

**Prescribed Fire Through Partnerships:  
Building Relationships Across Boundaries**

Idaho Prescribed Fire Council Annual Meeting  
Wednesday, March 20th @ 8:30-10; 2:30 – 3:30  
Boise City Hall West – Sawtooth Auditorium

**Prescribed Fire Policy & Programs  
in Idaho & Other States**

**Stephen R. Miller  
Professor of Law, Univ. of Idaho College of Law - Boise**

This is a summary of prescribed fire primary sources reviewed, which included statutes, administrative regulations, and major cases related to prescribed fire in western states and the federal government. The review was conducted in August, 2023 and reflects applicable law at that time. No known significant changes have occurred since then.

The states reviewed were as follows: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming.

**Air Permitting.**

All states surveyed required permitting for prescribed fire necessary to comply with federal air pollution requirements. Each state has a combination of statutory and administrative regulations that govern how and when prescribed burns can occur. There are several air pollution goals that these statutes and regulations address.

**National Ambient Air Quality Standards (NAAQS).**

Prescribed fires produce particulate matter (both PM2.5 and PM10) and ozone precursors, which contribute to haze. The Clean Air Act imposes both air quality and visibility regulations that are administered by the Environmental Protection Agency (EPA) and implemented at the state and local level. First, the National Ambient Air Quality Standards (NAAQS) impose quantitative standards for six criteria pollutants on each region within a state. Each state prepares a State Implementation Plan (SIPs) for how to meet those standards, and prescribed burning regulations are part of these SIPs.

A challenge with NAAQS compliance is that section 319(b) of the Clean Air Act allows states to exclude from their NAAQS accounting smoke from “exceptional events.” An exceptional event is one that the EPA Administrator determines, based on a submittal from a state: (i) affects air quality; (ii) is not reasonably controllable or preventable; and (iii) is caused by human activity that is unlikely to recur at a particular location or is a natural event.

EPA excludes wildfire emissions from NAAQS accounting as a “natural event.” However, prescribed fire is not treated as a “natural event,” and thus must be included in a state’s NAAQS accounting. The only option for states is to file for an exceptional event exemption. However, such exemptions are expensive to file, impracticable for most prescribed burns as presently operated, and by its own terms is contradictory to what a prescribed burn is intended to do.

There is currently a proposed rule to limit PM2.5 emissions further than the current NAAQS standards. Some prescribed fire advocates are concerned that this will make it even harder to set such burns. See 88 Fed. Reg. 5558 (Jan. 27, 2023).

**Regional Haze Rule.**

In addition to the NAAQS, section 169A of the Clean Air Act “declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility” in certain national parks and wilderness areas. The EPA administers section 169A through the Regional Haze Rule. States also have prescribed burn provisions that address haze.

Air Quality Statutes and Rules Relevant to Prescribed Burns

<b>Jurisdiction</b>	<b>Statutes</b>	<b>Rules &amp; Guidance</b>
U.S. Government	42 USCS § 7409 (establishing NAAQS); 42 USCS § 7410 (State Implementation Plans)	40 CFR § 50.14(b)(3) (exceptional events and prescribed fires); 2019 Exceptional Events Guidance <sup>1</sup>
Alaska	41.15.060 et seq.	11 AAC 95.412 - 11 AAC 95.430
Arizona		R18-2-602; R18-2-1501 - R18-2-1515
California		80100 - 80330
Colorado		8 CCR 1507-32 (prescribed burning); 5 CCR 1001-3 - 5 CCR 1001-11;
Hawaii	185-7	11-60.1-51 - 11-60.1-58
Idaho	38-115	20.02.01.010; 20.02.01.071; 58.01.01.006 - 58.01.01.614; Montana/ Idaho Airshed Group <sup>2</sup>

<sup>1</sup> [epa.gov/sites/default/files/2019-08/documents/ee\\_prescribed\\_fire\\_final\\_guidance\\_-\\_august\\_2019.pdf](https://www.epa.gov/sites/default/files/2019-08/documents/ee_prescribed_fire_final_guidance_-_august_2019.pdf)

