

Prescribed Fire Policy & Programs in Idaho & Other States

Prescribed Fire Through Partnerships: Building
Relationships Across Boundaries

Idaho Prescribed Fire Council Annual Meeting

Wednesday, March 20th @ 2:30 – 3:30

Boise City Hall West – Sawtooth Auditorium

Stephen R. Miller

Professor of Law, Univ. of Idaho
College of Law - Boise



General outline

- Morning session
 - Why prescribed fire? Building the case
 - Legal liability of prescribed fire
 - How legal liability looks in Idaho
- Afternoon session
 - Federal prescribed fire liability
 - Prescribed fire liability in other western States
 - Are southern States a helpful model?

Building the case for prescribed fire

Why prescribed fire? – Ecosystem restoration

- Ecosystem restoration
 - Western rangeland, forests and prairies require fire (i) to regenerate and (ii) to protect them against insect infestations



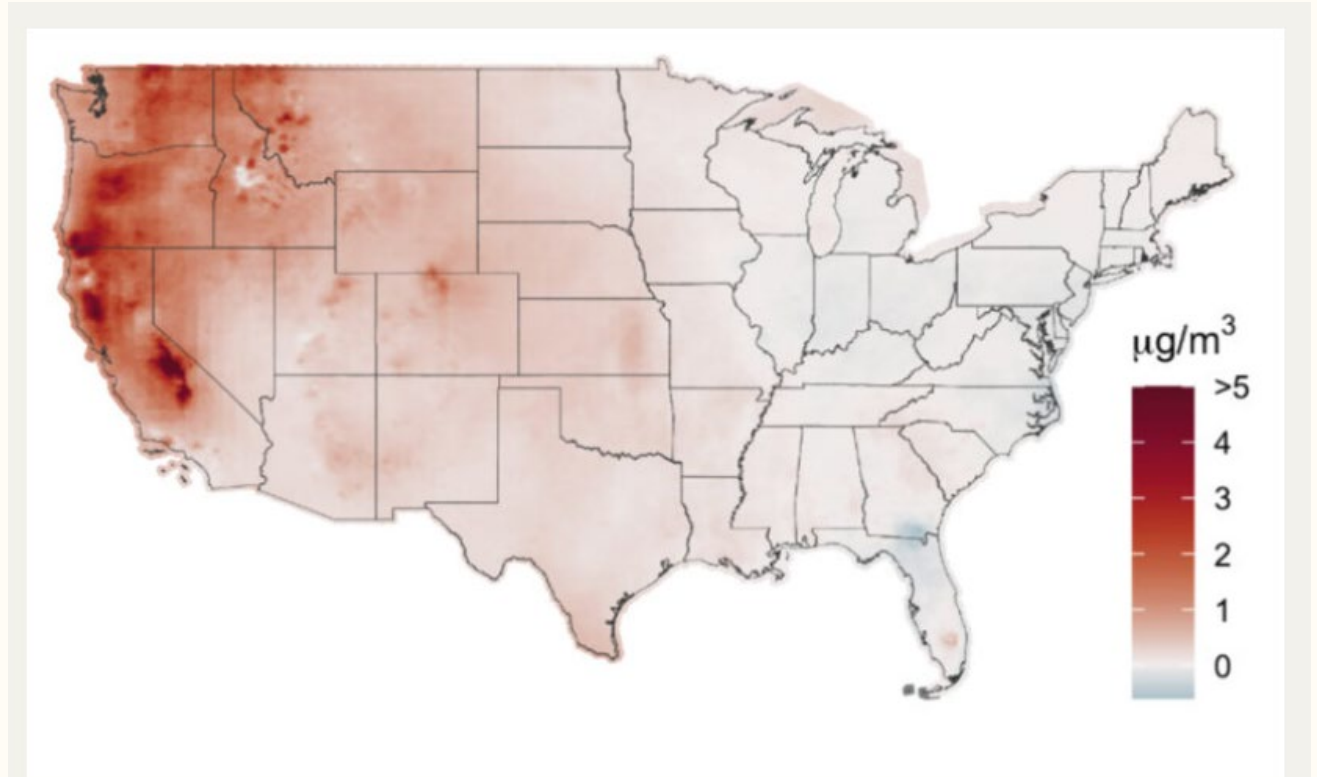
PRAIRIE FIRE!

