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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STEVEN DAKOTA KNEZOVICH; STEVEN L. KNEZOVICH; DEBORA M. KNEZOVICH, husband and wife; ANDREW M. TAYLOR; DENA DEA BAKER, husband and wife; RICHARD D. WRIGHT; DEONE R. WRIGHT, husband and wife; HOBACK RANCHES PROPERTY OWNERS IMPROVEMENT AND SERVICE DISTRICT, County of Sublette, State of Wyoming, Plaintiffs - Appellants, v. UNITED STATES OF AMERICA, Defendant - Appellee.	No. 22-8023

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 2:21-CV-00180-ABJ)

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Before **TYMKOVICH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

TYMKOVICH, Circuit Judge.

After the Roosevelt Fire burned 61,511 acres in southwestern Wyoming in 2018, victims of that fire sued the United States Forest Service, alleging it negligently delayed its suppression response. The Forest Service moved to dismiss the complaint on the grounds that it was not liable for the way it handled the response to the fire. Under the Federal Tort Claims Act, a government actor cannot be sued for conducting a so-called "discretionary function," where the official must employ an element of judgment or choice in responding to a situation. The government contends that responding to a wildfire requires judgment or choice, and its decisions in fighting the fire at issue here meets the discretionary function exception to the Act.

The district court agreed and dismissed the suit. We also conclude the Forest Service is entitled to the discretionary function exception to suit, and the district court lacked jurisdiction to hear the complaint. We therefore AFFIRM.

I. Background

A. The Roosevelt Fire

Western Wyoming endured at least seven forest fires during the summer of 2018. Several of the fires were manmade; the rest were ignited from natural causes like lightning strikes.

On September 15, 2018, at mid-day, an onlooker spotted another wildfire in the Bridger-Teton National Forest. He reported what became known as the Roosevelt

Fire to the United States Forest Service. At the same time, plaintiff Steven Knezovich and his son, alongside a handful of others, were hunting in the surrounding area. The hunting party eventually spotted the same fire and reported it to the Forest Service. The Service thanked them for the information but did not offer any warning or guidance. The rest of that day, the Forest Service monitored the fire.

The next afternoon, the Forest Service issued its "Roosevelt Incident Decision" for tackling the Roosevelt Fire (published in its Wildland Fire Decision Support System (WFDSS)). The plan broadly outlined the various considerations animating the Service's assessment of the fire. At that time, the fire was approximately 25 acres of unknown origin. The plan assessed the weather forecast, the risk profile of the fire to grow and spread, the potential length of the fire, nearby trails and structures, and so on. It placed a premium on firefighter safety, providing notice to affected visitors and property owners. It identified no "benefits" to the fire. The Forest Service recommended a "Course of Action" that would "[m]onitor and inform the public"; "[m]onitor the fire by patrolling, hiking, air patrol, and IR flights"; and "[i]dentify and inventory impacts to critical values at risk." App. 165.

In conclusion, the "Roosevelt Fire Decision Rationale" was to monitor its progression and secure public safety:

> [The fire manager's] [d]ecision is to manage the Roosevelt Fire with an initial emphasis on monitoring fire progression and visitor safety. The fire has a high probability of remaining manageable with a smaller organization due to few values at risk. The primary values are hunters that have been removed and evacuated from the area. The Forest service has been the primary decision

> makers in the decision process. Sublette County Fire and Sublette County Sherriff has been notified of the intended course or action. Additionally, the outfitters located in the area have been notified of the evolving situation. We have implemented a trail closure . . . on the Upper Hoback Trail. Currently no area closure has been implemented. Additionally,[] signs are being posted at multiple potential entry points that provide access to the area. The Fire is burning in steep timbered terrain largely surrounded by rocky steep slopes. Monitoring fire progression and providing for visitor safety is the emphasis. MAP's [Management Action Points] will guide future actions.

App. 170.