<sup>2</sup> <https://mi.airshedgroup.org/>

Kansas	65-3005	28-19-645-28-19-648
Montana	17.8.601-17.8.610	
Nebraska	81-520.01-81-520.05	TITLE 129, CH. 30, 001 – 002.08
New Mexico	68-5-1-68-5-8	19.20.5.2-19.20.5.11
Nevada	244.361	445B.22067
North Dakota		33.1-15-04-02
Oklahoma	16-24.1; 16-25; 16-28.1	252:100-13-1 - 252:100-13-11
Oregon		629-042-1000 et seq.
South Dakota	34-35-17; 34-35-20 (Interstate Compact for the Prevention and Control of Wildfires)	12:12:02:01 - 12:12:02:07; 74:36:06:07
Utah	19-2A-105	R307-240-1 - R307-240-4
Washington		WAC 332-24-201-332-24-271
Wyoming		WCWR 020-0002-10 - WCWR 020-0002-27
Florida	590.125	
South Carolina	12-6-148	

**State Negligence Liability Standards.**

Although studies show prescribed fires result in a low degree of property loss, the fear of liability is routinely noted as a reason why private individuals do not conduct more prescribed burns. Negligence is the primary liability concern for an escaped fire. Negligence reform for prescribed fires has sought to move away from a simple negligence to a gross negligence standard for damage caused by an escaped prescribed fire. For instance, Georgia, Michigan and Nevada have long had gross negligence standards and have seen significant increases in prescribed burns. Florida recently adopted a gross negligence standard for prescribed burns; South Carolina adopted a gross negligence standard but only for smoke effects of such burns.

Negligence Statutes and Rules Relevant to Prescribed Burns

Jurisdiction	Statutes	Rules & Guidance
U.S. Government		
Alaska	41.15.045 (civil immunity); 41.15.110 (due care to prevent spread)	
Arizona	13-1706; 49-501(a)(1) (burner qualifications)	R18-2-1514(D); see generally R18-2-1501 - R18-2-1515
California	PRC § 3333.8 (immunity for prescribed burn); § 4422 (allowing to burn uncontrolled); HSC §§ 13007 - 13009	
Colorado	24-33.5-1217(3)(B)(II)	
Hawaii	185-7	11-60.1-52(a)
Idaho	38-107	58.01.01.601
Kansas	See case law	
Montana	50-63-102 - 50-63-104; 76-13-406 (restoration damages line of cases)	
Nebraska	318.1181; 472.540	
New Mexico	68-5-4(A)	
Nevada	474.550; 527.126	
North Dakota	12.1-21-03; 23.1-08-07; 37-17.1-10.1; 33.1-15-04-02	
Oklahoma	15-28.1; 16-24.1; 16-25; 16-28.1; 16-28.2(G); 16-30	252:100-13-11
Oregon	477.068; 477.069; 477.085; 477.089; 477.095; 477.120; 477.125; 477.128	
South Dakota	34-35-9 - 34-35-14	
Utah	65A-8-211(A)-(B); 76-6-104	
Washington	76.04.183(3)	WAC 332-24-201- WAC 332-24-261
Wyoming	6-3-104-106 (criminal liability)	WCWR 060-0002-27 s4(d)(iii) (requiring insurance)

***Federal Agency Tort Liability***

Federal agency employees, which conduct the majority of prescribed burning at this time, can be held liability under the Federal Tort Claims Act for an escaped burn if a private person would have been liable in a similar situation. The applicable standard apply to the federal employee is the underlying state tort liability standard. However, if the action involves a “discretionary function,” then the agency employee is not liable. Courts have applied the discretionary function in some, but not all, prescribed burn cases creating uncertainty for federal agency employees.

See: 28 USCS § 1346 (federal tort liability); 28 USCS § 2680 (exceptions to federal tort liability);

### **Certified Burner Programs**

A number of states have created certified burner programs. In some instances, private persons that complete the training are authorized to burn and receive a heightened liability protection. In other instances, completion is required for anyone seeking to burn.

#### Statutes and Rules Relevant to Certified Burner Programs

<b>Jurisdiction</b>	<b>Statutes</b>	<b>Rules &amp; Guidance</b>
Arizona		R18-2-1512;
California	PRC 4421- 4497.2 (prescribed burn areas designated)	4500 – 4503 (effective through 1/1/28)
Colorado	24-33.5-1202 - 24-33.5-1217.7	
New Mexico	68-5-2 - 68-5-8	19.20.5.2 – 19.20.5.11
Nevada	527.128	
Oklahoma	16-28.2	155:45-3-1 - 155:45-5-7 (claims on indemnity fund)
Oregon		OAR 629-042-1005 - 629-042-1070
Washington	76.04.183	

### **Nuisance and Trespass.**

In addition to negligence, nuisance and trespass continue to apply to prescribed burns. Altering traditional approaches to these doctrines may be worth considering. For instance, some states treat prescribed fires as nuisances, such as Idaho, while others specifically state that escaped burns are not a nuisance, as in New Mexico. There is not a significant discussion of these issues in the literature, though these other torts may still produce liability.

