Consolidated Appropriations Act, 2018 Public Law 115-141

H. R. 1625—712

AN ANALYSIS OF DIVISION O

WILDFIRE SUPPRESSION FUNDING AND FOREST MANAGEMENT ACTIVITIES ACT1 TITLE I—WILDFIRE AND DISASTER FUNDING ADJUSTMENT

TITLE II—FOREST MANAGEMENT ACTIVITIES

(This Title at Section 201 describes forest management activities and does not include wildfire use)

TITLE I—Section 101 is the “Short Title “…and may be cited as the “Wildfire Suppression Funding and Forest Management Act”

Section 102 is the “Wildfire and Disaster Funding Adjustment” section. Subsection (a) amends the Section 251 (b)(2) of the Balanced Budget and Emergency Deficit Control Act of 1985 in (1) subparagraph (D )(i) (2) (D)(ii) and adds (3) Subparagraph (F) Wildfire Suppression. The purpose of which is to add additional budget authority for fiscal years 2020 through 2027.

When interpreting Federal law, the United States Government Accountability Office (GAO) through their Office of General Counsel (OGC) has published “Principals of Federal Appropriations Law” (“Red Book”) in several chapters2. Chapter 1 – Introduction advises how to determine Congressional intent with the “**Plain Meaning**” Rule.

*Every appropriation contains limitations upon its availability; that is, federal agencies may spend appropriated amounts only in accordance with the conditions that Congress has placed upon the appropriation. These conditions may be classified in three ways: purpose, time, and amount. For an example, examine the following appropriation for the Marshals Service for fiscal year 2015:*

*“For necessary expenses of the United States Marshals Service,*

*$1,195,000,000, of which not to exceed $6,000 shall be available for official reception and representation expenses, and not to exceed $15,000,000 shall remain available until expended.”*

1 wildfire-suppression-funding-and-forest-management-activities-act-division-o-of-the-consolidated-appropriations- act-2018-pub-l-115-141-132-stat-348-march-23-2018-h-r-1625-11

2 Principals of Federal Appropriations Law Fourth Edition 2016 Revision

*This language specifies purpose limitations: about $1.2 billion is available for the “necessary expenses” of the Marshals Service, while no more than 6,000 of that amount is available “for official reception and representation expenses.” This language places limits upon the permissible objects for which these funds may be used: the money is available only for the necessary expenses of the Marshals Service and not for, say, the Internal Revenue Service.*

An appropriation can be made only by means of a statute. In addition to providing funds, the typical appropriation act includes a variety of general provisions. Anyone who works with appropriations matters will also have frequent need to consult authorizing and program legislation. It should thus be apparent that the interpretation of statutes is of critical importance to appropriations law.

# Authorizing Legislation

**Organic act of 1897 [public--no.2.]** established forest reserves from the Public Domain for the purpose *“…of improve[ing] and protect[ing] the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.”* Further *“The Secretary of the Interior shall make provisions for the* ***protection against destruction by fire and depredations upon the public forests and***

***forest reservations which may have been set aside or which may be hereafter set aside under said Act of March third, eighteen hundred and ninety-one, and which may be continued;*** *and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this Act or such rules and regulations shall be punished as is provided for in the Act of June fourth, eighteen hundred and eighty-eight of the Revised Statutes of the United States.”*

**The Multiple Use Sustained Yield Act of 1960** declared that the purposes of the national forest include outdoor recreation, range, timber, watershed and fish and wildlife. The Act directs the Secretary of Agriculture to administer national forest renewable surface resources for multiple use and sustained yield. The policy of Congress is that national forests are established and administered for outdoor recreation, range, timber, watershed, and fish and wildlife purposes.

This Act is intended to supplement these purposes.

**National Forest Management Act Of 1976** reorganized, expanded and otherwise amended the Forest and Rangeland Renewable Resources Planning Act of 1974, which called for the management of renewable resources on national forest lands. The National Forest Management Act requires the Secretary of Agriculture to assess forest lands, develop a management program based on multiple-use, sustained-yield principles, and implement a resource management plan for each unit of the National Forest System. It is the primary statute governing the administration of national forests.

It is clear from the original authorizing legislation, the Organic Act and the subsequent cornerstones of the Multiple Use and Sustained Yield Act and the National Forest Management Act, Congress intended the protection, multiple uses and sustained yield principles for the Nation’s national forest. Thus, through these authorizing acts Congress expects that threats such as wildfire to the Nation’s national forest be suppressed.

# Appropriations Law

Starting with Wildfire Suppression which appears in the Division Title and the “Short Title.” What does Congress mean by suppression? Congress intends by the appropriation language to ensure ***a policy directed at putting out all wildfires as rapidly as possible*.**

*By far the most important rule of statutory construction is this: You start with the language of the statute. Countless Supreme Court decisions reiterate this rule. E.g., Sebelius v.*

*Cloer,U.S., 133 S. Ct. 1886, 1893 (2013); Carcieri v. Salazar, 555 U.S. 379 (2009); BedRoc Limited, LLC v. United States, 541 U.S. 176 (2004); Lamie v. United States Trustee, 540*

* 1. *526 (2004); Hartford Underwriters Insurance Co. v.Union Planters Bank, N.A., 530*
     1. *(2000); Robinson v. Shell Oil Co., 519 U.S. 337 (1997); Connecticut National Bank*

*v. Germain, 503 U.S. 249 (1992); and Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 300 (1989).* ***The primary vehicle for Congress to express its intent is the words it enacts into law****. As stated in an early Supreme Court decision:*

*“The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used ”*

*If the meaning is clear from the language of the statute, there is no need to resort to legislative history or any other extraneous source. As the Supreme Court observed in Connecticut National Bank v. Germain:*

*“[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”*

This is the “**Plain Meaning**” rule with respect to Wildfire Suppression.