Prairie fires destroy but they also renew. Thick plant growth chokes out new green growth that animals prefer to eat. Natural fires caused by lightning strikes burn this accumulation away, returning nutrients to the soil. Some plants even need fire to scorch their seeds before they'll sprout.

Without fires, native plants struggle to thrive. Today, Badlands National Park uses fire to restore the native prairie ecosystem. Managers prescribe controlled fires ranging in size from one thousand to five thousand acres on a planned cycle, taking care not to endanger people or property, including park neighbors.

Why prescribed fire? – Air quality

- Air quality
 - Wildfire smoke has reduced air quality gains since the 1970s
 - Smoke from prescribed burns is healthier than smoke from wildfires
 - Source: Childs et al. 2022, *Environmental Science & Technology*



Over the last decade, PM2.5 from wildfire smoke has increased in much of the U.S., particularly in Western states, but some areas in the South and East have seen modest declines. This map shows the decadal change in smoke PM2.5, meaning the difference in daily average smoke PM2.5 during 2006–2010 compared to 2016–2020. (Image credit: Childs et al. 2022, *Environmental Science & Technology*)

Why prescribed fire? – Suppression

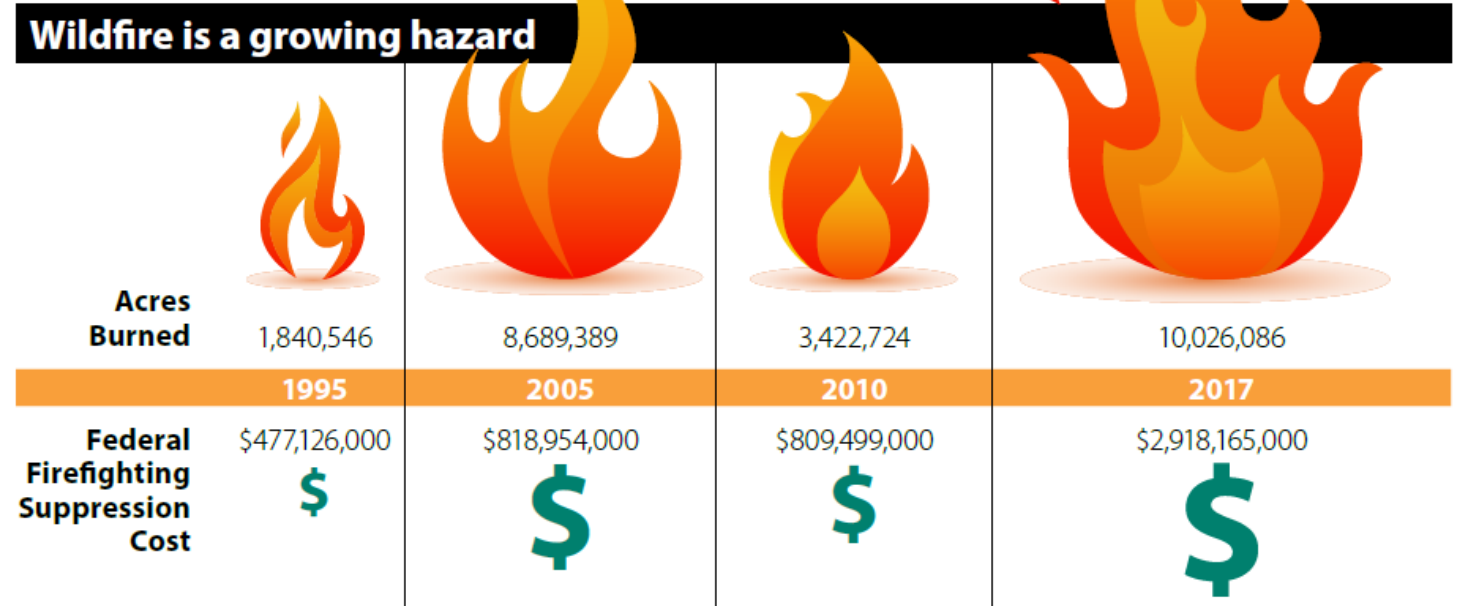
- Limits explosive wildfires that are uncontrollable
 - Clears underbrush, which is the source of runaway wildfires
 - Clears dead wood that results from timber infestation
 - Years of fire suppression have caused timber stands to grow beyond historic norms, also allowing old trees to crowd out new growth
 - Helps protect human development in the wildland-urban interface (WUI), where people live and that is difficult and costly to protect with suppression

Why prescribed fire? – Suppression

Suppression costs are growing

Where communities meet nature

One-third of all U.S. homes are in the wildland-urban interface (WUI), where development and wildlands mix and devastating fires pose a growing danger. **Read PAS Report 594, *Planning the Wildland-Urban Interface***, to help build communities that are more resilient to wildfire.



