Department of Interior, Agriculture and Homeland Security, the federal agencies that convene the council. The MOU asserts the goals of working strategically to “develop, review, update, and monitor implementation of:

- Federal Wildland Fire Management Policy;
- A Cohesive Wildfire Management Strategy (2009) (Quadrennial Fire Review);
- 10-Year Comprehensive Strategy (August 2001) & Implementation Plan (December 2006); and
- Other policies, procedures, and program management activities designed to protect communities and natural resources from wildfires, reduce hazardous fuels, restore fire-adapted ecosystems, and assist communities in their efforts to reduce loss from wildfires.”

In pursuit of this agenda, the agencies have prioritized supporting the creation of “fire adapted communities” that can avoid loss of life or property in the face of future wildfires.

Certainly coordination among agencies is a step in the right direction to address the risks of wildfire, but much less emphasis has been directed toward the ecological rewards. Thus, in large part these efforts have made only some progress in addressing public skepticism of wildfire as a restoration tool. By empowering citizens through a commitment to community collaboration in identifying hazardous fuels project prioritization, progress has been focused significantly on the WUI. CWPPs are even required to identify the methods to be used on public lands to reduce hazardous fuels. In sum, WUI communities were given leverage to participate in land management planning to reduce wildfire risk.

20. § 502(e)(3) (no increased limitation on funds if firefighting for defending private lands).
22. Id.
III. WILDFIRE AND ECOLOGICAL RESTORATION

Ecological restoration refers to human actions that guide natural systems toward a healthier, more resilient state. Land management agencies have rhetorically accepted that fire belongs in our western forests, and that bringing back natural fire regimes to fire-adapted landscapes for healthy forests is good forest stewardship.23 This is in stark contrast to policies of the past where the primary job of land managers was to suppress and fight fire at all costs.24 We now understand that it is not possible to keep fire away—fire will come back to the landscape; the question now is how that should happen.25 Land managers have identified that while fire can play an important role in the health of forests, unnaturally intense, catastrophic fires “do not renew forests; they destroy them.”26 All land management agencies in the Department of Interior and Agriculture are now using fire on the landscape to meet management objectives.

But a range of public stakeholders challenge the process of bringing fire back to public lands. There is a general consensus regarding the need for intervention to improve forest (and rangeland) health and reduce public risk, but the approaches are hotly contested.27 Many projects undertaken by federal land managers on forested lands identify multiple objectives and include mechanical thinning through timber harvests prior to prescribed burning. “Perhaps the greatest resistance to forest restoration treatment is from people who object to logging, especially on public lands, and believe that restoration is


24. For a discussion of the funding structure and potential perverse economic incentives in fighting wildfire see Bradshaw, Modern Overview, supra note 1, at 459–60. See also ROSS W. GORTE, CONG. RESEARCH SERV., RL 33990, FEDERAL FUNDING FOR WILDFIRE CONTROL AND MANAGEMENT 18 (2010).

25. Michael P. Dombrock et al., Wildfire Policy and Public Lands: Integrating Scientific Understanding with Social Concerns across Landscapes, 18 CONS. BIOLOGY 883, 886 (2004) (“In the long run restoration of fire will occur in one form or another. How fire returns to these fire-adapted ecosystems is the question.”).

26. P. Lynn Scarlett, Assistant Sec’y of the Interior for Policy, Mgmt. and Budget, Healthy Forests and Wildfire Policy: An Update, TRENDS, ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER, March/April 2003, at 1. The term “destroy” used here should not be confused with normally occurring “stand replacement fires” that have historically been part of the natural fire regime of some forests.

merely an excuse to continue conventional logging."28 It is bitter irony that those committed to forest stewardship (including ecological restoration) are quite skeptical when presented with the use of various methods of forest restoration proposed to return fire to fire-adapted landscapes.

A. Ecological Benefits of Fire

Fire sweeps away trees and vegetation that can otherwise limit sunlight necessary for saplings and vegetation to flourish. Some types of trees require fire for seeding, making them fire-dependent.29 Fire returns nutrients to the soil and can destroy exotic species, in turn bolstering the health and proliferation of native species. Fire also addresses disease and insect infestation.