#### Statutes and Rules Relevant to Nuisance Claims for Prescribed Burns

<b>Jurisdiction</b>	<b>Statutes</b>	<b>Rules &amp; Guidance</b>
Arizona		R18-2-1512;
California	PRC 4421- 4497.2 (prescribed burn areas designated)	§§ 4500 – 4503 (effective through 1/1/28)
Colorado	24-33.5-1202 - 24-33.5-1217.7	
New Mexico	68-5-2 - 68-5-8	19.20.5.2 – 19.20.5.11
Nevada	527.128	
Oklahoma	16-28.2	155:45-3-1-155:45-5-7 (claims on indemnity fund)
Oregon		OAR 629-042-1005 to 629-042-1070
Washington	76.04.183	

Trespass claims have also been discussed in case law from California (*Kelly v. CB&I Constructors, Inc.*); Idaho (*State v. Plum Creek Timber Co.*); and Oregon (*Ream v. Keen*).

### **Insurance for Burners and Indemnity Funds.**

Because of the significant potential for liability, insurance for burners and indemnity funds to pay for losses from escaped fires, should they occur, are of significant interest. Unfortunately, insurance can be difficult to get for burners in many markets throughout the western states and is often unavailable. Some states have created insurance funds to fill the gap.

State provisions that address insurance programs can be found in Arizona (4476); California (§ 4500); Colorado (30-11-124); Oregon (477.155); and Wyoming (WCWR 060-0002-27). Some states have also created indemnity funds that pay for damages of escaped burns. See Oklahoma (16-28.3; 155:45-3-1-155:45-5-7).

Private insurance remains available for private and public prescribed burners. One insurer contacted for this study currently is writing prescribed burn permits in 35 states for Lloyd's of London. That insurance is available on a yearly basis with cost determined by revenue and a minimum of \$5,000 annually.

### **Streamlining NEPA Compliance.**

The National Environmental Policy Act ("NEPA") requires that federal agencies study all "major federal actions significantly affecting the quality of the human environment" before acting. NEPA Section 102(2)(C). If significant affects are possible, the result of this study is known as an Enviornmental Impact Statement ("EIS"). Preparation of an EIS is a lengthy and expensive process. There are several categorical exclusions for prescribed burns that limit the environmental review process. See 16 USCS § 6591B; 16 USCS § 6591D; 36 CFR 220.6 (NEPA categorial exclusions). Even categorical exclusions can take time to prepare, which makes quick engagement with burns hard to achieve.

## IDAHO STATUTES

### 38-107. UNCONTROLLED FIRES A NUISANCE — ABATEMENT — CIVIL LIABILITY.

(1) 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. Any person responsible through his conduct, acts and/or control of property or operations for either the starting or the existence of such fire is hereby required to make a reasonable effort to control or extinguish it immediately, without awaiting instructions from the director of the department of lands or a fire warden. The director of the department of lands or any fire warden may summarily abate the nuisance thus constituted by controlling or extinguishing such fire and the person willfully or negligently responsible for the starting or existence of such fire shall be liable for the costs incurred by the state or its authorized agencies in controlling or extinguishing the same. The amount of such costs shall be recovered by a civil action prosecuted in the name of the state of Idaho and any amounts recovered shall be paid to the state treasurer for deposit to the forest protection fund. Civil liability provided for herein shall be exclusive of and in addition to any criminal penalties otherwise provided.

(2) Notwithstanding any other provision of law, in a civil action against any person, legal entity, state or political subdivision for forest or range fire caused by a negligent or unintentional act, which act was not willful or intentional under section 6-202, Idaho Code, the real and personal property damage is limited to:

- (a) The reasonable costs for controlling or extinguishing the forest or range fire;
- (b) Economic damages; and
- (c) Either (i) the diminution of fair market value of the real and personal property resulting from the fire, or (ii) the actual and tangible restoration costs associated with bringing the damaged real and personal property back to its pre-injured state to the extent that such actual and tangible restoration costs are reasonable and practical.

As used in this subsection, “economic damages” means objectively verifiable monetary loss including, but not limited to, out-of-pocket expenses, loss of earnings, loss of use of property or loss of business or employment opportunities. As further used in this subsection, “fair market value” means the amount a willing buyer would pay a willing seller in an arms-length transaction when both parties are fully informed about all of the advantages and disadvantages of the property and neither is acting under any compulsion to buy or sell, as determined by a state certified appraiser, who is qualified to appraise the property. Claims against the state or a political subdivision shall remain subject to the requirements of chapter 9, title 6, Idaho Code, and damages against the state or a political subdivision shall be the amount set forth in chapter 9, title 6, Idaho Code, as limited in this subsection.