Source: APA PAS No. 594: Planning the Wildland-Urban Interface

Why prescribed fire? – Suppression

Suppression costs keep growing!

Year	Fires	Acres	Forest Service	DOI Agencies	Total
2022	68,988	7,577,183	\$2,900,000,000	\$649,000,000	\$3,549,000,000
2021	58,985	7,125,643	\$3,741,000,000	\$648,000,000	\$4,389,000,000
2020	58,950	10,122,336	\$1,764,000,000	\$510,000,000	\$2,274,000,000
2019	50,477	4,664,364	\$1,150,000,000	\$440,000,000	\$1,590,000,000
2018	58,083	8,767,492	\$2,615,256,000	\$528,000,000	\$3,143,256,000
2017	71,499	10,026,086	\$2,410,165,000	\$508,000,000	\$2,918,165,000

Source: NIFC <https://www.nifc.gov/sites/default/files/document-media/SuppCosts.pdf>

Growth Rate of Homes in the WUI 1990-2010 by County (in percent)

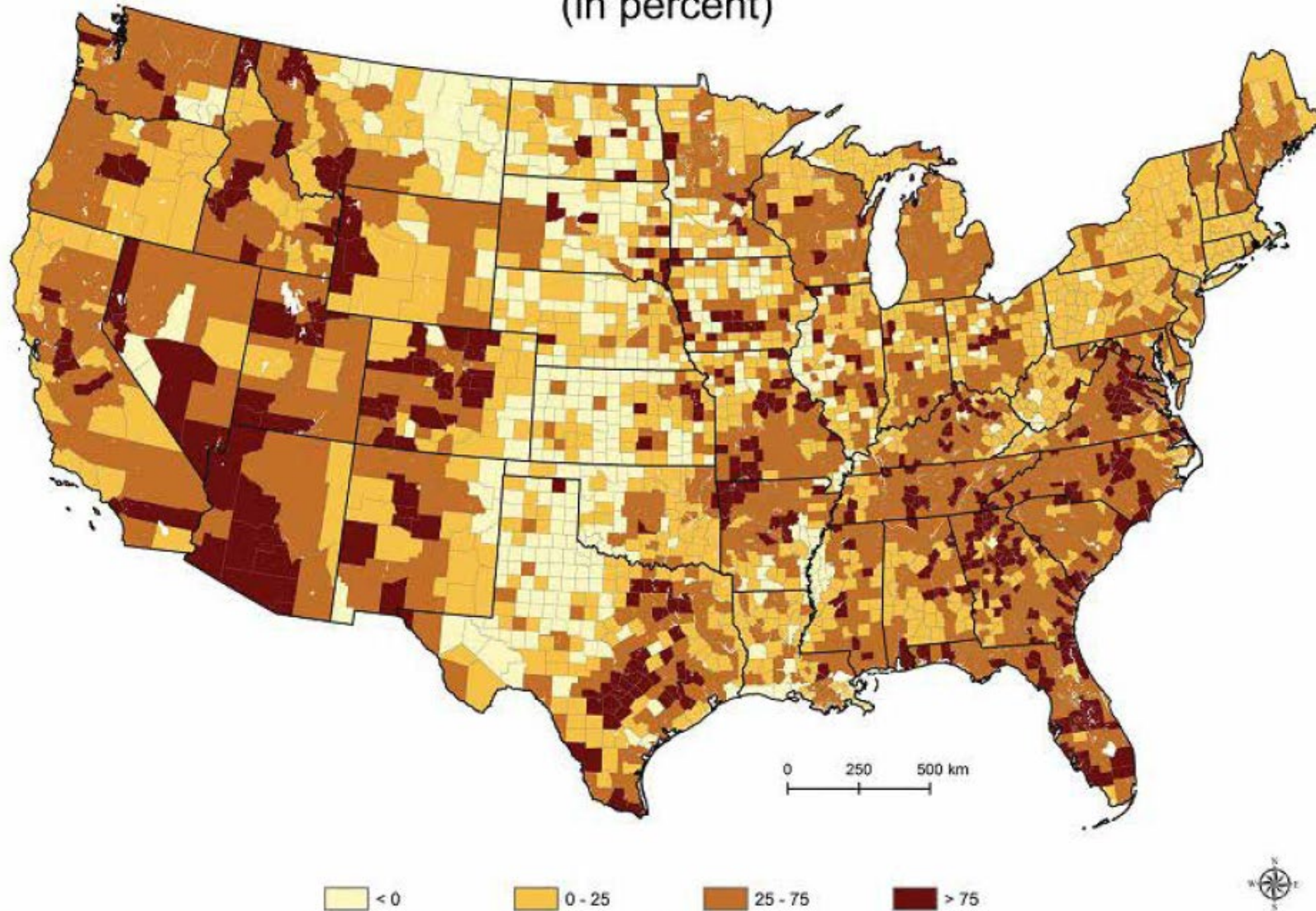


Figure 2.6. Growth rate of homes in the WUI 1990–2010 by county (in percent) (USDA Forest Service)

Why prescribed fire? – Insurance

- Insurance markets (may be) failing
 - Without action, some home will become uninsurable and investment return on those that remain insured will decrease substantially
 - For instance, State Farm pulled out of California markets citing wildfire risks
 - Insurer of last resort plans (Cal FAIR plan) are up to 3x the cost of current insurance plans; market rates to cover insured losses of homes in high wildfire areas are up to 5x the current rates
 - Reform is needed: California does not permit insurers to pass on the cost of re-insurance; however, that will likely need to change to allow reallocation of risk in markets with high wildfire
 - The primary other option: prescribed burns that reduce risk of catastrophic loss

Why prescribed fire? – Insurance

Climate change wildfire risk is beginning to drive insurance markets and affect returns

	Example Impact of Increased Cost		
	Current	Repricing after insurance adjustment 2023	Repricing for estimated future insurance risk
Annual rent	\$21,000	\$21,000	\$21,000
Homeowners Insurance	-\$1,436	-\$3,200	-\$5,426
Other building costs	-\$4,734	-\$4,734	-\$4,734
Net Operating Income (NOI)	\$14,830	\$13,066	\$10,840