Some fire on the landscape can also reduce the risk of fire damage to property and people. Fire can leave behind fire resistant trees, reduce “ladder” loads that might grow and facilitate fire reaching the top of trees and creating a “crown” fire that spreads through the forest canopy. Generally low intensity fires can be used as a way to reduce fuel loads that might support a sustained “catastrophic” wildfire.

In our forests we have been grooming an artificial environment; fragmented forests and continued human intrusions have contributed to a “sea of disturbed environments with islands of relatively undisturbed” land.30 Wildfire as a restoration tool could address multiple issues as a destructive force ultimately leading to a creative, self-ordering means of forest rejuvenation and renewal.

Despite better understanding that fire is a natural part of the landscape, the ecological benefits of fire are still under investigation. It is important not to suggest that fire is unequivocally beneficial. Some impacts are well known, but concerns about wildlife and impacts to riparian and aquatic habitat are still of concern. It will be important to continue to evaluate the benefits of fire in achieving ecosystem restoration.31


29. Heat from fire opens certain Lodgepole Pine cones releasing seeds, allowing germination. Id. at 55–56 (discussing Rocky Mountain lodgepole pine as fire-dependent tree capable of prospering in forests with either low or high-intensity fire regimes).


31. See Robert E. Keane & Eva Karau, Evaluating the Ecological Benefits of Wildfire By Integrating Fire and Ecosystem Simulation Models, 221 Ecological Modeling 1162 (2010), for one suggestion regarding the use of technology in assessing the ecological benefits of wildfire.
B. Restoration Frameworks

While generally there is agreement that some form of restoration is needed in forests, the precise outlines of restoration objectives have not been formed. This means the wildfire restoration agenda is currently a movement away from the “all out suppression” policy of the past, but its trajectory beyond fuels reduction and use of prescribed burns has not been formulated. All public lands agencies have used prescribed burns, so fire is in fact being restored to the landscape. Some are also allowing wildfire to burn more than in the past.

A successful restoration framework addresses the elements of biological integrity, historical fidelity, and public engagement. Attention to biological integrity is meant to achieve the goal of increased ecosystem health, often discussed in terms of resilience, and the productive nature of ecosystems. Historical fidelity emphasizes that the goal is not to create a whole new environment, but to have some faithfulness to the natural order that previously existed absent manifold human intrusions.

Those supporting restoration assume that forests restored to past conditions would be better able to support a diversity of habitats and wildlife. With forest restoration and the use of wildfire, one important point to note is that the climate is different now than it was in the past, and is predicted to change still more in the future. Thus, fire regimes are different now than in the past, and will be different in the future. This exacerbates the challenge of restoration and highlights the experimentation necessary when bringing fire back to fire adapted landscapes.

One commonly identified necessity in successful restoration is engagement of the public—both to support broad land use changes and to help support long-term funding and implementation of restoration objectives. A broader purpose of restoration is to affect the relationship of people to their supporting environment. Fundamentally, restoration is a negotiation regarding how particular land resources will be used. As with most land use decisions, broad public engagement can illuminate areas of agreement and the variety of values, economic and non-economic, associated with the lands in question.

32. See Richard T. Brown, et al., Fire Restoration and Fire: Principles in the Context of Place, 18 CONS. BIOLOGY 904 (Aug. 2004), identifying that advocates of restoration presume past conditions would support healthy populations of wildlife and fish because those species would have adapted to forests over thousands of years. Id.
33. Id.
34. See generally MARY DOYLE & CYNTHIA A. DREW, LARGE-SCALE ECOSYSTEM RESTORATION: FIVE CASE STUDIES FROM THE UNITED STATES (2008).
In fact, collaborative processes are now predominant in the management of public lands, and these collaborations may be one form of engaging the public in restoration work. Certainly, they are more democratic than top-down forms of land management. And while adjacency to public lands means there is a necessity for coordination in a fire policy, the question is whether that should provide a special role for adjacent WUI landowners to determine restoration policy.

