

PREScribed BURNING: Liability and Insurance Considerations

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Throughout Texas, prescribed burning is a popular grassland management tool you 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, control weeds, improve forage quality, and even prevent wildfires.

However, when not conducted in a careful manner, disaster can strike and damage can be severe and far-reaching. Anyone that contemplates using prescribed burning must consider their potential liability if the burn causes injury or property damage. Landowners should know all the requirements of prescribed burning statutes in their state—these statutes generally offer limited liability if requirements are met. Two of the key requirements for Texas' limited liability statute involve insurance coverage and who conducts the burn.

I. Legal approaches to burn liability

There are three legal approaches to liability in the event a controlled burn causes injury or damage: ordinary negligence, gross negligence, and strict liability. Most states, including Texas, use the ordinary negligence standard for prescribed burning. The ordinary negligence standard imposes liability if a burner fails to exercise reasonable care under the circumstances of the burn. Other states that use the ordinary negligence approach include North Carolina and Alabama. The second approach is gross



Jake Russell, USDA-USFS, 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 M.L. Russell*

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negligence, which generally means that liability is imposed only if the landowner acts with extreme, conscious disregard. Gross negligence states include Florida and Nevada. The third standard is strict liability, which imposes liability for damage, regardless of the level of care used by the landowner. Though very few states use this standard, those that do include Minnesota and Hawaii. An important first step for anyone considering a prescribed burn is to determine the standard followed by his or her state.

II. Limited liability statutes

In addition to which type of liability is followed in the burner's state, a burner should also be aware of any statutory provisions related to prescribed burning. Many states, including Texas, offer limited liability to landowners if certain requirements are met.

A. Limited liability for landowners, lessees, and occupiers of land

In Texas, a statute offers limited liability to a landowner, lessee, or occupier if certain conditions are met. There is no legal requirement that a person comply with these standards to conduct a burn, but limited liability is only available if the statutory requirements are followed. Even if a landowner qualifies for limited liability under this statute, he or she should still strongly consider having a liability insurance policy in place that covers the use of prescribed burning.

There are two requirements to qualify for limited liability in Texas. First, limited liability is available only if a prescribed burn is conducted on "agricultural or conservation land." "Agricultural or conservation land" is defined as land that is "suitable for the use and production of plants and fruits for human or animal consumption, the production of plants

grown for the production of fiber, floriculture, viticulture, horticulture, or planting seed; forestry and the growing of trees for the rendering of trees into lumber, fiber, or other items used for industrial, commercial, or personal consumption; domestic or native farm or ranch animals kept for use or profit; management of native or exotic wildlife; or conservation management of an ecosystem, a forest, a habitat, a species, water, or wildlife."

Second, to receive limited liability, the burn must be conducted under the supervision of a certified and insured prescribed burn manager (CIPBM) or by the members of prescribed burn organization (PBO).

1. Becoming a certified and insured prescribed burn manager

A CIPBM has the ultimate authority and responsibility when conducting a prescribed burn. A CIPBM must provide reasonable assurance that a prescribed burn will be confined to a predetermined area, that the effects of smoke emissions are minimized, and that a prescribed burn will be conducted in a manner that will accomplish land management objectives.



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 M.L. Russell*

Becoming a private certified and insured prescribed burn manager requires licensing by the Texas Department of Agriculture and approval by the Prescribed Burning Board. A CIPBM must meet the minimum standards of training and experience, and maintain required insurance. Certification and renewal fees are 500 dollars for a two-year license, contingent upon annual proof of insurance and continuing fire training requirements.

Applicants for certification as a CIPBM must complete a training course approved by the prescribed burn board and pass an exam. The course consists of general fire training and specialized training for the region in which the person is seeking certification, using training materials developed by the prescribed burn board. The course contains formal classroom lectures and practical field sessions, including a prescribed burn. The prescribed burn



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 M.L. Russell*

board may consider other training courses to meet the required training necessary for certification.

Regarding experience, applicants must be able to document a minimum of three years of prescribed burning within a specific region, thirty days of prescribed burning not limited by region, and five days of prescribed burning as the responsible individual.

Minimum liability insurance is also required for certification. To be certified, a CIPBM must always carry at least one million dollars of liability insurance coverage for each single occurrence of bodily injury to or destruction of property and a policy period minimum aggregate limit of at least two million dollars.