Cap rate	5%	5%	6%
Property Value (NOI/cap rate)	\$296,600	\$261,320	\$180,667
Difference		-\$35,280 (-11.9%)	-\$115,933 (-39.1%)

Table 10. Example of increased cost of home ownership's impact on property values due to insurance rates in CA

Why prescribed fire? – Cultural

- Cultural reasons
 - Long history of tribal (cultural) burning
 - Long history of western agricultural burning

The legal landscape of prescribed fire

I – CAA & burn permits

- Burn Permits for Clean Air Act NAAQS compliance / Regional Haze Rule
 - State issues
 - Federal compliance through State Implementation Plan (SIP)
 - Administrative ease for private burners
 - Fees
 - Difficulty / ease in obtaining permits
 - Burn plan complexity
 - Time / complexity for approval
 - One-time approval vs. seasonal vs. year
 - Certified burner requirements
 - Knowledge to conduct the burn
 - Training availability
 - Continuing education
 - Indemnity / Insurance (availability and cost)
 - Communication on Go / No-Go determinations

The legal landscape of prescribed fire

I – CAA & burn permits

- Federal issues
 - CAA 319(b) excepts wildfire smoke from NAAQS but not prescribed fire
 - New final rule reduces PM_{2.5} from revising the primary annual PM_{2.5} standard by lowering the level from 12.0 µg/m³ to 9.0 µg/m³ may make prescribed fire harder 89 Fed. Reg. 16202 (Mar. 6, 2024); 88 Fed. Reg. 5558 (Jan. 27, 2023)
 - Wildland fire, which encompass both wildfire and prescribed fire, accounts for 44% of emissions of primary PM_{2.5} emissions (U.S. EPA, 2021b). Emissions from wildfire comprises 29% of primary PM_{2.5} emissions
 - The EPA views the strategic use of prescribed fire as an important tool for reducing wildfire risk and the severity of wildfires and wildfire smoke (88 FR, 54118, 54126, August 9, 2023).²⁹ As noted in the PM NAAQS proposal, agencies have efforts in place to reduce the frequency and severity of human-caused wildfires (88 FR 5570, January 27, 2023).
 - However, the mechanism appears to be the Exceptional Event Rule, which is cumbersome