IV. TRANSPARENCY AND PUBLIC APPEASEMENT

The forested public lands in need of wildfire restoration are serving multiple purposes. Agencies responsible for these lands must abide by often competing statutory mandates. There is an enduring give-and-take over how public lands are used. Though a window into agency decision-making is demanded through existing public land statutes, transparency regarding the direction of a wildfire restoration agenda is still lacking. But in the last few years, attention to the dangers of wildfire has dialed up scrutiny of fire management. The war over wildfire restoration may have been avoided by the efforts to collaborate and create “fire-adapted communities”, particularly those adjacent to National Forests. “A fire-adapted community is one consisting of informed and prepared citizens collaboratively taking action to safely co-exist with wildland fire.” These communities have developed wildfire plans (CWPPs or the like) and “can withstand a wildfire without loss of life and property.”

The ideal of achieving “fire-adapted communities” is laudable, but could be misleading. Significant pressure was put on our land management agencies to address public fear of wildfires. The HFRA certainly elevated WUI concerns regarding fuels reduction on adjacent public lands in relation to stakeholders who would seek a broader forest restoration agenda, inclusive of the use of fire. There is great danger in the developing wildfire restoration agenda of obscuring true objectives and letting aggressive, unrealistic, public stakeholder demands drive strategy development. Wildfire, and perhaps even the

37. Particularly for the Forest Service, the additional emphasis of incorporating wildfire as a management tool is balanced among the multiple uses of national forests for outdoor recreation, range, timber, water, wildlife and fish purposes. 16 U.S.C. § 528 (2006).
occasional prescribed burn that gets beyond firefighters’ control, will likely damage property and, perhaps, regrettably take lives in the future. Thus, endorsing the view that communities could be “fire-adapted” may mislead future homeowners about the level of risk involved in living near forested lands that have throughout history burned. This is the tension between greater transparency and public appeasement.

A. Transparency

Skepticism over the goals of fuels reduction projects hampers trust that agencies are implementing a wildfire restoration agenda. The criticism has been most acutely directed at the U.S. Forest Service. In relation to national forests, transparency is demanded by the NFMA and NEPA. Generally speaking, if the Forest Service has followed appropriate procedure, the agency’s action will be upheld unless their decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (depending on the precise nature of the legal challenge). One of the challenges to agency transparency is the intermingled objectives of projects proposed on public lands for “multiple” objectives. Thus, a particular project could be identified as having the goals of timber production, fuels reduction, and ecosystem restoration. Stakeholders have challenged these projects, with suspicion over their true objectives.

One example is Earth Island Institute v. Carlton. This case involved post-fire logging of a snag forest that developed after a fire on national forest in the Sierra Nevada region of California. Of concern to plaintiffs were the potential impacts to the black-backed woodpecker, a species dependent on snag forests. The project also

40. During the writing of this essay a prescribed burn in Denver, Colorado destroyed many homes and claimed three lives. See Colleen Slevin, AP, Colorado Fire Called Deadly Set of Miscues, FT. WAYNE J. GAZETTE, Apr. 5, 2012.
41. Here I use the term appeasement to mean giving in to demands or concessions; achieving peace through compromise, sometimes even compromise of principles or values. See e.g. Webster’s New Collegiate Dictionary, “appease”. . . “to buy off (an aggressor) by concessions usu. at the sacrifice of principles.”
42. 5 U.S.C. § 706 (2) (2006); GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LANDS AND RESOURCES LAW 230 (6th ed.2007) (neither NEPA nor NFMA provide a private right of action). See also Utah Envtl. Cong. v. MacWhorter, No. 2:08-CV-118-SA, 2011 WL 4901317 at *3 (D. Utah Oct. 14, 2011) (noting that court would affirm the Forest Service approval of the Mt. Dutton project as a final agency action under the APA “unless the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).
43. Earth Island Inst., 626 F.3d 462, 467 (9th Cir. 2010) (noting that the fire burned both public and private lands, but approximately 78% of the fire was within the Plumas National Forest).
44. Id.
45. Id. at 467–68 (noting that while the parties disputed the impact of the project on the woodpecker’s ability to survive in the Sierra Nevadas, the Forest conceded that the project would destroy 38% of the habitat that was created by the fire).
sought to reduce roadside and other hazards to public, recover the value of the fire-killed trees, and replant conifer seeds. Following the legal challenge, the project was allowed over objections regarding impacts to species and conflicting opinions of plaintiff’s scientists.