The Forest Service also issued a press release warning the public of the fire. It explained that "[f]irefighters are monitoring the fire and assessing options for long-term management strategy" while "ground and aerial resources . . . monitor[] the fire" and "personnel . . . contact[] hunters in backcountry camps." App. 253. The press release warned that "[v]isitors and hunter [sic] to the area should remain alert and be prepared to modify their plans if fire behavior changes." *Id.*

Two Forest Service backcountry rangers delivered the news to the Knezovich hunting party around midday. They explained that the Service was, for the time being, monitoring the fire, but recommended that the hunting party return to the trailhead. Steven Knezovich set off on foot while the other hunters prepared their horses. Mr. Knezovich happened upon one of the rangers, who then warned that the Roosevelt Fire was spreading. He urged that the hunting party had only a "short window" to escape the fire. The hunters ultimately escaped the fire, but not without suffering serious injuries.

By the next day, September 18, the fire had grown out of control. In response, the Forest Service issued another WFDSS. This "Incident Decision" documented that the fire "may have reached private lands and is currently threatening structures including multiple residences and subdivisions," such that the fire would "require closures to trails/roads/areas to protect forest visitors in the short term." App. 179. The Decision again listed no benefits from the fire. It listed the Forest Service's "Course of Action" as developing an "appropriate response to protect values at risk with cooperators," and explained that the Service could utilize the "full spectrum of suppression strategies available":

> The fire is burning [in] steep, rugged inaccessible terrain in the upper hoback river drainage. The Bridger-Teton NF has defined the incident objectives and you have the full spectrum of suppression strategies available, including confine and contain and point protection where values are at risk. Utilize topography and natural barriers to reduce fire spread along the top of the Wyoming Range to the west. Full suppression should be utilized on the south east and northside of the fire to protect private lands.

App. 194.

The Roosevelt Fire ultimately forced the evacuation of around 230 residential homes, compromised around 130 structures, and spread over tens of thousands of acres, damaging the real and personal property of other parties now joined in this suit.

B. District Court Proceedings

The Roosevelt Fire victims sued the United States Forest Service under the Federal Tort Claims Act. The fire victims alleged various negligence claims arising from the Forest Service's response to the fire.

While the United States' sovereign immunity ordinarily renders it immune to tort liability, the FTCA acts as a limited waiver of that immunity. It permits plaintiffs to sue the United States for compensation for injuries caused by negligent acts of government employees. The United States thus makes itself liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

But where the waiver does not apply, courts lack jurisdiction to entertain such claims. Accordingly, the United States moved to dismiss the suit for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). It claimed that the FTCA's "discretionary function exception," which acts as a carve-out to the FTCA's waiver of sovereign immunity, barred the district court from adjudicating the claims. The exception precludes plaintiffs from seeking damages from the United States for conduct "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). According to the United States, the Forest Service was vested with discretion to manage the fire which triggered the exception.

The district court agreed, concluding that the government's conduct triggered the discretionary function exception, which stripped it of jurisdiction to adjudicate the fire victims' claims. The court accordingly granted the Forest Service's motion to dismiss for lack of subject matter jurisdiction with prejudice.

II. Analysis

The fire victims contend the discretionary function exception does not strip the district court of jurisdiction to hear the FTCA claims. We conclude that it does.

A. The Discretionary Function Exception

The Federal Tort Claims Act waives aspects of the government's sovereign immunity for certain classes of torts. But rather than a blanket waiver, it excludes certain types of decisions, including decisions covered by the so-called discretionary function exception. The discretionary function exception removes from the waiver any "claim . . . based upon the exercise of performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency." 28 U.S.C. § 2689(a). The exception reflects "Congress' desire to prevent the judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Ball v. United States*, 967 F.3d 1072, 1076 (10th Cir. 2020) (internal quotation marks omitted). It represents the "boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Redmon v. United States*, 934 F.2d 1151, 1153 (10th Cir. 1991) (internal quotation marks omitted).

The Supreme Court in *Berkovitz v. United States* established a two-step test for evaluating discretionary function claims: a court must "first consider whether the action is a matter of choice for the acting employee," and then "must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." 486 U.S. 531, 536 (1988).

