

# PRESCRIBED BURNING: LIABILITY CONSIDERATIONS

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Throughout Texas, prescribed burning is a popular grassland management tool landowners can use to manage invasive brush and rejuvenate native, perennial grasses. These burns, when conducted carefully, can be used to maintain and restore native grasslands, manage weeds, enhance forage quality, and mitigate wildfires. However, when not carefully conducted, escapes and spot fires may occur, and damage can be severe and far-reaching. Anyone that contemplates using prescribed burning must consider and fully understand his or her potential liability if the burn causes injury or property damage.

Landowners should know the legal approach and all the requirements of prescribed burning statutes in their state. These prescribed burning statutes generally offer limited liability if requirements are met.

## I. LEGAL APPROACHES TO BURN LIABILITY

There are three legal approaches to liability in the event a prescribed fire causes injury or damage: ordinary negligence, gross negligence, and strict liability.<sup>1</sup> An important first step for anyone considering a prescribed burn is to determine the standard followed by his or her state.

Most states, including Texas, use the ordinary negligence standard for prescribed burning. (“One kindling fire on his own land is not liable for the escape of the fire to the property of another, unless he is negligent.”<sup>2</sup>) The ordinary negligence standard imposes liability if a burner fails to exercise reasonable care under the circumstances of the burn. The same negligence standard is applied to smoke that may result from a burn and cause collisions on nearby roadways.<sup>3</sup> Other states that use the ordinary negligence approach include New Mexico and North Carolina.<sup>4</sup>

The second approach is gross negligence, which generally means that liability is imposed only if the landowner acts

with extreme, reckless disregard.<sup>5</sup> Florida is an example of a gross negligence state.<sup>6</sup>

The third standard is strict liability, which imposes liability for damage, regardless of the level of care used by the landowner.<sup>7</sup> Though very few states use this standard, Hawaii is one example.<sup>8</sup>

Understanding the legal approach to one’s state is critically important to know when liability may attach and what steps may be taken to help avoid liability when conducting a prescribed burn.

## II. LIMITED LIABILITY STATUTES

Many states, including Texas, offer limited liability to landowners if certain requirements are met.<sup>9</sup> These statutes are extremely important for landowners to review and implement to decrease the chance of being held liable for damages caused by a prescribed burn. The specific details of these statutes differ by state. This fact sheet will focus only on the Texas statutes.

### A. Key Definitions

Texas Natural Resources Code Sections 153.081 to 153.084 govern limited liability for prescribed burns in Texas. There are a number of key definitions that are important to understand when and where limited liability is granted.

“Agricultural or conservation land” is land located in Texas that is “suitable for: (1) use and production of plants and fruits for human or animal consumption or plants grown for the production of fibers, floriculture,

<sup>1</sup> (Wonkka, 2015).

<sup>2</sup> *Pfeiffer v. Aue*, 115 S.W. 300 (Tex. Ct. Civ. App. 1908).

<sup>3</sup> *Atchison v. T.P. Ry. Co.*, 186 S.W.2d 228 (Tex. 1945).

<sup>4</sup> *Archuleta v. Floersheim Mercantile Co.*, 187 P. 272 (N.M. 1920); N.C. Gen. Stat. Section 106-967(c).

<sup>5</sup> (Wonkka, 2015).

<sup>6</sup> Section 590.125, Fla. Stat. (2021).

<sup>7</sup> (Wonkka, 2015).

<sup>8</sup> HRS Section 185-7.

<sup>9</sup> Texas Natural Resources Code Sections 153.081 – 153.084.

