UC ANR Fire Network
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Agriculture & Natural Resources

Prescribed Fire Liability in California

In California and beyond, prescribed fire is increasingly being recognized as one of the most cost-effective and ecologically appropriate tools for restoring and maintaining resilient landscapes, habitats, and communities. However, the prescribed fire discourse is riddled with questions, concerns, and uncertainty about liability, and liability is often cited as a primary barrier to the use of prescribed fire in California. With this paper, we aim to clarify basic liability laws in California, using state law and case examples to further the collective understanding and comfort around prescribed fire liability.

The national context for liability

Across the United States, there are four general categories of state liability law: [1]

- **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);
- Liability is **uncertain** in states where laws and administrative codes are vague regarding prescribed fire.

Generally speaking, strict liability laws are the least conducive to prescribed fire and gross negligence laws are the most conducive. Simple negligence laws fall in between, and states with uncertain liability laws often default to something similar to simple negligence.

State liability laws may pertain to different facets of liability, including damages to another person's life or property (including smoke impacts), fire suppression costs for escaped prescribed burns, and/or injuries or equipment issues on burns.

Until recently, California was a simple negligence state for all facets of liability, and this was made clear by language in both the California Health and Safety Code and the Public Resources Code. However, Senate Bill 332 (Dodd 2021) shifted the state to a gross negligence liability standard for fire suppression costs associated with prescribed fire. Third party damages are still subject to a simple negligence standard in California.

Case examples

In a case from 1957, a California court found a landowner guilty for causing damages to a neighbor's property due to negligence and carelessness (Leuteneker v. Fisher, 155 Cal.App.2d 33, 1957). In this case, the defendants did not comply with all of the specific elements of their burn permit, which had been issued to them by the California Department of Forestry and Fire Protection (CDF, now CAL FIRE). The permit required that the landowner remove a swath of brush at least 60 feet from the road, which was to serve as the fireline, and provide notification of burning to adjacent landowners. The defendant did neither of these things, and they had no one stationed on the side of the burn where the risk of escape was highest. The fire, ignited on a warm day in August, burned through brush and trees on the edge of the unit, eventually burning across the road and onto the neighbor's property. Interestingly, a CDF ranger directed and supervised the burning, but was not

implicated in the case because the burn was ignited by the landowner on their land and was intended for their sole use and benefit. Public Resources Code 4491 does require that the Department provide standby fire protection for prescribed fire if resources are available; however, it was determined in this case that the decision to burn ultimately falls on the landowner in cases where they are the permittee, and it is the landowner's responsibility to ensure that permit requirements are met and conditions are appropriate for burning.

A more recent case offers similar lessons in due diligence and negligence (Massa 2019). In this case, a Monterey County landowner was conducting a winter burn in chaparral, and the burn escaped his control, burned onto an adjacent property, and caused the Encinal Fire, which burned approximately 190 acres over four days and involved a significant and costly suppression response by the state. The landowner had obtained permits from the local air quality district as well as CAL FIRE, and provided notification to both agencies on the day of the burn. However, upon investigation, a number of factors emerged that pointed to negligence by the landowner: unit preparation was limited, and the control lines that had been established were not entirely on the landowner's property; the burn was ignited from the bottom of the slope in the absence of sufficient control lines at the top; the planned prescribed burn area was outside of the area outlined in his permit; he had a bulldozer on site with known fuel filter issues, and it was dysfunctional when the fire escaped and it was most needed; and the landowner waited until the evening to report the fire to CAL FIRE, at which point there was little daylight to allow for a sufficient or effective response. Other factors also supported the idea that the landowner wasn't sufficiently prepared for the burn; for example, the fire experience of his workers was unknown, external and internal communications were limited because they had no cell service or radios, no firing plan was outlined prior to ignitions, and the adjacent landowners had not been notified of the day's activities. In this case, the landowner was found negligent and held liable for a portion of the costs associated with the suppression of the Encinal Fire. Though the gross negligence standard for fire suppression costs was not yet in place, it's unlikely that the landowner would have fulfilled the best management practices required by SB332.

Lessons learned

In both of the aforementioned cases, it is clear that the landowners did not comply with the specifications of their permits. In California, Senate Bill 1260 (Jackson 2018) recently clarified that "compliance with a permit issued pursuant to this article shall constitute prima facie evidence of due diligence" (Public Resources Code § 4494). This new language did not represent a change to state law, but it did offer helpful clarification.

However, due diligence and negligence relate not only to the language in a permit; as we see in the cases above, other factors may also be considered during a determination of negligence. According to California law, a person is not negligent if "the person did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." In consideration of an escaped prescribed fire, the court may seek expertise on the types of actions that would be reasonably expected of a diligent prescribed fire practitioner, and these actions would likely include some level of prescribed fire planning, unit preparation, and forethought on issues of staffing, equipment, and communications. In times of year when CAL FIRE permits are not required,4 these considerations may be even more critical to determinations of negligence and due diligence, as there is no permit for reference.

Recommendations for mitigating prescribed fire liability concerns in California

- **Enroll your project in the Prescribed Fire Claims Fund**, which may provide $2 million dollars of coverage for projects led by a state-certified burn boss, federally qualified burn boss, or cultural practitioner.
- **Include neighbors in the planning and implementation** of projects whenever possible.
- **Always obtain and comply with relevant permits**, including air quality permits (year-round) and CAL FIRE permits (during declared fire season).[2] Take an active role in the development of permit parameters, and strive for specific parameters rather than generalized statements. For example, request a permit that outlines the number of personnel and engines that CAL FIRE would recommend for controlling the fire rather than a permit that says you need to have enough resources to keep the fire under control.
- **Ensure that you have planned and prepared your unit adequately** for the time of year and the conditions under which you will be burning. Even under mild winter conditions, it is wise to have a basic burn plan/prescription, control and/or contingency lines, and a water resource on site. To take advantage of the benefits afforded by SB332, ensure that your burn plan has been reviewed and approved by a state-certified burn boss (note: cultural burners are exempt from this requirement).
- **Consider using release of liability forms** if you have volunteers or others working on your prescribed burn.
- **Request that CAL FIRE provide contingency resources for your burn**, as outlined in PRC § 4491. If your CAL FIRE unit has resources available, they are required by law to support prescribed fire projects on private lands.
- **Consider the types of additional actions that you should take as a reasonable, prudent prescribed burner.** Working with a community group like a prescribed burn association, having functional equipment, ensuring good communications with crew members and neighbors, and other similar actions can help demonstrate due diligence and responsible behavior.

References

[1] Melvin, M.A. 2018. 2018 national prescribed fire use survey report. Technical Report 03-18. The Coalition of Prescribed Fire Councils, Inc. 23 pp.

[2] In the upper 2/3 of the state, CAL FIRE permits are only required during declared fire season, May 1-late fall. See PRC § 4423, PRC § 4413, and PRC § 4414 for guidance on permit requirements in different parts of the state.

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