In another example of this mistrust, *Hapner v. Tidwell*, the “Smith Creek Project” was proposed with goals of: (1) reducing risk of wildfire; (2) decreasing the risk of infestation and disease; and (3) promoting habitat diversity. The project proposed a mix of commercial logging and prescribed burns in the Gallatin National Forest, adjacent to Yellowstone National Park. Plaintiffs challenged, among other things, whether the Forest Service properly addressed scientific debate as to whether forest thinning would actually reduce wildfire intensity. The project was near residential homes, the largest being the Smith Creek subdivisions. Historically, the forest had experienced large scale stand replacement fires. As the opinion reports, wildfires were “important in creating and maintaining the habitat.” Moreover, the area had been previously logged, which had impacts to the soil and riparian areas as well as road construction. The project proposed to break up vertical and horizontal vegetation continuity to reduce the risk of “crown fires” and prevent or slow the spread of fire should it occur. Although the Environmental Assessment (“EA”) for the project identified reducing risk of wildfires to local residents as a primary purpose, it did not address the scientific debate over whether forest thinning actually reduced wildfire intensity. The project was allowed, and the court noted specifically that the Forest Service did acknowledge in the EA the “limits of the benefits” provided by the project.

Collaboration is not always easy, but it is increasingly an expected mode of operation in public lands management. In *Wildwest Institute v. Bull*, the Forest Service was sued by wildlife organizations alleging selective inclusion and exclusion of stakeholders in the development of a hazardous fuels reduction plan. The court ruled in favor of the Forest Service, noting that the Service complied with HFRA by holding public meetings and responding to public comments and Freedom of Information Act (“FOIA”) requests.

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46. *Id.* at 467.
47. *Id.* at 473 (noting that a “battle of the experts” did exist over the scientific findings of the Plaintiff’s experts and the Forest Service).
48. *Hapner*, 621 F.3d 1239 (9th Cir. 2010).
49. *Id.* at 1242.
50. The project area is forested by lodgepole pine, dependent on fire for germination, as well as Douglas fir, aspen, spruce, and sub-alpine fir. *Id.* at 1242.
51. *Id.* (noting soil disturbance and riparian damage).
52. *Id.*
53. *Id.* at 1244.
54. *Id.* at 1245.
the court also pointed out that the Service’s approach was likely a public relations mistake.

Finally, the Forest Service’s claims of procedural burden (process paralysis) also point to evasive tactics that might avoid due scrutiny of wildlife and environmental impacts.56 This raises significant transparency concerns by those stakeholders who might otherwise support a broad restoration agenda. In sum, it can be difficult to discern whether fire restoration is part of the ultimate goal or not; many times proposals identify reducing fire risk to people and property coupled with other objectives.57 Those stakeholders who are concerned that “fuel reduction” is a subterfuge for allowing logging have little assurance in this context. Overall this situation makes it less likely a broader constituency for restoring fire to public lands will be energized; and the concerns of landowners in WUI areas who have been most vocal regarding achieving safety are likely to dominate.

B. Safety — An Elusive Goal

Wildfire will always create safety risks. Return of a natural fire regime to the landscape is anticipated to reduce risk of catastrophic fires due to suppression of past fire and fuel buildup, particularly in ecosystems adapted to frequent, low-intensity fires. However, fire will always present a potential threat. Legislative and administrative efforts to date appeased some stakeholders by not confronting the very real impact of an increased adjacent population in the WUI.58 It is undeniable that the growth of the wildland-urban interface has greatly increased the risk of harm from fire to people and homes.59 Yet it is still the case that we assume the public does not appreciate the risks of

56. For example, the joint counterpart regulations adopted by the Forest Service and Fish and Wildlife Service changing Endangered Species Act section 7 consultation procedures for projects supporting the national fire plan were challenged by an environmental plaintiff. The court rejected the explanations for the change in procedures since in fact no fuel reduction projects had been slowed down by existing consultation procedures. Defenders of Wildlife v. Salazar, 842 F. Supp. 2d 181, 185 (D.D.C. 2012).

