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MISSOULA, MT
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PATRICK E. BUFFY
BY _____
DEPT. CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

BACKFIRE 2000 (an *ad hoc* citizen's)
group which is comprised of)
individual plaintiffs), et al.,)
)
Plaintiffs,)

CV 03-198-M-DWM

vs.)

UNITED STATES OF AMERICA,)
)
Defendant.)

ORDER

ALLSTATE INSURANCE COMPANY, as)
subrogee of Larry Baecht, et al.,)
)
Plaintiff,)

CV 03-201-M-LBE

vs.)

UNITED STATES OF AMERICA,)
)
Defendant.)

I. Introduction

This is a tort action pursuant to the Federal Tort Claims Act. The claim involves property damage allegedly caused by

negligent acts of United States Government ("Government") employees. Plaintiffs' complaint alleges that Government firefighters destroyed Plaintiffs' property by negligently lighting backfires¹ on August 6, 2000, during firefighting operations in Montana's Bitterroot Valley. Defendant claims immunity from suit under the discretionary function exception to the Federal Tort Claims Act. After review of the pleadings, briefs and submissions, in my view, the Defendant is correct for the reasons stated below.

II. Jurisdiction

Subject matter jurisdiction is disputed in this case, so jurisdiction is assumed to the extent necessary to rule on the jurisdictional facts at issue. Here, (1) the Court has exclusive jurisdiction over Plaintiffs' causes of action, 28 U.S.C. § 1346(b)(1); (2) the question of subject matter jurisdiction is intertwined with the facts of the case, and (3) the Court "cannot determine jurisdiction on the basis of a threshold inquiry analogous to a 12(b)(6) motion," Roberts v. Corrothers, 812 F.2d 1173, (9th Cir. 1987) (quoting Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983)). Consequently, "the court may assume jurisdiction and go on to determine the relevant jurisdictional facts on 'a motion going to the merits'" such as summary judgment. Id.

¹For purposes of this Order, the terms "backfire," "firing operation," and "burnout" shall be synonymous and are defined as fires intentionally ignited by firefighters involved in wildland fire suppression.

III. Standard of Review

When subject matter jurisdiction is intertwined with the merits of the case, the standard of review is the same as the standard for review of summary judgment. Augustine, 704 F.2d at 1077. When "a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief," then jurisdiction and the merits of the action will be considered intertwined. Sun Valley Gas, Inc. v. Ernst Enters., Inc., 711 F.2d 138, 139-40 (9th Cir. 1983).

Here, the Federal Tort Claims Act is the basis of subject matter jurisdiction as well as Plaintiffs' substantive claims. A party is entitled to summary judgment on demonstrating "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Upon motion for summary judgment, the Court must determine whether a fair-minded jury could return a verdict in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The same principle applies even though Federal Tort Claims are non-jury cases.

IV. Factual and Procedural Background

On July 27, 2000, Governor Marc Racicot declared a state of emergency in Montana because of imminent threats of wildfires. On July 31, lightning started wildland fires in the Bitterroot Valley and the Bitterroot National Forest.

The fires burning in the south end of the Bitterroot Valley

were administratively divided into two "complexes": the Sula Complex, west of Highway 93, and the Valley Complex, east of Highway 93. Two Type I Incident Management Teams (IMTs) assumed responsibility for the fires. Steve Frye was Incident Commander of the Valley Complex IMT and Joe Stam was Incident Commander of the Sula Complex IMT. The Sula Complex included the Spade Fire, burning south of Conner, Montana. On the Spade Fire, the chain of command under Joe Stam was as follows: Daily operations were directed by Operations Chief Lynn Wilcock; Branch Director Chip Houde was next in command; Division Supervisor David Whitmer answered to Houde. Bill Beardsley was the Spade Division's Safety Officer.

On August 5, the Stam team discussed plans to prevent the Spade fire from spreading to populated areas. They worried that if the fire reached gentler topography to the northeast, it could move faster and either run north towards Conner, or burn the structures along the East Fork/Highway 93 corridor and jump the highway. If the fire jumped Highway 93, it could trap crews working the Valley Complex fires on the east side of Highway 93.