**IDAHO CODE § 38-115. CLOSED SEASON FOR FIRES — PERMITS — REGULATIONS —  
EXTENSION OF CLOSED SEASON — SUSPENSION OF PERMITS — PENALTY.**

The period from May 10 to October 20, inclusive, of each year shall be known as the closed season. During the closed season it shall be unlawful for any person to set or cause to be set a fire in any slashing area, or a fire to any stump or stumps, log or logs, down or standing timber or to set or cause to be set, a fire on any forest or range lands or dangerously near thereto, or in any field in any forest protective district, without having first procured a permit from the fire warden of the district, provided, that unless campfires have been prohibited during critical hazard periods, campfires may be set without permit provided there is compliance with the provisions of section 38-116, Idaho Code. Every permit shall prescribe the conditions upon which the permit is given, and contain rules and regulations governing the setting of fires and the prevention of the spread thereof to the property of another. At no time shall any fire be set when the wind is blowing to such an extent as to cause danger of the fire getting beyond the control of the person responsible for setting it, or without sufficient men, tools, supplies and firefighting equipment to control it, and the fire shall be kept under the control of the person responsible for setting it until it is out. The state board of land commissioners shall from time to time make all necessary rules and regulations governing the setting of fires on forest lands for both the closed and open season, and for their proper control and extinguishment. It shall be the duty of the director of the department of lands to prepare the proper form of permit to be used in carrying out the provisions of this section. The fire wardens shall at all times have authority to refuse permits and/or to revoke the same and to postpone their use when issued, when they shall deem it necessary so to do in the interest of public safety. Any permits obtained by misrepresentation shall be invalid.

In seasons, localities and under conditions of unusual fire danger, the director, with the advice of the fire warden of any protective district, shall have the power to extend the period of closed fire season in any district of the aforementioned districts to meet the particular fire hazard of each district, and when the safety of the public requires, change the closed season in any district by fixing inclusive dates other than those herein designated; close to entry therein by any person or party, the forest and range lands in any section of the state wherein a critical fire hazard exists, and may restrict or suspend travel on any road or trail leading into any such land, until a permit shall have secured from the fire warden of the forest protective district wherein such lands are situated, and may also, without proclamation, suspend any and all permits or privileges authorized by this section and prohibit the setting of any campfires, and/or fire in forest and range land or dangerously near to such, or in fields in any forest protective district.

Any violation of the provisions of this section shall be deemed a misdemeanor.

**IDAHO ADMINISTRATIVE REGULATIONS**

**IDAPA 20.02.01.010. DEFINITIONS.**



In addition to the definitions set forth in the Act, the following definitions apply to these rules: (3-31-22)

**01. Act.** The Idaho Forest Practices Act, Title 38, Chapter 13, Idaho Code. (3-31-22) . . .

**33. Prescribed Fire.** The controlled application of fire to wildland fuels, in either their natural or modified state, under conditions of weather, fuel moisture and soil moisture that allow the fire to be confined to a predetermined area while producing the intensity of heat and rate of spread required to meet planned objectives. (3-31-22)

**IDAPA 20.02.01.071. PRESCRIBED FIRE.**

**01. Purpose.** Prescribed fire is a land management tool. Smoke from prescribed fires can have adverse impacts on ambient air quality or public health. These rules establish a management system for smoke from prescribed fires that will protect air quality. (3-31-22)

**02. Notification.** The use of prescribed fire requires a valid notification in accordance with Subsection 020.05 to maintain air quality and to protect public health. Possession of a valid notification will not preclude meeting the fire safety requirements specified in Section 38-115, Idaho Code. (3-31-22)

**03. Recommended Practices.** To maintain air quality and protect public health the following practices are recommended: (3-31-22)

**a.** Slash and large woody debris piles should be compact and free of stumps, soil, snow, and nonwoody organic material. (3-31-22)

**b.** Piles should be fully cured, dried at least two (2) months, prior to ignition. Piles should be at least partially covered with a water-resistant material so they can be ignited after enough precipitation to lower the fire danger. (3-31-22)

**c.** Broadcast burns should be conducted within a prescription that minimizes adverse effects on air quality. (3-31-22)

**d.** Membership in good standing in a recognized Airshed Group is encouraged. (3-31-22)

**IDAPA 58.01.01.006. GENERAL DEFINITIONS.**

. . .

