

Consolidated Appropriations Act, 2023

Public Law 117-328

H. R. 2617

AN ANALYSIS OF DIVISION G  
TITLE III RELATED AGENCIES  
DEPARTMENT OF AGRICULTURE – FOREST SERVICE  
WILDFIRE FIRE MANAGEMENT (INCLUDING TRANSFERS  
OF FUNDS)

*“For necessary expenses for forest fire presuppression activities on National Forest System lands, for emergency wildland fire suppression on or adjacent to such lands or other lands under fire protection agreement, and for emergency rehabilitation of burned-over National Forest System lands and water.”*

*“...Provided further, That of the funds provided under this heading, \$1,011,000,000 shall be available for wildfire suppression operations, and is provided to meet the terms of section 4004(b)(5)(B) and section 4005(e)(2)(A) of S. Con. Res. 14 (117th Congress), the concurrent resolution on the budget for fiscal year 2022 and section 1(g) of H. Res. 1151 (117th Congress), as engrossed in the House of Representatives on June 8, 2022.”<sup>1</sup>*

This paragraph provides appropriation direction (law) for forest fire presuppression, emergency wildland fire suppression and the emergency rehabilitation of burned over National Forest System lands and waters while requiring that the terms of the Budget Resolution for FY 2023 be met.

The Inflation Reduction Act (PL 117 – 169) and the Infrastructure Investment and Jobs Act (PL 117 – 58) provide no incorporating amendments to H. R. 2617. The FY 2023 Omni-bus appropriation provides clear direction for emergency wildfire suppression.

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 chapters<sup>2</sup>. Chapter 1 – Introduction advises how to determine Congressional intent with the “**Plain Meaning**” Rule.

---

<sup>1</sup>

<sup>2</sup> Principals of Federal Appropriations Law Fourth Edition 2016 Revision

*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.”*

*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 (law). 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. Fire, managed fire, natural ignitions and other wildfire prolonging methods are not mentioned.

**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. Fire, managed fire, natural ignitions and other wildfire prolonging methods are not mentioned.

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 Wildland Fire Management, what does Congress mean? Congress intends by the appropriation language to ensure ***a policy directed at putting out all wildfires as rapidly as possible***, which it terms as “emergency wildfire suppression.” *An emergency is an urgent, sudden, and serious event or an unforeseen change in circumstances that necessitates immediate action to remedy harm or avert imminent danger to life, health, or property; an exigency.*<sup>3</sup>

*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 U.S. 526 (2004); Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A., 530 U.S. 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:*

---

<sup>3</sup> [WEX Definitions Team Cornell Law School Legal Information Institute](#)

*“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 G Title III 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 because Congress has defined them as emergencies.

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 Response<sup>4</sup> at paragraphs 5, 6, and 7 state:

*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.*

*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.***

For 2023, Randy Moore’s [Leaders Intent Memo](#) provided direction to his agency staff on his expectations for wildfire suppression. In the memo, the Chief stated; *“We will also continue to use every tool available to reduce current and future wildfire impacts and create and maintain landscape resilience, **including using natural ignitions at the right time and place in collaboration with tribes, communities, and partners. Use of natural ignitions as a***

---

<sup>4</sup> [WO AMENDMENT 5100-2020-1](#) (wo\_FSM 5100\_5130-2020.docx)

*management strategy will also be approved by Regional Foresters during Preparedness Levels 4 and 5 in accordance with the [Red Book](#) (not to be confused with the GAO Red Book on appropriations law).” His expectation is to use the “**approval of the Regional Forester during Preparedness Levels 4 & 5 in accordance with the [Red Book](#).**” Which in practice would prolong wildfires and not suppress them.*

So, nowhere does the Chief’s Leader’s Intent Memo, and/or the agency manual system direct agency personnel to suppress wildfire, notwithstanding the wording in Division G -- **Wildfire Suppression**. This is evident in the [Pass Fire \(NMGNF000191\)](#) where a lightning strike ignition occurred on the 18<sup>th</sup> of May 2023 and is now of this analysis 53,081 +/- acres and only 13% contained.<sup>5</sup>

*“We will also continue to use every tool available to reduce current and future wildfire impacts and create and maintain landscape resilience, including using natural ignitions at the right time and place in collaboration with tribes, communities, and partners. Use of natural ignitions as a management strategy will also be approved by Regional Foresters during Preparedness Levels 4 and 5 in accordance with the [Red Book](#).”*

The Chief continued; *“The Forest Service’s policy is that every fire receives a strategic, risk-based response, commensurate with the threats and opportunities, and uses the full spectrum of management actions.”*

## **Conclusion**

The use of appropriated suppression funding for *“continue[ing] to use every tool available to reduce current and future wildfire impacts and create and maintain landscape resilience, including using natural ignitions at the right time and place in collaboration with tribes, communities, and partners”* or when *“The Forest Service’s policy is that every fire receives a strategic, risk-based response, commensurate with the threats and opportunities, and uses the full spectrum of management actions”* violates appropriation law because the Chief ‘s “leader intent memo” and his agency’s action in implementing the appropriation and the policy stated in the Red Book does not align with the appropriation law as enacted. The enacted law states **Wildfire Management**. Suppression is in the text of HR 2617 as such *“For necessary expenses of forest fire presuppression activities on National Forest System lands, for emergency wildfire **suppression**, on or adjacent to such lands or other lands under a fire protection agreement and for the emergency rehabilitation of burned-over National Forest System lands and water \$945,956,000 to remain available until expended...”*

The Forest Service is in violation of the appropriation law for **Wildfire Management** by failing to accomplish the intent of the appropriation which is **emergency suppression**. The test is the extent to which the expenditure will contribute to accomplishing the purposes of the appropriation the agency wishes to charge. In the Pass Fire and similar wildfires in FY 2023, 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*

---

<sup>5</sup> <https://inciweb.wildfire.gov/incident-information/nmgnf-pass-fire>

*Wildland Fire Management Strategy Addendum Update to “use fire where we can and — as a nation — learn to live with wildland fire”*” and they are not referenced in Division G. The [Red Book](#), the National Cohesive Wildfire Management Strategy Addendum Update which are policy as well as the Forest Service Manual (FSM) 5100 FSM 5100 - Fire Management Chapter 5130, are not specified in Division G of the Consolidated Appropriations Act of 2023-PL – 117 – 328.

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 appropriations law 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 and not the use of natural ignitions at the right time and right place to maintain landscape resiliency.

**End of Paper**