Division O clearly and unambiguously directs the USDA Forest Service (FS) and the land management agencies of the Department of the Interior and the subsidiary State and Territorial forestry agencies to suppress wildfires.

But in reality, what happens in wildfire suppression response by the FS? The current Forest Service Manual (FSM) 5100 FSM 5100 - Fire Management Chapter 5130 - Wildfire Response3 at paragraphs 5, 6, and 7 state:

1. *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.*
2. *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.*
3. ***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.*

At the time, Interim Chief. Vicky Christiansen’s Leaders Intent Memo4 for 2018 provided direction to her agency staff on her expectations for wildfire suppression. In the memo, the Interim Chief referred to *“…windows of opportunity in accordance with our Federal Wildland Fire Management Policy, to reinstate ‘the role of fire as an essential ecological process and natural change agent” by using both planned and unplanned ignitions “to restore or maintain the natural fire regime where safe and possible.’”* Her expectation was to use the **“decision support process in evaluating the potential for using fire under conditions where it can be done safely and effectively.”**

So, nowhere does the Interim Chief’s Leader’s Intent, and/or the agency manual system direct agency personnel to suppress the wildfire, notwithstanding the wording in Division O -- **Wildfire Suppression**. This is evident on-the-ground in the case of the Pole Creek Fire which occurred on the Uinta/Wasatch-Cache National Forest in 2018.

The Facilitated Learning Analysis (FLA)5 of the Pole Creek/Bald Mountain Fire prepared by the Uinta/Wasatch-Cache National Forest provides a “road map” for flouting appropriations law.

*“The Forest embraces opportunities to allow* ***unplanned fires to reduce fuel accumulations and contribute to landscape sustainability*** *where and when conditions are right to do so with little risk. The intent is for the Forest to communicate this every spring at meetings with neighbors and partners. Each year, Forests improve their outreach to partners to attend these spring meetings, including the UWF. At the meetings, a map showing areas in which fire starts might be considered as a means to*

3 WO AMENDMENT 5100-2020-1 (wo\_FSM 5100\_5130-2020.docx)

4 https://[www.fs.usda.gov/inside-fs/leadership/leaders-intent-2018-summary-fire-year](http://www.fs.usda.gov/inside-fs/leadership/leaders-intent-2018-summary-fire-year)

5 https://wildfiretoday.com/documents/PoleCreek-BaldMtn\_FLA\_Final.pdf

*meet Forest Plan objectives is shared and discussed. These maps can be amended where appropriate based on these spring conversations. The map is referred to as “The Red/Green Map” (Default Initial Fire Response Map) and is required for each Forest in the Intermountain Region as a consistent means to communicate intent and opportunity. An area marked in red indicates where fire is likely unwanted due to adjacent values. A green area might be evaluated for an approach that would lead to a larger fire footprint.*

*The value of the Red/Green map is in the conversation with partners pre-season.”*

# Conclusion

The use of appropriated suppression funding for “*using fire under conditions where it can be done safely and effectively”* or *“unplanned ignition”* or when *“wildfire originating from a natural ignition may be managed to achieve Land and Resource Management Plan objectives”* violates appropriation law because the agency Interim Chief ‘s “leader intent” and her agency’s action in implementing the appropriation and the policy stated in the FSM does not align with the appropriation law as enacted. The enacted law states **Wildfire Suppression**. Suppression is in the Division Title as well as the Short Title and in the Amendment to the Balanced Budget and Emergency Deficit Control Act of 1985 at a new section (F) **Wildfire Suppression**.

The Forest Service is in violation of the appropriation law for **Wildfire Suppression** by failing to accomplish the intent of the appropriation. The test is the extent to which the expenditure will contribute to accomplishing the purposes of the appropriation the agency wishes to charge. In this wildfire Pole Creek/Bald Mountain Fire and similar wildfires in FY 2018, the agency chose to “manage” the wildfire to achieve objectives pursuant to policy and strategy i.e. the *Federal Wildland Fire Management Policy* and/or *“the goals of the National Cohesive Wildland Fire Management Strategy to use fire where we can and — as a nation — learn to live with wildland fire”* and are not referenced in Division O. The several national forest land and resource management plans which are derivatives of the National Forest Management Act are not specified in Division O of the Consolidated Appropriations Act of 2018-PL – 115 – 141 – 132 with its associated amendment of the Balanced Budget and Emergency Deficit Control Act of 1985.

This paper has verified the established “plain meaning rule” of the appropriation language. Further Wildfire Suppression appropriation language in the enacted law calls for Wildfire Suppression Operations which means the emergency and unpredictable aspects of wildland firefighting including support, response, emergency stabilization and other emergency activities and funds necessary to repay any transfers needed for the cost of wildfire suppression operations.

There is no discussion in the appropriation text for using “unplanned fire” or achieving Land and Resource Management Plan objectives or even an exception for lands designated as Wilderness. Additionally, in the text there is no mention of prescribed burns, nor any text allowing a wildfire to become a prescribed burn.

It is clear from the Wildfire Suppression Appropriation as enacted, that Congress is legislating

**Wildfire Suppression** through the appropriation.