The first step requires a court "to determine whether the challenged conduct 'involves an element of judgment or choice,' in which case it is discretionary and falls within the language of the exception." *Kiehn v. United States*, 984 F.2d 1100, 1102 (10th Cir. 1993) (quoting *Berkovitz*, 486 U.S. at 536). If a policy "specifically prescribes a course of action" where an agency would have no choice but to follow that policy, the exception would not apply. *Id.* If the plaintiff fails to show that the conduct was mandatory rather than discretionary, the exception typically applies.

But even if the challenged conduct was discretionary, jurisdiction can still be established at step two. Under step two, "plaintiffs may still overcome the discretionary function exception by demonstrating . . . that the nature of the actions taken does not implicate public policy concerns, or is not susceptible to policy analysis." *Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008) (internal quotation marks and alterations omitted). After all, the discretionary function exception works to shield "those discretionary actions or decisions which are *based on considerations of public policy*." *Kiehn*, 984 F.2d at 1103 (emphasis added) (internal quotations marks omitted). We therefore consider whether the plaintiffs challenge "legislative and administrative decisions grounded in social, economic, and

political policy." *Id.* (quoting *Berkovitz*, 486 U.S. at 537). If the challenged decision implicates these types of policy concerns, the discretionary function exception applies, and the district court lacks jurisdiction to consider the claim.

Application of the discretionary function exception "presents a threshold jurisdictional determination which we review de novo." *Tippett v. United States*, 108 F.3d 1194, 1196–97 (10th Cir. 1997) (citing *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1537 (10th Cir. 1992)).

B. Judgment or Choice

We first consider whether the fire victims have demonstrated "that the challenged decision involved no element of judgment or choice." *Elder v. United States*, 312 F.3d 1172, 1176 (10th Cir. 2002) (internal quotation marks omitted). For this inquiry, we focus on "the particular nature of the regulatory conduct at issue," *Berkovitz*, 486 U.S. at 539, and examine "the challenged decision," *Elder*, 312 F.3d at 1176–77. Our lodestar is "the nature and quality of the harm-producing conduct, not . . . the plaintiffs' characterization of that conduct." *Fothergill v. United States*, 566 F.3d 248, 253 (1st Cir. 2009).

The fire victims must show that the Forest Service's initial incident decision "violated a federal statute, regulation, or policy that is both specific and mandatory." *Elder*, 312 F.3d at 1171 (internal quotation marks omitted). Language that meets this standard will leave little room for judgment calls.

Our most recent case in the context of firefighting is instructive. In *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216 (10th Cir. 2016),

plaintiffs sued the Forest Service for mishandling a fire—specifically, for implementing a partial-suppression response to the fire rather than a full-suppression response. To overcome the discretionary function exception, the plaintiffs pointed to the Forest Service's assumedly mandatory "Design Checklist," a document the Service created to guide firefighting. The Forest Service failed to fill out the Checklist, which featured a series of questions like, "[i]s there other proximate fire activity that limits or precludes successful management of this fire?" *Hardscrabble Ranch,* 840 F.3d at 1219. If the Service answered "yes" to any of the questions, the Checklist required it to implement a suppression-oriented fire response.

We applied the discretionary function exception despite the Forest Service's failure to follow the above prescription. We did not characterize the Forest Service's "challenged decision" as failing to abide by the mandatory procedures. Instead, we considered whether the Forest Service had discretion in "how to respond to the [fire]," *id.* at 1220, or, alternatively, "how to fight the fire," *id.* at 1221