57. At least one settled case illustrates skepticism regarding the government’s broad use of the private property protection rationale, even when coupled with a dual objective of ecological restoration. American Lands Alliance, WWP et al v. Kolkman, No. N-02-cv-182 (D. Nevada) (BLM proposal in Nevada challenged on grounds of NEPA, FLPMA and APA violations). Plaintiffs’ complaint challenged the proposed projects on multiple grounds, including “failure to discuss the need to deforest 34 square miles of public lands in the name of “protecting” approximately 1.2 square miles of private land. . .” Complaint at paragraph 53i. Plaintiffs noted at the outset of their complaint that BLM’s reasoning for undertaking the projects were “ecological health” and to “reduce risks of catastrophic wildfires”. Complaint at paragraph 1.


building in wildland-urban interface areas.\textsuperscript{60} It should be consistently communicated that safety is in fact an elusive goal.

More frequent fires must be allowed on public lands. This necessitates a level of risk, as fire is unlike other restoration tools within human control such as mechanical cutting of brush and trees. But prescribed burns, allowing fires ignited naturally or by land managers to burn out in a way that meet management objectives, have the potential to restore natural fire regimes, reduce vegetation, and in turn reduce risks of catastrophic wildfires. An important illustration of the tension involves the prescribed burning at Bandelier National Monument in 2000.\textsuperscript{61} The National Park Service set a small brush fire. The goal was to have the small fire prevent a large fire in the future. However, winds fanned the fire into a large, uncontrolled wildfire that ultimately required evacuation of Los Alamos, New Mexico.\textsuperscript{62} Hundreds of homes and thousands of acres were scorched in the devastating fires.\textsuperscript{63} Safety in the short term may compete with safety in the long term, as more manageable, less intense fire regimes return to some forests.

Professor Colburn has noted in his scholarship on the WUI, “[r]estoration that entails real risks has precious few advocates.”\textsuperscript{64} Some are extremely skeptical that prescribed or allowed burns will ever be publicly acceptable. “[W]ill homeowners really put up with the smoke and temporarily blackened forests, even if they are told that burning today might prevent the loss of their homes tomorrow?”\textsuperscript{65} One study indicates that the selling price of homes near blackened forest areas are reduced, but if the effects of fire are “out of sight” then there is little impact to pricing as the risk of fire is likely “out of mind.”\textsuperscript{66} Researchers acknowledged that some of the reduc-

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  \item[\textsuperscript{61}] Gary Giusto, N.M. Wildfires Raise Doubt About Burn Policy, Boston Globe, May 21, 2000. Similarly, prescribed burns in Yosemite National Park in 2009 got out of control. This project could conceivably have helped protect the adjacent WUI community of Forest in the long run, but the community had to be evacuated until the fire could be brought under control. Similarly, in summer 2012, a state prescribed burn in Colorado resulted in a large, destructive wildfire and re-consideration of the use of prescribed burning. Colorado Governor Suspends Prescribed Burns after Wildfire, AP, The Courier, Mar. 29, 2012. Colleen Slevin, AP, Colorado Fire Called Deadly Set of Miscues, FT. WAYNE J. GAZETTE, Apr. 5, 2012.
  \item[\textsuperscript{62}] Staci Matlock, Lessons from the Cerro Grande Fire: A decade ago, a prescribed burn ravaged Los Alamos, Santa Fe New Mexican, Apr. 26, 2010.
  \item[\textsuperscript{63}] Id. noting that 235 homes were destroyed, and more than 40,000 acres of pine-covered mountains burned in the ensuing wildfire.
  \item[\textsuperscript{65}] Natural Disasters Roundtable, To Burn or Not to Burn: Summary of the Forum on Urban/Wildland Fire 5 (National Academies Press 2001).
  \item[\textsuperscript{66}] Kyle M. Stetler et al., The Effects of Wildfire and Environmental Amenities on Property Values in Northwest Montana, USA, 69 Ecological Econ. 2233, 2241 (2010).
\end{itemize}
tion in price, and thus demand for WUI property, may in fact come from the increased understanding of wildfire risk. It may be, however, that people who have been living with wildfire risk have some measure of acceptance for that tradeoff, making them more stubborn in the face of proposed changes. For example, commentators have theorized that Californians are more “ruggedly obstinate about the choice they have made to live with the constant threat of fire.” It is hard not to accept this possibility, as an increasing number of homes have been built in the fire danger zone over the last decade, and at the same time media attention has not hidden the attendant risk. Many people appreciate living in close proximity to environmental amenities, which has increased the size of some cities in the West.