To control easterly spread, Whitmer supervised a north-south 'dozer line parallel to the fire's eastern flank. Whitmer, Beardsley, Wilcock, and another Safety Chief discussed the possibility of burning out between the north-south line and the fire, but they were concerned about adequate escape routes for firefighters. Whitmer and Houde also discussed a "contingency" plan in the event that the Spade fire started running east or

northeast, such as building an east-west line from the East Fork to the West Fork. This contingency line could be used to anchor a backfire to keep the Spade fire from jumping Highway 93 or spreading to the north.

On August 6, 2000, an inversion lifted and the Bitterroot fires accelerated. According to Steve Frye, "there was extraordinary fire activity occurring throughout the Bitterroot Valley [with] [f]ires making rapid runs, extreme spotting distances . . . spreading in all directions." The Maynard Fire, another fire in the Sula Complex, jumped Highway 93 and burned over a Valley Complex fire camp; firefighters and support personnel escaped injury by sheltering in busses.

That day the Spade Fire began to heat up and Houde and Whitmer pulled crews to safer, defensible positions. The incomplete north-south 'dozer line, intended to control the east flank of the fire, was abandoned because of the increasingly violent fire behavior, and the fire burned across the line into the Spade Creek watershed. The prevailing winds tended to be out of the northwest. Along its western edge, the Spade fire backed downhill toward a hand-line above the West Fork, and crews under orders from Whitmer successfully backburned between that line and the main fire. As fire behavior worsened in the late afternoon, Whitmer consulted with Houde and began firing operations on the east-west contingency line. Whitmer believed that the main fire had already entered the Dickson Creek watershed when he began his firing operations.

Plaintiffs claim that Whitmer's backfire - not the main Spade Fire - destroyed their property. Plaintiffs also claim that the Government lit other backfires to which it has not admitted. The Government claims that (1) by the time firefighters decided to backfire from the east-west line, the Spade Fire had already reached the main Dickson Creek drainage, and the Spade Fire burned the Plaintiffs' properties, not any backfire; and (2) the backfires of August 6, 2000 were a success because the Spade fire did not jump Highway 93 that day.

Plaintiffs filed suit on December 2, 2003, claiming negligence, nuisance, trespass, and "negligence in investigating agency misconduct." The Government moved for summary judgment on May 31, 2005, arguing that Plaintiffs' suit is barred by the discretionary function exception to the Federal Tort Claims Act.

V. Analysis

A. Law of discretionary function.

The United States is immune from suit except to the extent it has waived its sovereign immunity. Reed ex rel. Allen v. U.S. Dept. of Interior, 231 F.3d 501, 504 (9th Cir. 2000). The Federal Tort Claims Act waives the government's immunity for "tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. However, certain exceptions apply. See 28 U.S.C. § 2680. When the discretionary function exception found in Section 2680 applies, courts are without jurisdiction to hear the claim. O'Toole v. United States, 295 F.3d 1029, 1032 (9th Cir. 2002).

The discretionary function exception provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to-(a) Any claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

There is a two-step test to determine whether challenged Government employee conduct is immune under the discretionary function exception. See Berkovitz v. United States, 486 U.S. 531, 536-37 (1988). Only Government actions satisfying both steps are immune from tort liability.

First, the employee must have had discretion to make the challenged decision or judgment that led to the plaintiff's damages. Id. at 536. "[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." Id.

Second, the challenged decision or judgment must be "of the kind that the discretionary function exception was designed to shield." Id. In creating the discretionary function exception, Congress "desire[d] to 'prevent judicial second-guessing of legislative and administrative decisions grounded in social economic, and political policy through the medium of an action in tort.'" Id. (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 814 (1984) (internal quotation marks omitted) (hereinafter Variq Airlines)). Thus, only

discretionary Government actions "based on considerations of public policy" are protected under the exception. Id.; see also Dalehite v. United States, 346 U.S. 15, 36 (1953) ("Where there is room for policy judgment and decision there is discretion.").

Once the weighing of policy considerations has taken place and the Government has decided on a course of action, the Government has a duty to implement that course of action with reasonable care. See Huber v. United States, 838 F.2d 398, 400-01 (9th Cir. 1988). Negligent execution of a course of action that has already been put into place is not insulated from review under the discretionary function exception. Id.