We then observed that "neither the Checklist nor other procedures identified by Hardscrabble explicitly told the Forest Service to suppress the fire in a specific manner and within a specific period of time." *Id.* at 1222 (internal quotation marks omitted). Put differently, it did not suffice to point to a handful of policy mandates in an endeavor fundamentally defined by discretion. Filling out the Checklist, for example, may have been mandatory; but "the Checklist itself conferred discretion on the USFS decisionmakers" because each consideration amounted to a judgment call. *Id.* at 1221. We concluded that "[t]he existence of some mandatory language does

not eliminate discretion when the broader goals sought to be achieved necessarily involve an element of discretion." *Id.* at 1222 (internal quotation marks omitted); *cf. Sabow v. United States*, 93 F.3d 1445, 1453 (9th Cir. 1996) ("[T]he presence of a few, isolated provisions cast in mandatory language does not transform an otherwise suggestive set of guidelines into binding agency regulations."). And even if the Forest Service violated the Checklist procedures, at worse that would be an "abuse of discretion" protected by the FTCA. *Hardscrabble Ranch,* 840 F.3d at 1221.

As in *Hardscrabble Ranch*, the Forest Service's challenged decision is its initial decision to monitor the fire at the outset. The Incident Decision lays out the myriad considerations that led to that decision, including safety, terrain, weather, and risk. Other factors included the difficult terrain where the fire started, and the competing draw of firefighting resources to other nearby fires. Those considerations are quintessentially discretionary.

The fire victims resist this conclusion, arguing that the Forest Service's initial decision violated its mandatory duty to deploy full resources to the fire at the outset. They point to language in the Forest Service Manual—a policy document that, in part, instructs the Service on firefighting. [1] One of the many provisions in the Manual states:

[1] The Forest Service Manual sets out Forest Service policy and response guidelines on issues ranging from road maintenance to land management. Chapter 5130 is titled "Wildfire Response" and describes how the Service should respond to fires. *See* App. 103.

> *Human-caused fires and trespass will be managed to achieve the lowest cost and fewest negative consequences with primary consideration given to firefighter and public safety and without consideration to achieving resource benefits*.[2]

FSM § 5130.3(8) (emphasis added). According to the fire victims, for this fire the Forest Service *did* consider resource benefits, which contributed to its decision to monitor the fire. They claim that the Forest Service had no discretion to monitor the fire since it was human-caused or of unknown origin at the time it was first reported.[3]

As evidence for this they point to a Forest Service press release issued after the Initial Decision was filed on September 16. The press release stated that while the cause of the fire was unknown, "firefighters are monitoring the fire and assessing options for long-term management strategy." App. 253. It also included boilerplate language stating "[w]ildfires burning under the right weather conditions and in appropriate locations can break-up forest fuels and create landscapes that are more

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[2] When the Forest Service manages a fire for "resource benefits," it allows the fire to play its natural role in thinning forests. This offers various ecological benefits, like ensuring the forest is not conducive to particularly big fires. *See* App. 254.

[3] The plaintiffs emphasize that when the cause of a fire is unknown, the Forest Service must treat it as human caused, and therefore cannot utilize it for resource benefits. *See* App. 74. And here, the cause of the Roosevelt Fire was unknown during the time of the Forest Service's initial decision. *See* App. 206. (Several weeks after the fire, it was determined to originate in a campfire pit.) But while delaying a full-suppression response is consistent with using a fire for resource benefits, it is also consistent with managing a fire without consideration of resource benefits. The Forest Service had to balance the distribution of firefighting resources when the fire was confined to "steep timbered terrain . . . surrounded by rocky steep slopes" that harbored the fire. App. 170.

resistant to large high severity fires" and that "a combination of tools, including the use of restoration wildfire, can help managers reduce the risk of future mega-fires." App. 253–54. The fire victims suggest that the language in the release gives rise to an inference that the Forest Service considered forbidden resource benefits. But even if the press release's "canned" language gives rise to that inference, the overall discretionary nature of the guidelines prevents the victims from overcoming the exception. App. 395 (expert witness for the fire victims describing the statement as "canned"). And apart from the press release, no language exists in the official operative decision documents that suggest anything different; in fact, the WFDSS publications expressly identify no "benefits" to the fire.