Thus, increased transparency—and in particular—acknowledging that it is not possible to ensure safety from wildfires started naturally or by prescribed burns—is in tension with the goal of assuring the public that protecting life is the number one priority in fire strategy. Public appeasement on this point has been significant. The government has authorized aggressively using means and funding to reduce fuels in the WUI and places where communities have organized to obtain funding. Despite these efforts, the actual reduction of risk to WUI landowners has been unclear.

C. Experimentation

Related but distinct to safety is the need to be transparent regarding the experimentation required to carry out a return of fire to the

67. Id.
68. Experience with past wildfires may lead to different reactions by different people. Some may be more cognizant of risk and seek to reduce it, others may reject mitigation measures because they have become accustomed to living with the risk. See Martha C. Monroe, et al., Social Science to Improve Fuels Management: A Synthesis of Research Relevant to Communicating with Homeowners About Fuels Management, GEN. TECH. REP. NC-267, U.S. DEPT. OF AGRIC., FS, N. CENT RES. STATION 4 (2006), available at http://nrs.fs.fed.us/pubs/gtr/gtr_nc267.pdf.
70. Id. (citing analysis by University of Wisconsin that indicated fires in same location in San Diego in October 2007 would have been within one mile of 61,000 homes in 1980, 106,000 homes, and 125,000 homes by 2007).
73. ROSS W. GORTE, CONG. RESEARCH SERV., RL 33990, FEDERAL FUNDING FOR WILDFIRE CONTROL AND MANAGEMENT 18 (2006) (noting that despite increased funding for fuels reduction, “it is unclear whether, or to what extent, increasing fuel treatment funding and efforts will protect communities and ecosystems from damaging wildfires”).
land.  

Yet by recognizing that experimentation is required, we should resist calls for expanding agency tort liability or other penalties directed at land managing agencies when pursuing wildfire agendas. Land management agencies must have the flexibility to experiment, and the features of NEPA coupled with NFMA (and ESA) requirements can facilitate that flexibility adequately while still providing a window of transparency.

Nonetheless, disputes over scientific legitimacy will ensue during experimentation. Earth Island Inst. v. Gibson is one example. Plaintiffs contested the characterization of various reports cited by the Forest Service and provided their expert’s evaluation of the proposed Angora project. The Angora project was intended to treat fire-affected areas from the Angora prescribed fire in the WUI of Lake Tahoe Basin region. One element of the dispute centered over whether the proposed project would achieve the identified management objectives—to impact future fire behavior and reduce future fire risk. The court held that the Forest Service was entitled to deference when making predictions in its area of expertise at the frontiers of science. Other cases have also challenged the Forest Service methodology when approving projects, including habitat restoration and fuels

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75. In one article on wildfire and HFRA the author points out that HFRA passed “because the public’s fear of wildfire has been exploited.” Rebecca K Smith, War on Wildfire: The U.S. Forest Service’s Wildland Fire Suppression Policy and its Legal, Scientific, and Political Context, 15 U. BALT. J. ENVT’L. L. 25, 43 (2007). Thus, it is not surprising that the public may be misled regarding the potential for HFRA supported thinning measures and the like to reduce wildfire risk or improve forest health.


reduction, questioning whether a higher standard than arbitrary and capricious should be applicable.\footnote{78}

D. \textit{Broader Forest Restoration}

Wildfire is part of a broader challenge of improving the health of national forests and other public lands. There is a need to address all the issues\footnote{79} (logging, watershed protection, pollution impacts, diversity of species, fragmentation of habitats), but wildfire is a focal point because public fear has galvanized action. We must not lose sight of the fact that many WUI owners value the forest in equal terms with structures. Some examples from past fire events illustrate this. One homeowner “lamented that he would rather have lost the home, which could be replaced in a short time, than the forest, which could not.”\footnote{80}

Three goals of the Cohesive National Wildland Fire Strategy include first, “restoring and maintaining resilient landscapes.” This is the closest to embracing wildfire restoration. Second is “creating fire-adapted communities,” which uses the language of wildfire to “naturalize” the build up of dangerous adjacent populations on the border of public lands in the west. “Responding to wildfires” is the third goal of the cohesive strategy, and relates to multi-jurisdiction participation in risk-based wildfire decision-making. Reconciling these goals may not be achievable unless we confront the tensions among them.