But "[i]ssues of negligence are irrelevant to the discretionary function inquiry." In Re Glacier Bay, 71 F.3d 1447, 1451 (9th Cir. 1995). As long as both steps of the test are satisfied, an admittedly negligent act is insulated from review, even if the employee abused his or her discretion. 28 U.S.C. § 2680(a); Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1029 (9th Cir. 1989); see also Berkovitz, 486 U.S. at 538-39 n.4 ("[The Federal Tort Claims Act] is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion.") (quoting H.R. Rep. No. 79-1287, at 6 (1945)).

In applying the two-prong analysis here, it is necessary to examine each separate action "to determine whether the specific actor had discretion of the type Congress intended to shield."

In Re Glacier Bay, 71 F.3d at 1451. The Government must prove that the discretionary function exception applies. GATX/Airlog Co. v. United States, 286 F.3d 1168, 1174 (9th Cir. 2002).

B. Parties' arguments.

Plaintiffs allege that in the Spade Fire firing operations of August 6, 2000, Government employees' actions (1) were not properly authorized; (2) were unsafe given the extreme conditions; (3) were executed when employees did not know who or what would be endangered, and without adequate warning to those who were in its path; and (4) were unnecessary because the main Spade Fire would have spared Plaintiffs' properties. These acts and omissions are alleged to constitute negligence under Montana law.

Plaintiffs claim that these negligent acts and omissions are not protected by the discretionary function exception to the Federal Tort Claims Act because, alternatively: (1) Government employees did not possess discretion to violate various Government policies and directives, such as those requiring firefighters to consider safety above all other considerations, and to properly warn other firefighters and inhabitants before lighting a backfire; or (2) even if the Government employees had discretion to make the decisions that resulted in Plaintiffs' damages, those decisions are not of the sort the Federal Tort Claims Act was designed to protect.

The Government claims that its employees' firefighting actions of August 6, 2000 were discretionary, and the decisions

and actions alleged to have caused Plaintiffs' damages are grounded in social policy. The Government argues that these decisions and actions are therefore shielded by the discretionary function exception to the Federal Tort Claims Act, and this Court lacks subject matter jurisdiction over Plaintiffs' case.

C. First prong of the discretionary function exception: The Government employees' actions were discretionary, and were not specifically prescribed by some statute, regulation, or policy.

1. Forest Service policies in place on August 6.

Plaintiffs point to several Government documents to support their claim that certain aspects of the Government's activities that give rise to this suit were specifically prescribed by Government policy and therefore were not discretionary.

a. Wildland Fire Situation Analysis for Sula Complex.

A Wildland Fire Situation Analysis (WFSA) for the Sula Complex was prepared on August 5. The WFSA identified firefighter safety, aviation safety, public safety, and minimizing the loss of improvements (residences and businesses) as the top objectives in the Sula Complex. Regarding firefighter safety, the WFSA directed:

Maintain safety by anchoring all tactical actions to the 10 Standard Fire Orders. Don't bend or break them. Utilize LCES to identify and mitigate the 18 Watchout Situations prior to initiating any tactical actions. If tactical hazards cannot be mitigated don't implement them.

Firefighter and aviation safety were to be the highest priority.

Regarding public safety, the WFSA stated:

The Forest has been closed to public use. Numerous drainages located along the west side of Hwy 93 along the East Fork Bitterroot River as well as the upper East Fork have been evacuated. Trigger points for evacuations must be determined and reviewed with the Forest Supervisor. Forest LEO's will serve as liaisons with the County Sheriff to implement evacuations.

Finally, with regard to structures, the WFSA directed the team to "[m]inimize loss of residences and businesses by preparing an inventory, utilizing a risk assessment process that outlines and prioritizes protection measures . . . in consultation with the Resource Advisor."

The WFSA considered three alternatives for fighting the fires in the Sula Complex and selected Alternative B, a Modified Attack/Confine Plan. Alternative B directed the following actions:

- Any combination of direct, parallel or indirect strategies to control the fire(s). Use the light fuel areas to construct line and burn out to protect communities, structures and highest priority resource values.
- Use aggressive suppression methods to keep all new starts within the urban interface to the smallest possible size.
- Ensure for firefighter and public safety while implementing structure and resource protection.
- Focus control suppression strategies activities that will maximize short and long term protection of structures and private property.
- A monitoring strategy should be considered on fires within the complex downwind from fires that have not been contained or when weather conditions or lack of sufficient resources make for low probabilities of meeting tactical objectives.
- Develop trigger points for evacuation for all communities within the fire area. Work closely with Ravalli County Sheriff and local agencies and implement Unified Command with all jurisdictional agencies.