Hardscrabble Ranch's approach compels our conclusion that the Forest Service Manual provision does not defeat the discretionary function exception. As an initial matter, the cited provision does not "specify the precise manner" in which the Forest Service must respond to a human-caused fire. *Domme*, 61 F.3d at 791. It lists some considerations—firefighter safety and public safety—alongside a prohibition on considering resource benefits. But it does not mandate a partial or full suppression response from the get-go—nor does it prohibit waiting the fire out until more information is available. The fire victims acknowledge as much. *See* Reply Br. at 7 ("The United States argues that fire managers have the discretion to refrain from suppressing human-caused wildfires if firefighter or public safety dictates. Of course they do."). In addition to the provision the fire victims focus on, the Manual explains the multiple values that inform any response to a wildfire. In particular, human-

caused (or unknown-caused) fires will be managed "to suppress the fire at the lowest cost with the fewest negative consequences with response to firefighter safety." § 5130.3(8); App. 334. [4]

More importantly, while the fire victims point to one provision of many, the Manual as a whole contains competing considerations that bear on a wildfire response. These include:

> 1. Protecting human life is the preeminent objective in every wildfire response. Assessing the potential threat to firefighter and public safety will be a continuous process on every wildfire. Every wildfire response will establish protection objectives that seek to mitigate these threats when they are identified.
> . . .
> 5. Initial response actions are based on policy and Land and Resource Management Plan objectives, with consideration for prevailing and anticipated environmental conditions that can affect the ability to accomplish those objectives.
> 6. Threats to property and natural resources will be identified and every wildfire will establish objectives that seek to mitigate these threats when time, resources, and prevailing conditions allow for action without undue risk to human life.

[4] The fire victims try to distinguish *Hardscrabble Ranch* by emphasizing that the Forest Service there was not precluded from considering resource benefits. Knezovich Br. at 27. But we look to *Hardscrabble Ranch* not because it dealt with resource benefits, but because it set out a standard for assessing the presence of mandatory language in a largely discretionary regulatory environment. The fire victims also claim that *Hardscrabble Ranch* did not concern "rules at all, but mere guidance for the exercise of discretion." Reply Br. at 6. But *Hardscrabble Ranch* explicitly assumed for the sake of argument that the Checklist was mandatory, not optional. *See* 840 F.3d at 1221. And claiming that *Hardscrabble Ranch* does not apply because the court found that the Checklist required considerations that implicated discretion ignores the fact that the Forest Service was obliged to use the Checklist to guide its actions.

> 7. All or a portion of a wildfire originating from a natural ignition may be managed to achieve Land and Resource Management Plan objectives when initial and long-term risk is within acceptable limits as described in the risk assessment.
> 8. Human-caused fires and trespass will be managed to achieve the lowest cost and fewest negative consequences with primary consideration given to firefighter and public safety and without consideration to achieving resource benefits.
> 9. A wildland fire may be concurrently managed for one or more objectives and objectives can change as the fire spreads across the landscape. Objectives are affected by changes in fuels, weather, topography; varying social understanding and tolerance; and involvement of other government jurisdictions having different missions and objectives.
> 10. The Wildland Fire Decision Support System (WFDSS) will be used to inform and document decisions related to actions, resource allocations, and risk management for all wildfire responses. Periodic assessments throughout the duration of the fire incident must be completed and documented in WFDSS.

§ 5130.3(1), (5)–(10); App. 103–04.

Considered in context, the Forest Service Manual does not prevent the Service from making a judgment call in its initial response to a fire of human or unknown origin. To conclude otherwise would strip the Forest Service of its ability to balance the safety, conditions, weather, and resource requirements that go into any fire response.

This conclusion is supported by other caselaw. In *Gonzalez v. United States*, for example, the Ninth Circuit evaluated a policy that guided the FBI's disclosure of information to local law enforcement. It required that a local field office "*shall* promptly transmit [credible information of serious criminal activity or refer the

complainant] to a law enforcement agency having jurisdiction." *Gonzalez v. United States*, 814 F.3d 1022, 1029 (9th Cir. 2016) (emphasis added). The Court concluded that the guidelines' mandate that agents "shall promptly transmit the information or refer the complainant" under particular conditions did not overcome the discretionary function exception. Like in this case, given the guidelines' policy goals, "[v]iewed in context, mandatory-sounding language such as 'shall' does not overcome the discretionary character of the Guidelines." *Id.* at 1030; *see also Clark v. United States*, 695 F. App'x 378, 385–86 (10th Cir. 2017) ("Where the regulatory language 'mandates' the consideration of alternatives, the weighing of factors, or the application of policy priorities bounded by practical concerns, the language leaves to the decisionmaker's discretion how best to fulfill such 'mandatory' priorities.").