**78. Open Burning.** The burning of any matter in such a manner that the products of combustion resulting from the burning are emitted directly into the ambient air without passing through a stack, duct or chimney. (3-24-22)

. . .

**91. Prescribed Fire Management Burning.** The controlled application of fire to wildland fuels in either their natural or modified state under such conditions of weather, fuel moisture, soil moisture, etc., as will allow the fire to be confined to a predetermined area and at the same time produce the intensity of heat and rate of spread required to accomplish planned objectives, including: (3-24-22)

**IDAPA 58.01.01.601. FIRE PERMITS, HAZARDOUS MATERIALS, AND LIABILITY.**

Compliance with the provisions of Sections 600 through 623 does not exempt or excuse any person from complying with applicable laws and ordinances of other jurisdictions responsible for fire control or hazardous material disposal or from liability for damages or injuries which may result from open burning. (3-24-22)

**IDAPA 58.01.01.602. NONPREEMPTION OF OTHER JURISDICTIONS.**

The provisions of Sections 600 through 623 are not intended to interfere with the rights of any city, county or other governmental entities or agencies to provide equal or more stringent control of open burning within their respective jurisdictions. (3-24-22)

**IDAPA 58.01.01.603. GENERAL RESTRICTIONS.**

**01. Categories and Materials.** No person shall allow, suffer, cause or permit any open burning operation unless it is a category of open burning set forth in Sections 600 through 623 and the materials burned do not include any of the following: (3-24-22)

- a.** Garbage, as defined in Section 006. (3-24-22)
- b.** Dead animals, animal parts, or animal wastes (feces, feathers, litter, etc.) except as provided in Section 616. (3-24-22)
- c.** Motor vehicles, parts, or any materials resulting from a salvage operation. (3-24-22)
- d.** Tires or other rubber materials or products. (3-24-22)
- e.** Plastics. (3-24-22)
- f.** Asphalt or composition roofing or any other asphaltic material or product. (3-24-22)
- g.** Tar, tar paper, waste or heavy petroleum products, or paints. (3-24-22)
- h.** Lumber or timbers treated with preservatives. (3-24-22)
- i.** Trade waste, as defined in Section 006, except as specifically allowed under Sections 600 through 623. (3-24-22)
- j.** Insulated wire. (3-24-22)
- k.** Pathogenic wastes. (3-24-22)

- I. Hazardous wastes.** (3-24-22)
- 02. Air Pollution Episodes.** No person shall allow, suffer, cause or permit any open burning to be initiated during any stage of an air pollution episode declared by the Department in accordance with Sections 550, through 562. (3-24-22)
- 03. Emergency Authority.** In accordance with Title 39, Chapter 1, Idaho Code, the Department has the authority to require immediate abatement of any open burning in cases of emergency requiring immediate action to protect human health or safety. (3-24-22)

**IDAPA 58.01.01.614. PRESCRIBED BURNING.**

The use of open outdoor fires to obtain the objectives of prescribed fire management burning is an allowable form of open burning when the provisions of Section 614 are met. (3-24-22)

- 01. Burning Permits or Prescribed Fire Plans.** (3-24-22)
  - a.** Whenever a burning permit or prescribed fire plan is required by the Department of Lands, U.S.D.A. Forest Service, or any other state or federal agency responsible for land management, any person who conducts or allows prescribed burning shall meet all permit and/or plan conditions and terms which control smoke. (3-24-22)
  - b.** The Department will seek interagency agreements to assure permits or plans issued by agencies referred to in Subsection 614.01.a. provide adequate consideration for controlling smoke from prescribed burning. (3-24-22)
- 02. Smoke Management Plans for Prescribed Burning.** (3-24-22)
  - a.** Whenever a permit or plan is not required by the Department of Lands, U.S.D.A. Forest Service, or any other state or federal agency responsible for land management, any person who conducts or allows prescribed burning shall meet all conditions set forth in a Smoke Management Plan for Prescribed Burning. (3-24-22)
  - b.** The Department will develop and put into effect a Smoke Management Plan for Prescribed Burning consistent with the purpose of Sections 600 through 616. (3-24-22)
- 03. Rights-of-Way Fires.** The open burning of woody debris generated during the clearing of rights of way shall be open burned according to Sections 38-101 and 38-401, Idaho Code, IDAPA 20 Title 16 and Sections 606 through 616 of these rules. (3-24-22)

**MONTANA / IDAHO AIRSHED GROUP**

Idaho and Montana operate a unique airshed sharing collaboration to determine days of permissible open burning. The airshed's website is: <https://mi.airshedgroup.org/>