The legal landscape of prescribed fire II – Common law liability for escaped fire

- Negligence
 - Gross v. simple negligence
 - Simple negligence: P must show omission to do something a reasonable person would have done
 - Gross negligence: reckless disregard for duty of care owed to others by burner; usually simple negligence applies if burn plan not followed
 - Idaho – stated to be simple negligence, but more complicated (38-107)

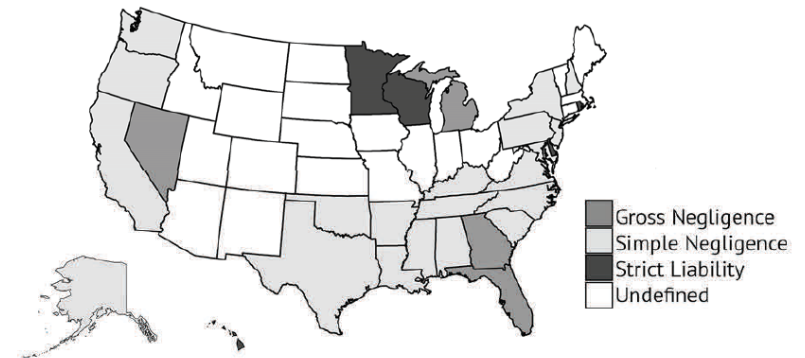


Figure 1. Map of the U.S. showing the current standard of care applied in prescribed burning-related lawsuits. Undefined means the standard of care is established through court precedent, not stated explicitly a state statute. In all undefined states, simple negligence is the standard that has been applied in court cases. Reprinted with permission from John Wiley & Sons©

From Wonkka, GPE publica² on 2016-7

Prescribed fire liability factsheet: standards of care by state (2016)

The legal landscape of prescribed fire II – Common law liability for escaped fire

- Nuisance – unreasonable interference with another’s land
 - Public nuisance / private nuisance
 - Nuisance per se / in fact
- Trespass – intentional invasion of another’s land (compensatory / punitive damages)
- Other torts largely untested, but consider...
 - Interference with prospective business relations
 - Emotional distress

The legal landscape of prescribed fire

III – Employee / burner injury

- Negligence of employer
- Insurance

The legal landscape of prescribed fire

IV – Environmental analysis

- Idaho requires no environmental analysis; however, burning on federal lands does require environmental analysis, as would coordinated burns between private and federal parties
- Information and certainty for decisionmakers today v. stalled policy implementation and inaction creating dangerous situations in forests, rangelands and prairies

Federal environmental review policy requires repetitive analysis at cost of money, time, and inaction

- National Environmental Policy Act requires environmental review of all federal agency actions with significant effects on the environment
- Usually, requires an EA to determine if an EIS is required. In 2012, an EIS took, on average, 4.6 years. Today, often longer for an EIS.
- Six categorical exclusions (CEs) (3 in NEPA, 3 in the Health Forests Restoration Act, or HFRA) seek to reduce environmental review for prescribed fire
 - Applicability is haphazard and highly conditioned
 - Environmentalists have long fought these CEs because some include other forms of timber harvesting that benefitted the timber industry and history of distrust (sometimes justified)
- Result: environmental review, while well intentioned, has slowed down and lessened the use of prescribed fire

The legal landscape of prescribed fire

V – Insurance and indemnity

- Insurance for prescribed burners
 - Private market
 - State-sponsored (e.g., California)
- Indemnity funds for escaped fires
 - Oklahoma
- More on these state solutions later today...