There are four types of CIPBMs, and landowners should select the type that is appropriate to the given situation. A commercial CIPBM may conduct prescribed burns for hire on any property allowed by certification. A private CIPBM may conduct burns only on property owned by, leased by, or occupied by the CIPBM or his or her employer. A not-for-profit CIPBM conducts burns on property owned or leased by a prescribed burning organization, or on property owned or leased by a person who is a member of a prescribed burning organization. Finally, a governmental CIPBM is employed by or acts on behalf of a government unit and may only conduct burns on land owned, leased, or controlled by the governmental unit.

There is an important exception included within the limited liability statute, which provides that this limited liability does not apply to a landowner, lessee, or occupant of agricultural or conservation land who is a CIPBM and conducts a burn on that land. Thus, a CIPBM who wishes to burn on his own property and have the statutory limited liability must either have another CIPBM supervise and conduct the burn, or be a member of a prescribed burn organization that meets the statutory requirements for limited liability to apply.

2. Prescribed burn organization membership

A prescribed burn organization is defined as “an entity established for the purpose of promoting the use of prescribed burning as a tool for land management.” The members of a prescribed burn association are afforded statutory limited liability when conducting burns if two conditions are met.



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 M.L. Russell*

First, the member in charge of the burn must have completed the training curriculum approved by the Prescribed Burn Board.

Second, the PBO must carry insurance coverage of at least one million dollars of liability coverage for each single occurrence of bodily injury to or destruction of property and a policy maximum aggregate limit of at least two million dollars. Under this statute, if a prescribed burn organization does not carry this level of insurance, its members are not afforded limited liability under the statute, unless a CIPBM conducts the burn.

B. Analyzing required insurance coverage

As noted by statute, whether a burn is conducted by a CIPBM or members of prescribed burn organization, a specific level of liability insurance must be in place for a landowner, lessee, or occupier of land to receive limited liability pursuant to the Texas statute. Analyzing insurance coverage is critical for landowners, lessees, or occupiers who plan to conduct a burn, for anyone interested in becoming a CIPBM, and for members of a PBO.

Although a private landowner is not required to obtain liability insurance to conduct a burn or

receive limited liability pursuant to the statute, having this coverage in place is prudent. Often, landowners may have some form of prescribed burn coverage based on their farm and ranch liability policy. Landowners must carefully review their policy, including the declarations page, policy pages, endorsements, exclusions, and limitations to determine whether this coverage is included. If prescribed burn coverage is not included, you can purchase additional policies that specifically cover prescribed burning.

Additionally, a landowner, lessee, or occupier intending to conduct a prescribed burn who wants to ensure limited liability applies should confirm that the CIPBM conducting the burn, or the PBO of which the landowner, lessee, or occupier is a member carries the required insurance coverage.

The following checklist outlines TDA's insurance requirements for certification as a CIPBM. This list can also help landowners analyze their own policy or the policy of a PBO of which they are a member. Actual examples of coverage contained in common insurance policies are provided in Table 1.

- Coverage limits meet program requirements (one million dollars per occurrence/two million dollars aggregate) for bodily injury and property damage. This typically involves review of the "insuring agreement," usually contained in "Coverage H" of most CGL or farm liability policies.
- The policy contains the "hostile fire" exception to the pollution exclusion, which is normally the clause that covers prescribed burning activities. Note, a contractor's pollution liability coverage policy will usually have different language that affords coverage for prescribed burning activities. A CGL policy may include a "total pollution exclusion" but offer

protection through a special endorsement that covers prescribed burning activities. Ensure that the policy covers damage resulting from heat, smoke, fumes, and other consequences of prescribed burning.

- The definition of the “insured” should be broad enough to cover the acts of the CIPBM while engaged in prescribed burning activities. Sometimes a burn manager may be named insured on the policy; sometimes a burn manager may try to qualify as an employee under a farm and ranch policy.
- “Coverage territory” or “insured premises” are broad enough to include all locations where prescribed burning activities will take place. A CGL policy submitted in support of the commercial certified insured prescribed burn manager (CCIPBM) category must offer broad coverage for any location where prescribed burning activities will take place during the policy period. A policy submitted in support of the not-for-profit certified insured prescribed burn manager (GCIPBM) and private insured prescribed burn manager (PCIPBM) categories only need to show coverage for specific named locations where the applicant will conduct burns—for example, the farm and

ranch in question.

- Ensure there are no provisions that take prescribed burning activities out of coverage. Review the contents of the policy, as well as all endorsements, exclusions, and limitations. For example, a typical “forester’s” policy has a total pollution exclusion, but provides coverage for prescribed burning activities through a “forester’s endorsement.”