The rationale for choosing Alternative B was that "due to lack of

available resources, extreme fire behavior, the potential for a long duration event, and the proximity to numerous other large fires," a direct attack on the fires (Alternative A), the method normally preferred, was not feasible in the Sula Complex. The rationale explained further: "Priorities are protection of life and property. Alternative B provides the team the flexibility to utilize tactics that achieve these goals and to make progress to confine the fires and for reducing resource losses when conditions are favorable."

b. Incident Action Plan for Sula Complex, Division Spade.

Joe Stam prepared a Daily Incident Action Plan (IAP) for August 6 activities in the Sula Complex. The IAP provided the following special instructions to the Division Spade team: "Establish communications. Designate safety zones and escape routes. . . . If initiating a burnout, make sure everyone knows before you begin."

The IAP also directed the Division Spade team to "[h]old all existing line," and "[p]rotect structures along west fork." Joe Stam testified in his deposition that his statement to "make sure everyone knows before you begin" initiating a burnout meant that all those in Division Spade who were involved in the firing operation, including the Division Supervisor, should know that a burnout operation is about to occur.

c. Ten Standard Fire Orders.

The Fireline Handbook contains the Ten Standard Fire Orders

referred to in the WFSA. As indicated in the WFSA, the Orders are mandatory. The Ten Standard Fire Orders are as follows:

- (1) Fight fire aggressively but provide for safety first.
- (2) Initiate all action based on current and expected fire behavior.
- (3) Recognize current weather conditions and obtain forecasts.
- (4) Ensure instructions are given and understood.
- (5) Obtain current information on fire status.
- (6) Remain in communication with crew members, your supervisor and adjoining forces.
- (7) Determine safety zones and escape routes.
- (8) Establish lookouts in potentially hazardous situations.
- (9) Retain control at all times.
- (10) Stay alert, keep calm, think clearly, act decisively.

2. The Government employees' acknowledged August 6 firing operations were discretionary.

The primary inquiry under Berkovitz's first prong is whether the applicable Forest Service policies were mandatory instructions that left no room for discretion. According to Plaintiffs, the firefighting policies and directives discussed above prescribed Defendant's actions on August 6 such that there was no room for judgment or discretion. Citing Berkovitz, 486 U.S. at 544, Plaintiffs assert that the discretionary function exception does not apply because the Government failed to act in accord with mandatory directives. Plaintiffs argue Government firefighters should not have lit a backfire at all, but should have at least ascertained who was in the area and warned them - firefighters and residents alike - that backfires might threaten their safety and property.

In Re Glacier Bay involved allegations that Government

hydrographers were negligent in failing to follow mandatory agency guidelines. 71 F.3d at 1450. The Ninth Circuit analyzed the Department of Commerce's internal agency guidelines and concluded that the language of the instructions was mandatory. Id. at 1452. The guidelines, governing the hydrographers' preparation of nautical charts, specified maximum measurements for hydrographers to follow while testing ocean characteristics for the charts. Id. The court held that the hydrographers did not have discretion to go outside those maximum measurements; therefore their actions were not shielded by the discretionary function exception. Id.

In contrast to In Re Glacier Bay, the Ninth Circuit determined in Miller v. United States, 163 F.3d 591 (9th Cir. 1998), that policies prescribing requirements for fire suppression did not eliminate discretion because they did not tell firefighters how to fight the specific fire at issue. The disputed issue in Miller was how firefighters should have allocated suppression resources. Id. at 595. The plaintiffs alleged that Government firefighters negligently failed to commit resources to one particular fire during a multiple fire situation. Id. at 592. The court held:

[W]hile the [applicable] . . . standards and procedures outline certain requirements for fire suppression, they do not eliminate discretion because they do not tell firefighters how to fight the fire. As the district court phrased it, they did not tell the Forest Service to suppress the fire in a specific manner and within a specific period of time. The existence of some mandatory language does not eliminate discretion when the broader goals sought to be achieved necessarily

involved an element of discretion.