The fire victims point to a few cases to rebut this conclusion, but none is persuasive. They first highlight *Tinker v. United States*, 982 F.2d 1465 (10th Cir. 1992), where a plaintiff sued the Federal Aviation Administration for negligently failing to furnish weather information to the pilot of an aircraft that crashed with her on board. The government argued that the FAA Specialist who could have provided the information was protected by the discretionary function exception. We disagreed, finding that answering the pilot "would not have been conduct that can be said to be grounded in the policy of the regulatory regime" and did not "involve an element of judgment or choice," as the Flight Services Manual required him to respond to the pilot. *Id.* at 1464 (internal quotation marks omitted). By contrast, the conduct the

fire victims challenge *was* grounded in the policy of the regulatory regime, and, as outlined above, was fundamentally discretionary.

The fire victims also point to *Florida Department of Agriculture & Consumer Services v. United States*, 2010 WL 3469353, No. 4:09–cv–386/RS–MD, (N.D. Fla. Aug. 30, 2010). There, the government ignited a controlled burn in Osceola National Forest, which spread to the plaintiff's land and inflicted physical injury and property damage. The district court found the discretionary function exception inapplicable because the government "demonstrate[d] a clear disobedience to mandates that are not discretionary." *Id.* at *4. Once again, because the fire victims fail to cite language that rendered the Forest Service's conduct non-discretionary, this case differs in kind.

Finally, in *Bell v. United States*, 127 F.3d 1226 (10th Cir. 1997), the plaintiff dove into a reservoir and hit his head on a submerged dirt embankment covering a pipeline. He sued the Department of Interior's Bureau of Reclamation for negligence under the FTCA. We recounted that the Bureau was obliged to administer a contract between its contractor and the New Mexico Interstate Stream Commission during construction around the reservoir. And in particular, its contractor had to strictly abide by the Bureau's specifications while the Bureau ensured compliance. The contract required the contractor to relocate the pipeline, but it failed to do so—and that led to plaintiff's injury. We found that the discretionary function exception did not apply because the government conduct at issue—leaving the pipeline—was not a "matter of choice" under the contract. *Id.* at 1229 (quoting *Berkovitz*, 486 U.S. at

536). *Bell* does not unsettle our conclusion here. The choice and judgment in how to respond to the Roosevelt Fire required significant discretion.

In sum, the fire victims have failed to demonstrate that the Forest Service's delayed full-suppression response "involved no element of judgment or choice." *Elder,* 1177 (internal quotation marks omitted). "[T]he broader goal[] . . . to be achieved"—fire management—"necessarily involve[s] an element of discretion," and the Manual's language did not foreclose the Forest Service from delaying a full-suppression strategy as it assessed the fire. *Hardscrabble Ranch,* 840 F.3d at 1222.

C. Policy Judgment

Even though we conclude the Forest Service's initial decision was discretionary, we still must consider the second step of the discretionary function exception: whether the judgment the Forest Service exercised was "susceptible to policy judgment" and "involve[d] an exercise of political, social, or economic judgment." *Duke v. Dep't of Agric.*, 131 F.3d 1407, 1410 (10th Cir. 1997) (internal quotation marks omitted). The "focus of the inquiry . . . is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Hardscrabble Ranch*, 840 F.3d at 1222 (quoting *United States v. Gaubert*, 499 U.S. 315, 325 (1991)).