Insurance for prescribed fires

- Example of prescribed fire insurance: C.D. Rigdon Insurance Co.
 - Has written prescribed fire insurance policies in the U.S. since 2008; in Year 2 of writing for Lloyd's of London, which has significantly increased reach
 - Currently in 35 states; hopes to enter California in 2025 despite the state fund
 - Writes “several” policies in Idaho “south of Boise”
 - Insures university extension programs that do burns (e.g., Texas A&M Extension)

Insurance for prescribed fires (cont'd.)

- Example from C.D. Rigdon:
 - Revenue-based policies with a minimum of \$5,000
 - Written annually, not per event
 - Policy terms
 - \$1 million per occurrence; \$2 million aggregate
 - Includes a duty to defend, which includes attorney fees
 - Cost is based on burner revenue (e.g., less than \$150,000 annual revenue pays \$5,000 minimum, and steps up in tiers from there)
 - Not written in individual names; must be incorporated (is that a barrier in Idaho? If so, then may need legal assistance to incorporate)
 - Includes (i) general liability; (ii) errors and omissions; and (iii) pollution liability for smoke as both “obscurant” and “pollutant”

Insurance for prescribed fires (cont'd.)

- Is regulatory reform a substitute for insurance?
 - Rigdon notes that most of the new regulatory regimes (he mentioned Missouri, which I did not research) are untested and so liability retains some uncertainty even with new regimes
 - Attorney fees: even if burner prevails, the cost of litigation without insurance defense could still be very high
 - I would be curious to hear your thoughts
- State options
 - Create a state-sponsored insurance program – see California
 - What about a state-subsidized insurance program that remains with private insurers?
- Response or comments on insurance?

Prescribed fire liability in Idaho

- CAA / Burn Permit Compliance
 - Burn season excludes May 10 – October 20 (38-115)
 - Burn permits required; violation a misdemeanor (38-115)
 - Compliance with permit does not preclude other forms of liability (IDAPA 58.01.01.601)
 - Requires smoke management plans (IDAPA 58.01.01.614)
- Certified burner program? Trade training for...lower standard of negligence? Insurance? Indemnity? Who will offer? Who will pay?
- Employer liability for workers on prescribed burns? (Unstated...general standards presumably apply)

Prescribed fire liability in Idaho (cont'd)

- Common law claims
 - Nuisance
 - Escaped fire is a public nuisance (38-107(1))
 - Private nuisance is not addressed in statute; cases have permitted it
 - Negligence
 - 38-107(2) – states damages calculated for negligently escaped fire
 - Simple negligence – reasonable person standard
 - Trespass
 - Other tort liability?

Prescribed fire liability in Idaho (cont'd)

- Do common law claims apply to smoke? (Unclear.)
- The common law claims can all be plead together (e.g., don't have to choose negligence or nuisance)
- Insurance / indemnity?
- Incentivize local public and private actors (e.g., HOAs)?
- What does Idaho need to do culturally to “build the case” to make prescribed burning more acceptable?

Afternoon session

The legal landscape of prescribed fire

- The federal perspective

Federal liability for prescribed fire is dependent on state standards

- Background rule: sovereign immunity prohibits liability
- Federal Tort Claims Act (FTCA) permits tort claims against the federal government in certain instances
 - Prohibits claims of strict liability for ultrahazardous claims and most intentional torts
 - Negligence is primary liability for federal agencies
- Discretionary function exemption
 - Agency is not liable if the action was (1) discretionary and (2) protected by policy (*Gaubert* test)
- If the discretionary function exemption doesn't apply, the applicable negligence standard for prescribed fires is that of the state where the action occurred
 - U.S. Supreme Court first held that a federal agency was liable for wildfires caused by agency negligence in 1957 (*Rayonier*) and that the extent of liability was the same as private individuals in the state of the action
 - That means federal agency liability for prescribed burns varies based on underlying state negligence law

State law – negligence (simple v. gross)

- Significant variability in prescribed fire negligence standards; however, the literature tends to divide these into the following categories:
- **Strict Liability:** holds a person legally responsible for harm even if no negligence was found
- **Simple Negligence:** holds a person legally responsible for harm if reasonable care was not taken
- **Gross Negligence:** holds a person legally responsible for harm only if it can be shown that they took less care than even a careless person would use (i.e., reckless disregard for safety)
- Prescribed fire liability is usually simple or gross negligence. Those seeking to promote prescribed fire are seeking to move from simple to gross negligence