Id. at 595.

Here, like in Miller, the various Government orders and directives related to firefighter safety enumerated by Plaintiffs do not give firefighters specific protocols for determining exactly when a backfire is appropriate. Plaintiffs have not shown that specific Government policies require a certain level of authority to light a backfire. Plaintiffs have also failed to show that the Government required firefighters to obtain approval before firefighters lit the Spade fire backfires.

On the contrary, the vague principles of the Ten Fire Orders and other directives show that hard and fast rules are not appropriate to all fires under all circumstances. Because fires are unpredictable, and because lighting a backfire can be a lifesaving emergency measure, the Government's orders and directives do not specifically direct, for example, at what wind speed a backfire is prohibited. One firefighter, Safety Officer Beardsley, cancelled a backfire on August 5 because the "wind is blowing . . . too much for a burnout." Because one firefighter decided a burnout was too risky on one day at one location does not mean that the next firefighter, assessing different, or even identical circumstances, would possess any less discretion in making his or her own judgment. The point is not the sagacity of the firefighter, but rather "the nature of the conduct." Variq Airlines, 467 U.S. at 813.

Plaintiffs claim that Government firefighters had no

discretion to deviate from Government policies on safety, such as those in the Ten Firefighting Orders and the Eighteen Watchout Situations. Plaintiffs are correct, these policies contained mandates. But each mandatory directive provides discretion to the firefighter. For example, Standing Fire Order Number Seven holds that a firefighter must "determine safety zones and escape routes." But the firefighter must use discretion to decide what constitutes an adequate safety zone based on the surrounding fuels, topography, weather, fire behavior, availability of other firefighting resources, time available to prepare the site and other factors involved in fire fighting discretion. An adequate safety zone may vary greatly in size depending on these and other factors. The Orders tend toward vagueness. Standing Fire Order Number Ten instructs firefighters to "Stay alert, keep calm, think clearly, act decisively." This is the language of discretion, not of specific mandatory actions or protocols.

The non-specific language of the Government's policies and directives, such as the Standing Orders and Watchout Situations, supports the Government's position. These are flexible principles to be used in fighting fire, an activity that depends on firefighters' judgment, common sense, and experience. The Miller Court's holding is applicable here: "The existence of some mandatory language does not eliminate discretion when the broader goals sought to be achieved necessarily involved an element of discretion." Miller, 163 F.3d at 595.

Plaintiffs do not identify any statute, regulation, or

policy that prohibited a firing operation in the situation firefighters faced on August 6, 2000. Lighting a backfire can be dangerous to firefighter and public safety; the nature of the firefighter's discretion is to weigh the dangers of a backfire against the benefits.

Although the risks associated with lighting a backfire increase as wind speed increases and as ambient humidity and fuel moisture decrease, Government policies set no express limits when such environmental factors would preclude a firefighter from igniting a backfire. A firefighter must also evaluate the risks of not lighting a backfire, which may vary from nil to extreme. As the risks of not lighting a backfire increase, a firefighter's discretion to make the decision to backfire must also increase.

Because a firefighter must weigh competing risks, his or her act of lighting a backfire falls squarely under the first prong of the Berkovitz test. The act of lighting a backfire under the circumstances of August 6, 2000 involved "an element of judgment or choice." Berkovitz, 486 U.S. at 536; United States v. Gaubert, 499 U.S. 315, 322 (1991).

On August 6, 2000, firefighters faced extreme fire and atmospheric conditions. The firefighting resources were stretched thin. Firefighters in the Bitterroot Valley that day faced a number of large, running fires threatening people and structures. Under these conditions, firefighters had to make difficult decisions. Their acts were "discretionary in nature." Gaubert, 499 U.S. at 322.

A firefighter's discretion to light a backfire is not unlimited. But, the firefighters on the Spade Fire were exercising their discretion on August 6, 2000.

D. Second prong of the Berkovitz discretionary function test: The Government's decisions were grounded in social, economic or political considerations.