Of course, "nearly every governmental action is, to some extent, subject to policy analysis—to some argument that it was influenced by economics or the like." *Duke*, 131 F.3d at 1410. As a result, we look for more than just a trace of policy

concerns when determining whether "the decision or nondecision implicates the exercise of a policy judgment of a social, economic or political nature." *Id.* at 1411. Furthermore, "we presume that a government agency's acts are grounded in policy [where]," as here, "no statute, regulation, or policy sets forth a required course of conduct." *Ball*, 967 F.3d at 1079. The plaintiffs bear the burden of proving otherwise.

We have little trouble concluding that the "nature of the actions" taken by the Forest Service involved the exercise of policy judgment of the sort the exception is meant to protect. *Hardscrabble Ranch*, 840 F.3d at 1222 (quoting *Gaubert*, 499 U.S. at 325). As in *Hardscrabble Ranch*, the Forest Service's fire management had to "balanc[e]" the competing interests in "protect[ing] private property" and "ensur[ing] firefighter safety" while prioritizing the wellbeing of nearby inhabitants.[5] *Id.*; *Ohlsen v. United States*, 998 F.3d 1143, 1163 (10th Cir. 2021) ("Decisions about whether and when to distribute limited resources—namely a fire guard or water truck—are informed by policy considerations such as public and firefighter safety, suppression costs, environmental risks, and the availability of resources."). This is especially so

[5] The fire victims object that they do not ask us to second guess policy considerations; rather, the policy prohibition against considering resource benefits has *already* been established. But this misapprehends our inquiry. We ask whether the "nature of the . . . action[]" taken by the Forest Service is inflected with policy considerations. *Hardscrabble Ranch*, 840 F.3d at 1222 (quoting *Gaubert*, 499 U.S. at 325). And, as explained above, the relevant action is the Forest Service's delay of its full-suppression response—not the consideration of resource benefits. Properly framed, the Forest Service exercised relevant policy judgment.

given the fact that another fire—the Lead Creek Fire—was burning nearby simultaneously and demanded deployment of scarce resources. App. 76.

The task of balancing these interests is best lodged with officials and experts on the ground than with judges aided by the benefit of hindsight. *See Miller v. United States*, 163 F.3d 591, 596 (9th Cir. 1998) ("Our task is not to determine whether the Forest Service made the correct decision in its allocation of resources. Where the government is forced, as it was here, to balance competing concerns, immunity shields the decision."). Fire management necessarily "involves balancing practical considerations of funding and safety as well as concerns of a fire's impact on wildlife, vegetation, and human life." *Ohlsen*, 998 F.3d at 1163 (analyzing the discretionary function exception in the context of a wildfire). It is no wonder that, time and again, the courts have declined to manage the firefighting role.[6] *See, e.g.*, *Esquivel v. United States*, 21 F.4th 565 (9th Cir. 2021) (applying the discretionary function exception in the context of a controlled burnout); *Green v. United States*, 630 F.3d 1245, 1251–52 (9th Cir. 2011) (distinguishing Forest Service decisions regarding attacking a fire and allocating suppression resources from duties not susceptible to a policy analysis); *see also Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1164–65 (11th Cir. 2020) (discussing policy concerns inherent in

[6] The fire victims point to *Rayonier Inc. v. United States*, 352 U.S. 315 (1957) as evidence to the contrary. There, the Supreme Court permitted a negligence suit against the government for its handling of a fire. But as the fire victims concede, that case did not concern the discretionary function exception and does not control here.

monitoring a controlled burn); *cf. Abbott v. United States*, __ F.4th __, 2023 WL 5286966 (6th Cir. Aug. 17, 2023) (remanding for potential consideration of policy behind fire warnings).

The Roosevelt Fire victims have failed to demonstrate that the Forest Service's judgment was not based on considerations of public policy. The district court properly determined that the discretionary function exception stripped it of jurisdiction to hear the case.[7]

III. Conclusion

We **AFFIRM** the district court.

[7] Because the discretionary function exception stripped the court of jurisdiction to hear the fire victims' claims, we also affirm the court's denial of the fire victims' motion for additional discovery. Additional discovery favorable to the fire victims would not change our jurisdictional conclusion.