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Jake Russell, United States Forest Service, prepares to start stripping out fire on the backfire edge of a blackline on a native rangeland pasture west of San Antonio, Texas. This prescribed fire was conducted during the 2017 dormant season. *Photo by Morgan Treadwell*

viticulture, horticulture, or planting seed; (2) forestry and the growing of trees for the purpose of rendering those trees into lumber, fiber, or other items used for industrial, commercial, or personal consumption; (3) domestic or native farm or ranch animals kept for use or profit; (4) management of native or exotic wildlife; or (5) conservation or management of an ecosystem, a forest, a habitat, a species, water, or wildlife.”<sup>10</sup>

A “certified and insured prescribed burn manager” or “CIPBM” is a person who has satisfied the minimum standard required by the Texas Prescribed Burn Board for certification including completing an application, completing an approved training program, 3 years prescribed burn experience, 30 days prescribed burn days, of which 5 days are served as burn boss, paying the required \$500 fee for 2 years, 6 biannual credits of continuing fire training credits, and carrying the level of



Prescribed burning is very effective at managing pricklypear and causing plant mortality within a couple of weeks following the prescribed burn. Fine fuel loads dictate the fire behavior and also play an crucial role in the fire behavior necessary for pricklypear management. It is the burn boss’s job to ensure prescribed burn objectives are met through safe and effective fire weather conditions.

*Photo by Morgan Treadwell*

insurance required by the Texas Prescribed Burn Board (currently statute requires at least \$1 million for each single occurrence of bodily injury, death, or injury to or destruction of property, and a policy period minimum aggregate limit of at least \$2 million).<sup>11</sup>

A “burn boss” is an individual responsible for directing a prescribed burn under a statutory written prescription plan.<sup>12</sup>

## B. Limitation on liability of landowner, lessee, or occupier

An owner, lessee, or occupier of *agricultural or conservation land* is not liable for property damage, or injury or death to persons caused by a prescribed burn on his or her land if the burn is conducted under the supervision of a *certified and insured prescribed burn manager* who has the required liability insurance coverage of at least \$1 million for each single occurrence of bodily injury, death, or injury to or destruction of property, and a policy period minimum aggregate limit of at least \$2 million.<sup>13</sup> The only exception to this prohibition on liability is that if a CIPBM is a landowner, he or she may not rely on this limited liability for landowners when conducting a burn on his or her own property.<sup>14</sup> Given this statutory shield from liability, landowners, lessees, and occupiers of agricultural or conservation land should strongly consider using a CIPBM when conducting prescribed burns on their land.

## C. Limitation on liability of burn bosses

The Texas statute also offers limited liability for a *burn boss* in certain situations. A burn boss is not liable for property damage, personal injury, or death caused by a burn in excess of the insurance requirements established by the Texas Prescribed Burn Board for CIPBMs (currently at least \$1 million for each single occurrence of bodily injury, death, or injury to or destruction of property, and a policy period minimum aggregate limit of at least \$2 million) if the burn boss has: (1) completed an accredited prescribed burn training course approved by the Prescribed Burn Board; (2) satisfies the minimum experience requirements required by the Prescribed Burn Board; and (3) has liability insurance equal to or in excess of that required for CIPBMs by the Prescribed Burn Board.<sup>15</sup> In other words, if a burn boss meets the three listed requirements, any liability imposed on the burn boss will be capped at the insurance amount required by the Prescribed Burn Board.

<sup>10</sup> Texas Natural Resources Code Section 153.081(c).

<sup>11</sup> Texas Natural Resources Code Section 153.048; 153.084.

<sup>12</sup> Texas Natural Resources Code Section 153.083(a).

<sup>13</sup> Texas Natural Resources Code Section 153.081(a); 153.082(1).

<sup>14</sup> Texas Natural Resources Code Section 153.081(b).

<sup>15</sup> Texas Natural Resources Code Section 153.084(b).

## D. Limitation on liability of Certified and Insured Prescribed Burn Managers

There are a couple of limitations on liability that apply to CIPBMs.

First, if a burn boss is a CIPBM, then the burn boss is not liable for property damages, injury, or death that result from smoke occurring more than 300 feet from the burn.<sup>16</sup> There is an exception to this limitation if the CIPBM acts with gross negligence or intentionally causes the damage, injury, or death.<sup>17</sup>

Second, the limitations applicable to a burn boss generally, discussed in Section II(C) above, also apply to a CIPBM who serves as a burn boss as a CIPBM would necessarily meet the requirements in order to qualify for the limited liability for a burn boss.