As the next phase of the Cohesive National Wildland Fire Strategy ensues, the tradeoffs required to implement the plan will be evaluated. Halting the expansion of WUI areas should at minimum be identified if human safety is the first priority. But none of the Congressional expression of values in these statutes emphasize this need.

Broader restoration initiatives related to forest health are underway. The Omnibus Public Land Management Act of 2009 authorized funding of specified collaborative ecological restoration projects in National Forests, with return of natural fire regimes as one component.\footnote{81} The Collaborative Forest Landscape Restoration program (“CFLRP”) provides funding to ecological restoration projects on National Forest Lands developed with multiple public benefits in mind.\footnote{82}

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  \item \footnote{78}{Cary Catherine Whitehead, \textit{Wielding a Finely Tuned Legal Scalpel: Why Courts Did Not Cause the Decline of The Pacific Northwest Timber Industry}, 38 ENVTL. L. 979 (2008).}
  \item \footnote{79}{Cheng, supra note 39 at 856. Professor Cheng notes that Forest Chief Dale Bosworth identified “four threats” to the national forests—“catastrophic wildfire, invasive species, land fragmentation and development on borders, and unregulated motorized recreation.” \textit{Id}.}
  \item \footnote{80}{FLAMES IN OUR FOREST, supra note 6 at 159.}
  \item \footnote{81}{COLLABORATIVE FOREST LANDSCAPE RESTORATION PROGRAM, 16 U.S.C.A. § 7303(b)(3)(A) (West 2009).}
  \item \footnote{82}{§ 7303(b)(3). See also People Restoring America’s Forests: A Report on the Collaborative Forest Landscape Restoration Program, Collaborative Forest Landscape Project (2009).}
\end{itemize}
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In 2010 a group of organizations formed the CFLRP coalition and now serves as a steering committee.63 Although a relatively new development, many projects have been funded, and this approach could prove a possible counter-balance to the more narrow, fear-initiated hazardous fuels reduction mindset.64

V. CONCLUSION

As long as the wildfire restoration agenda is left vague, it will be impossible to build a broad, enduring coalition to support it. Restoration is, in fact, directly related to people; it is constructed to support beneficial human interaction with the environment. While restoration of fire on public lands could potentially achieve more “natural” conditions both in a physical and historical sense, due to political realities, the wildfire restoration agenda at this point is significantly focused on safety to the likely detriment of broader ecological restoration. But restoration is in fact occurring in the forests, and active management will be necessary so that all the possible values demanded by the public are maximized.65 To the extent that nature is both socially and physically constructed, a broader constituency for restoration must be engaged, not just those in the WUI who, having recognized the risks of wildfire, can easily be understood when communicating their risk tolerance levels.


83. People Restoring America’s Forests: A Report on the Collaborative Forest Landscape Restoration Program 37 (Nov. 2011). A federal advisory panel provides recommendations on applicant project selection to the Secretary of Agriculture. Id.

84. Thomas D. Sisk, Seeding Sustainability in the West, 31 UTAH ENVTL. L. REV. 79, 89 (2011) (discussing Four Forest Restoration Initiative (4FRI) in northern Arizona). While CFLRP emphasizes they are already achieving success measured by the number of applications, it is too early to judge whether these initiatives will achieve the myriad goals established in their proposals. People Restoring America’s Forests: A Report on the Collaborative Forest Landscape Restoration Program (Nov. 2011). 85. As Professor Robert Keiter noted, “ecosystem management and forest health concerns have rekindled the management versus non-management debate, albeit in the cloak of ecological restoration rather than commodity production.” Robert B. Keiter, The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation, 36 ENVTL. L. 301, 374 (2006). Prof. Keiter also notes that the public is not always welcoming of aesthetic impacts from thinning projects or prescribed burning; air quality and “blackened forests that are left behind.” Id. Ultimately Prof. Keiter recommends that the federal government wield its power to influence local land use and zoning policies to achieve the necessary integrated wildland fire policy across jurisdictional boundaries.