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 burning requirements or statutes that limit liability for landowners. To qualify for limited liability in Texas, a landowner must use a CIPBM who is properly licensed and insured or be a member of an adequately insured prescribed burn organization. Further, it is critical that landowners analyze their own insurance policy and the policies of the CIPBM or PBO involved.

Finally, there is no substitute for common sense. Anyone conducting a controlled 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.



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 M.L. Russell*

Table 1. Comparison of commercial general liability policy provisions with prescribed burning liability coverage on farm and ranch policies

Carrier	Coverage	Insured	Additional	Renewal	PBB requirements met?	Off-property coverage	Hostile definition	Primary
Essex CGL	Liability only	Named person, organizations, PBA, corporations	Volunteers get some cover 1-Not if hurt the named insured & 2- Not if "Recreational Land Use"	After the specific term or the 3rd+ burn	Yes	None	Fire which becomes uncontrollable or breaks out from where it was intended to be	Strictly intended for "excess" of any other liability policy
Term set in policy	occurrence w/in policy term	No-Fault Med Pay						
Texas Farm Bureau Farm and Ranch Policy A4	Hostile fire exception to pollution exclusion expanded liability coverage	Landowner for perils, property loss and 3rd party liability and has med pay w/o no fault statement	No additional insured names	Annualw	Yes	Can burn up to 5 times per year on other's land and be personally protected from Liability	Fire that becomes uncontrollable or breaks out from where it was intended to be	Primary
Germania's Farm Liability Policy	Separate liability policy, the pollution exclusion has a hostile fire exception, also an occurrence policy	Has a similar No-Fault Med Pay as Essex	No Additional Insureds	Annual	Yes	No	Fire that becomes uncontrollable or breaks out from where it was intended to be	Strictly intended for "excess" of any other liability policy
Hochheim Prairie Insurance Personal Liability	Personal liability policy is separate from its F&R policy and separate from its Farm liability policy	The coverage is personal to the insured, covering all household, and volunteers, no-fault med pay, coverage is direct, not via an exception to an exclusion	Limited to residents on the property with the named insured, no pollution exclusion, no hostile fire exception for bodily injury, fire, smoke, and explosion are exceptions to property damage exclusion from coverage	Annual	Yes	No	No definition of hostile fire	Strictly intended for "excess" of any other liability policy

ⁱ Carissa Wonkka, Prescribed fire liability factsheet: standards of care by state, available at <https://static1.squarespace.com/static/55687b65e4b0bd1f0f6f4548/t/57168e5962cd947da7894a8d/1461096027124/GPE2016-7+WonkkaLiability.pdf> (2016).

ⁱⁱ Texas Natural Resources Code §153.002.

ⁱⁱⁱ Texas Natural Resources Code § 153.081(c).

^{iv} Texas Administrative Code § 225.1(7).

^v Texas Administrative Code § 225.3(b).

^{vi} Texas Administrative Code § 226.1.

^{vii} Texas Administrative Code § 226.5.

^{viii} Texas Administrative Code § 226.4(a).

^{ix} Texas Administrative Code § 226.4.

^x Texas Natural Resources Code § 153.082(1); Texas Administrative Code § 227.1(a).

^{xi} Texas Administrative Code § 225.2(a)(1).

^{xii} Texas Administrative Code § 225.2(a)(2).

^{xiii} Texas Administrative Code § 225.2(a)(3).

^{xiv} Texas Administrative Code § 225.2(a)(4).

^{xv} Texas Natural Resources Code § 153.081(b).

^{xvi} Texas Administrative Code § 225.1(17).

^{xvii} Texas Natural Resources Code § 153.049(1).

^{xviii} Texas Natural Resources Code §§ 153.082(3); 153.049(2); Texas Prescribed Burn Board Meeting Minutes, September 2015, available at http://www.texasagriculture.gov/Portals/0/Files/ACP/Burn%20Board/PBB%20Meeting%20Minutes_091715.pdf.

^{xix} Texas Natural Resources Code §§ 153.082(3).

^{xx} Texas Department of Agriculture, Legal Policies and Procedures Review of Insurance Policies Submitted by Certified Prescribed and Insured Burn Managers (May 2, 2016).

^{xxi} These are examples of common policies only. As every policy is different and language changes frequently, it is critical that landowners, CIPBMs, and PBOs carefully analyze their specific policy language.