State law – criminal negligence

- Wyoming 6-3-105
 - Criminal negligence for fire is a misdemeanor with punishment of up to 6 months and jail and \$750
- Colorado 18-13-109
 - Criminal negligence for fire is a petty offense involving mandatory fine of \$250 - \$1000 but permits additional “sentencing alternatives”
- Arizona 13-1706
 - Criminal negligence for fire is a class 2 misdemeanor

State law - nuisance

- Traditional approach: all fire is a public nuisance
 - Idaho Code § 38-107: “Any forest or range fire burning out of control or without adequate and proper precautions having been taken to prevent its spread, is hereby declared a public nuisance, by reason of its menace to life and/or property....”
- New approach: prescribed fire is NOT a nuisance
 - New Mexico Code § 68-5-3: “Prescribed burning is considered in the public interest and not a public or private nuisance.”

State law - trespass

- No surveyed state addressed trespass in statute or regulation
- Traditional approach of courts
 - Ream v. Keen, 112 Oregon App. 197 (1991): intentional trespass was established as a matter of law resulting from drift of smoke caused by field burning that drifted onto neighbor's residential property
 - Kelly v. CB&I Constructors, Inc., 179 California App. 4th 442 (2009): the spread of a negligently set fire to the land of another constitutes a trespass
- Almost no discussion of reform here for prescribed fire, but why not?
- [Note: As an intentional tort, trespass is not a permitted claim against federal agencies under the FTCA]

State indemnity and insurance for private burners

- Wyoming
 - Requires insurance prior to private parties burning (WCWR 060-0002-27)
- Colorado
 - Counties may purchase an indemnification insurance policy and private landowners who enter into memoranda of understanding with the board shall have the opportunity to opt into such policy (Colorado Rev. Statutes § 30-11-124)
- California
 - Prescribed Fire Liability Pilot Program (Pub. Res. Code § 4500): covers prescribed fire and cultural burning
 - Permits state forestry agency to purchase insurance to cover private-party prescribed burn (Pub. Res. Code § 4476(e))
- Oklahoma
 - Oklahoma Controlled Burn Indemnity Fund (2 O.S. § 16-28.3): compensates landowners for losses incurred from a fire that spreads beyond the control of the burner, except for losses covered by insurance.

Certified burner programs

- National Wildfire Coordinating Group (<https://www.nwcg.gov/>) provides training
- Colorado
 - Create certified burner and noncertified burner designations for users of prescribed fire on private and nonfederal land (24-33.5-1217), but does not require certification for prescribed burning
- New Mexico
 - Similarly, created certified burner standard and training (68-5-7; 19.20.5 et seq) but did not require

Legal ways forward (and trade-offs)

- Reduce state negligence standard from simple to gross negligence
 - Assists both private and federal burners with certainty
 - Makes insurance / indemnity for private burners more palatable
- Eliminate criminal negligence
- Change fire statutes from nuisance per se to nuisance shields
- Change fire statutes to prevent trespass claims
- Eliminate intentional tort claims other than negligence on the state level that would apply to private burners

Legal ways forward (and trade-offs)

- Trade training for insurance with certified burner programs
- Ease prescribed burn compliance within CAA
 - Remove prescribed fires from airshed compliance?
- Ease access to indemnity funds for private burners
- Robust exemption for prescribed burns from environmental review permitting quick action
- Require local actors, such as cities and HOAs, to engage in yearly maintenance, which could include prescribed fires as a means of clearing underbrush

Ways forward for cultural norms

- Accepting fire in the air as part of 3 seasons
- Accepting fire on the landscape
- Accepting the risk of escape fire (about 1%), which may be catastrophic, and insuring/indemnifying it
- In exchange...
 - Less severe wildfire, which means less loss of property and life
 - Lower suppression costs
 - Fewer days of hazard air quality
 - Healthier fire-based ecosystems (new growth, lessened effect of insect infestations)
 - Viable property insurance markets
- Fire policy is often made after a catastrophic event
 - Prepare solutions in advance to be prepared to seize the focus
 - Finding co-benefits for fire policy



Thank you!

STEPHEN R. MILLER

Professor of Law
University of Idaho, College of Law
millers@uidaho.edu | Zoom
415-377-9501 (Cell)