Plaintiffs claim that even if the Government employees who lit backfires on August 6, 2000 had discretion, they were not making policy decisions, but were implementing policy choices already made. The Government argues that each firefighter making the decision to light a backfire must look to the same social policy considerations that employees at the policy-setting level must look to. The Government has the better legal argument in this instance, too.

The second step of the discretionary function analysis requires consideration of whether the challenged judgment, act, or failure to act was based on public policy. Gaubert, 499 U.S. at 323. The discretionary function exception is intended "to protect political, social, and economic judgements that are the unique province of the Government, not all decisions involving some discretion." Bear Medicine v. United States, 241 F.3d 1208, 1214 (9th Cir. 2001) (internal quotations marks and citation omitted).

In Summers v. United States, 905 F.2d 1212, 1215-16 (9th Cir. 1990), the Ninth Circuit held that the National Park Service's failure to post warnings of a known hazard was not a decision grounded in public policy, and not subject to the

discretionary function exception. The Park Service permitted campfires in a designated section of beach at the Golden Gate National Recreational Area, yet failed to warn visitors that hot coals may be left behind in fire rings. A barefoot child accidentally stepped into a fire ring and was seriously burned. The court held that the Government's failure to warn was not a policy decision, but a negligent departure from the Park Service's established safety policies. Id.

In Oberson v. U.S.D.A., Forest Service, 441 F.3d 703, 711-12 (9th Cir. 2006), the U.S. Forest Service's decision not to post a warning sign on a dangerously steep section of a frequently traveled snowmobile trail after earlier deciding to warrant the trails, was not a shielded policy decision. The challenged conduct, though discretionary, failed Berkovitz's second prong, and was not protected by the discretionary function exception. Id. at 711-12.

As in Summers and Oberson, Plaintiffs in this case allege that the Government failed to properly follow its own safety procedures because "where the challenged government activity involves safety considerations under an established policy, rather than the balancing of competing policy considerations, the rationale for the exception falls away." Summers, 905 F.2d at 1215.

The Miller plaintiffs argued that public safety was not a policy consideration. Miller, 163 F.3d at 596. The court rejected the plaintiffs' argument: "While safety was one

consideration, the decision regarding how to best approach the Bald Butte fire also required consideration of fire suppression costs, minimizing resource damage and environmental impacts, and protecting private property." Id. Faced with such competing policy considerations, the Government was shielded from immunity by the discretionary function exception. Id.

The safety policy in this case is very different from the safety policies in Summers and Oberson and more like the safety issue in Miller. The safety considerations regarding allocating firefighting resources or lighting a backfire involve a weighing of competing risks. The competing considerations in a decision whether to warn of a known, static hazard, like that at issue in Summers and Oberson, are fundamentally different.

Although Plaintiffs correctly identify the Government's established firefighting safety policies, these policies do not prescribe specific conduct, as in Summers, but guide the weighing of risks. The decision to light a backfire involves "the balancing of competing policy considerations." Summers, 905 F.2d at 1215. Not lighting a backfire on the Spade Fire may have allowed the fire to jump a highway, trap firefighters on other fires, or spread to areas where other people, property or resources could be burned. A firefighter contemplating a firing operation must assess those risks in the context of current and expected environmental conditions, and must judge whether those who may be in the path of the backfire have been adequately protected and warned. Placing one resource at risk in order to

protect another resource is a social policy decision that must be made at the level of the individual firefighter as well as at the national policy level.

Accepting Plaintiffs' portrayal of Government safety directives as rigid prescriptions not only would diminish firefighters' discretion, but would hamper firefighters' ability to fight fire effectively. Firefighters must consider a course of action that best provides for the public good, not which course of action exposes them to the least tort liability. Decisions about how best to fight a catastrophic wildland fire are the type of social policy decision that the discretionary function exception was intended to shield.

E. Plaintiffs' allegations that the Government conducted other, unacknowledged firing operations do not create a genuine issue of material fact.

Having found that the Government's admitted firing operations (Schmidt's, Whitmer's, and Hvizdak's) satisfy both prongs of the Berkovitz discretionary function test, it is necessary to address Plaintiffs' claim that Government employees initiated three un-admitted firing operations. Plaintiffs support their allegations with citations to videotape and deposition testimony by lay persons and Plaintiffs' expert, Dr. Omi.

