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Prescribed fire liability factsheet: standards of care by state

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INTRODUCTION

Resistance to the use of prescribed fire is strong among many private land managers despite the advantages it offers for maintaining fire-prone ecosystems. Often, managers who are aware of the benefits of using prescribed fire as a management tool avoid using it because of fear of liability for damages that may result from an escaped fire or smoke. In the United States, state open burning statutes define the standard of care owed to the public by burners. In a lawsuit, a burner will be found liable for damages resulting from their fire or smoke if they have not met the standard of care prescribed by their state statute. If a state has not developed a statute specifically related to open burning or prescribed burning, judges will apply the standard of care established by previous prescribed burning cases in their state. Three different standards of care have emerged for prescribed fire practitioners: strict liability, simple negligence, and gross negligence.

STRICT LIABILITY

Strict liability is the most stringent standard of care for those using prescribed fire, with only five states (Hawaii, Delaware, Rhode Island, Minnesota, and Wisconsin) applying this standard in prescribed fire civil cases. Under a strict liability standard, a court would hold burners liable for any property damage caused by an escaped prescribed fire, regardless of the action of the burner. This standard is more often established through case law, not explicitly stated in the statute. Some states have language that suggests strict liability will apply even though the statute does not expressly state this. Hawaii, for example, makes escape of fire beyond the established burn perimeter evidence that, if uncontested, is sufficient to prove willfulness, malice, or negligence. This means that a plaintiff in a case against a burner could win a lawsuit simply by showing that the fire escaped. The burden of proof would fall on the defendant to prove they were not negligent in the events leading up to the escape that caused the damages.

SIMPLE NEGLIGENCE

Simple negligence standards are the most common rules for prescribed fire. Simple negligence standards require the burner to practice reasonable care in applying a prescribed burn, and require the plaintiff to show negligence by the defendant in order for the burner to be liable for damage caused by escaped prescribed fire. Simple negligence standards are either explicitly stated statutorily or established through case law. They require a plaintiff to show that the defendant omitted something that a reasonable person in similar circumstances would do, or that he/she did something a prudent and reasonable person in similar

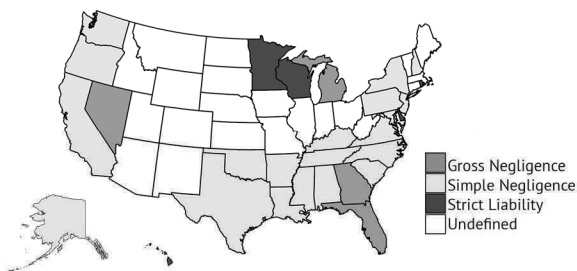


Figure 1. Map of the U.S. showing the current standard of care applied in prescribed burning-related lawsuits. Undefined means the standard of care is established through court precedent, not stated explicitly a state statute. In all undefined states, simple negligence is the standard that has been applied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

circumstances would not do. What a “reasonable” person would or would not do given the circumstances is usually circumscribed by the norm for others in a given profession/social group. For instance, in medicine, the behavior of a “reasonable” person is determined by what is acceptable standard practice in the medical community. This standard is somewhat subjective and might differ slightly as applied to prescribed fire cases from jurisdiction to jurisdiction.

GROSS NEGLIGENCE

A statute or case law identifying gross negligence as the appropriate liability standard for prescribed burning related cases states that, if a burner follows a set of burning regulations (stated in the statute), a plaintiff must show reckless disregard of the duty of care owed others by the burner. Gross negligence is a severe degree of negligence above and beyond failing to do what the reasonable person would have done given similar circumstances. It is often defined in the courts as wanton or reckless behavior. Usually, in states with gross negligence rules, simple negligence will apply if the burner has not followed the regulations stated in the statute. Statutes identifying gross negligence liability standards have recently been enacted in several states as part of comprehensive prescribed fire statutory reform. Recognizing the importance of burning to ecosystem management, these reforms seek to reduce liability for prescribed burners. In addition, the gross negligence standard incentivizes burners to become certified and follow other safety regulation, increasing the safety of prescribed burning.

STANDARD OF CARE BY STATE

Florida was the first state to undergo comprehensive statutory reform in 1990. The original statute identified simple negligence as the standard of care to be applied in civil suits resulting from escaped prescribed fire. Florida’s legislature later amended The Florida Prescribed Burning Act to state that the less stringent gross negligence standard of care would be applied in cases against a certified prescribed burn manager as long as they had a written prescription for a burn, were on site during burning, and had adequate personnel, equipment, and firebreaks in place. Georgia followed in

2000 with an amendment to its prescribed fire statute that included a gross negligence standard. However, unlike Florida, the Georgia statute does not include a list of regulatory hurdles for protection under the statute. It requires the burner only to obtain a permit from the division of forestry before burning. A Georgia appellate court upheld the standard stating that slight diligence was all that a landowner was required to exercise in carrying out a burn given the gross negligence liability standard stated in the statute. Many other states have developed comprehensive prescribed fire legislation, but only four states have statutorily prescribed gross negligence as the appropriate legal standard of care. The states in the Great Plains all apply a simple negligence standard of care to cases where escaped prescribed fire results in property damage or personal injury. Only two of the states in the Great Plains, Texas and Oklahoma, have statutes explicitly stating that simple negligence will be the standard applied. The other states have established that simple negligence will be applied through precedent in the courts. The standard of care for each state is identified in the map (Figure 1).

GETTING HELP

For more information on burning regulations by state: [KS](#), [MO](#), [MT](#), [ND](#), [NE](#), [OK](#), [SD](#), [TX](#), [WY](#). The Great Plains Fire Science Exchange has more fire science resources at <http://www.GPFireScience.org>.

REFERENCES

[Wonkka, CL, WE Rogers and UP Kreuter. 2015. Legal barriers to effective ecosystem management: exploring linkages between liability, regulations, and prescribed fire. Ecological Applications 25\(8\):2382–2393.](#)



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