## E. Limitation on liability of persons other than burn boss

If a prescribed burn is conducted in accordance with a written prescribed burn plan as required by statute, a person may not be liable for property damage, personal injury, or death resulting from the burn unless the person is a *burn boss* or is otherwise liable under the law.<sup>18</sup> There is an exception to this limited liability for anyone who acts with gross negligence or intentionally causes damage or injury.<sup>19</sup> This means that if a person is assisting with a burn, for example, if he or she is not the *burn boss* and is not otherwise legally liable, the person is not liable for damages so long as a written prescribed burn plan meeting the statutory requirements is in place and followed. For anyone attending or assisting with a burn, ensuring the written burn plan is properly done and followed is a way to limit liability.



Prescribed burning mimics the evolutionary process of fire that shaped all rangeland plant communities in Texas. Understory brush such as algerita, persimmon, mesquite, and juniper species are maintained through a frequent fire return interval. *Photo by Morgan Treadwell*



A fire ignition specialist with Conservation Fire Team walks a line of fire in along the edge of a bladed line. Fire breaks should be built 15 to 25 feet wide, bladed down to bare mineral soil, and the berm should be rolled to the outside of the burn unit. Building safe and effective fire breaks is imperative and is regarded as part of prescribed burn standards of care to ensure a safe and successful prescribed burn. *Photo by Morgan Treadwell*

## III. INSURANCE

There is no requirement that a private landowner, lessee, or occupier obtain liability insurance to conduct a burn. However, having liability insurance that covers every activity taking place on one's property is a critical step for all landowners and lessees to protect themselves and their operation.

Landowners, lessees, or occupiers must carefully review their liability policy to determine whether there is coverage for prescribed burns. Many farm and ranch policies may include this type of coverage, at least in certain situations. One should review the policy, including the declarations page, policy pages, endorsements, exclusions, and limitations to determine whether prescribed burning coverage exists. If this coverage is not included, or a person wishes to have an increased amount of coverage, he or she may be able to either add an endorsement to the existing policy or purchase a separate prescribed burning policy.

<sup>16</sup> *Ibid.*

<sup>17</sup> Texas Natural Resources Code Section 153.084(c).

<sup>18</sup> Texas Natural Resources Code Section 153.083(b).

<sup>19</sup> Texas Natural Resources Code Section 153.083(c).



Prescribed burning is a popular, and likely underutilized, grassland management tool throughout Texas to manage invasive brush and rejuvenate native, perennial grasses. These burns, when conducted carefully, can serve to maintain and restore native grasslands, control weeds, improve forage quality, and even prevent wildfires. *Photo by Morgan Treadwell*

Landowners, lessees, or occupiers of land should carefully review policies and consult with an insurance agent to ensure they have adequate liability coverage generally, and particularly before conducting a prescribed burn.

## IV. CONCLUSION

Prescribed burning can benefit landowners when conducted carefully and in accordance with a state's rules. Before conducting a prescribed burn, landowners should understand their state's liability approach. It is also important to determine if there are any additional local or county burning requirements or statutes that

limit liability for landowners. For Texas landowners, lessees, or occupiers of agricultural or conservation land to qualify for limited liability in Texas, they must utilize a Certified and Insured Prescribed Burn Manager to conduct the burn. Further, it is critical that landowners analyze their own insurance policy and the policy of anyone conducting a burn, particularly if that person is not a CIPBM. Finally, there is no substitute for common sense. Anyone conducting a prescribed burn should use best management practices such as having and executing a well-thought-out burn plan, checking weather conditions, being aware of any forecast changes, and being in contact with neighbors and local fire departments.

## REFERENCES

- Archuleta v. Floersheim Mercantile Co.*, 187 P. 272 (N.M. 1920).
- Atchison v. T.P. Ry. Co.*, 186 S.W.2d 228 (Tex. 1945).
- Hawaii Revised Statutes Section 185-7.
- N.C. Gen. Stat. Section 106-967(c).
- Pfeiffer v. Aue*, 115 S.W. 300 (Tex. Ct. Civ. App. 1908).
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- Texas Natural Resources Code Sections 153.081 – 153.084.
- Wonkka, Carissa L., et al. (2015). Legal barriers to effective ecosystem management: Exploring linkages between liability, regulations, and prescribed fire, *Ecological Applications* 25, 2382–2393.