The fact that three acknowledged firing operations are shielded by the discretionary function exception does not mean that all the Government's firefighting actions are necessarily shielded. "The proper question to ask is not whether the

Government as a whole had discretion at any point but whether its allegedly negligent agents did in each instance. Each separate action must be examined to determine whether the specific actor had discretion of a type Congress intended to shield." In re Glacier Bay, 71 F.3d at 1451.

Plaintiffs produced substantial proof of only one of the three alleged unacknowledged firing operations: an alleged backfire conducted by Chip Houde. Compared to seven pages describing the alleged Houde firing operation, Plaintiffs expend one sentence each to describe the other two alleged unacknowledged backfires. Pl. Backfire's Statement of Genuine Issues, at 2-8.

Even taking Houde's alleged firing operation as fact, there is no genuine issue that would preclude summary judgment. Assuming *arguendo* that Houde lit a backfire and then lied about it, Houde still confronted the same fire conditions on August 6, and had to balance the same risks and benefits discussed in relation to the Government's acknowledged firing operations. Supervisor Whitmer had the discretion to light a backfire, Houde, above Whitmer in the chain of command, had equal or greater discretion. Applying both prongs of the Berkovitz analysis, Houde's actions are also shielded by the discretionary function exception. Because Houde's decisions and actions are shielded by the discretionary function exception, Plaintiffs' documentary evidence of his alleged backfire and the alleged subsequent Government coverup are irrelevant to the outcome of Plaintiffs'

legal claim.

Plaintiffs allege that the "second" firing operation was ignited by an unidentified Government firefighter along the West Fork "proximate to the Castle House." Pl. Backfire's Statement of Genuine Issues, at 8. As is the case with Schmidt's undisputed backfire along the West Fork, the main body of the Spade fire intervened between the second backfire and Plaintiffs' properties. Thus, the second firing operation, taken as fact, would not have affected Plaintiffs' properties and does not alter the disposition of the case. See Anderson, 477 U.S. at 249-50.

Plaintiffs also allege that an unidentified Government firefighter conducted a "third" firing operation "near the Landing Strip." Pl. Backfire's Statement of Genuine Issues, at 8. This alleged firing operation would have taken place west of Whitmer's backfire and, compared to Whitmer's, would have been much less likely to have affected Plaintiffs' properties. This allegation is also not significantly probative to defeat summary judgment.

Finally, the bulk of Plaintiffs' proof goes to the claim that Whitmer's acknowledged backfire destroyed their properties. Even if Plaintiffs are correct about Whitmer's backfire, they cannot escape summary judgment by presenting merely colorable allegations of other unacknowledged backfires. Whitmer's actions are shielded by the discretionary function exception.

VI. CONCLUSION

A firefighter's weighing of risks becomes more complicated

and more difficult with increasing development, but the balancing of risks and benefits constitutes policy-based discretion to execute the Government's duty to provide for the common good. Those decisions should not be "second guess[ed] . . . through the medium of an action in tort." Varig Airlines, 467 U.S. at 814.

Congress created the land management agencies and granted authority and broad discretion to fight wildfires on public lands. How federal agencies fight wildland fires and balance the concomitant dangers to lives and property on public and adjacent lands constitutes the exercise of discretionary social, political, and economic policy.

The Government actions are protected by the discretionary function exception. Whether the Government employees' actions were wise, foolish, or negligent is irrelevant in considering whether the exception applies. In Re Glacier Bay, 71 F.3d at 1451.

Because the discretionary function exception applies to Plaintiffs' causes of action, the United States possesses sovereign immunity and Plaintiffs' claims are barred. Thus, this Court lacks subject matter jurisdiction. No genuine issue of material fact remains, and the United States is entitled to judgment as a matter of law

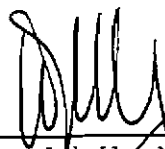
Accordingly, IT IS HEREBY ORDERED that:

1. Defendant's Motion for Summary Judgment (dkt # 38) is GRANTED.
2. The Clerk of Court is directed to enter Judgment in favor of

Defendant and terminate this action.

3. All other motions are DENIED as moot.

DATED this 31st day of August, 2006.



Donald W. Molloy, Chief Judge
United States District Court

