



## Prescribed Fire Liability Insurance – Current Conditions & Pathways Forward

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### **Purpose**

To summarize current conditions with respect to availability of prescribed fire liability insurance; specifically, how limited opportunities for Non-Governmental Organizations (NGOs) and private contractors to acquire insurance impacts the ability to use prescribed fire. Additionally, to outline a set of solutions in play, and how members of the National Association of State Foresters might engage on approaches others are exploring.

### **Current Context**

Wildfires are becoming a growing challenge across the United States, and particularly the West, due in part to a changing climate, drought, and decades of fire suppression. There is widespread agreement that increasing the use of prescribed fire is essential to reducing wildfire hazards and restoring ecological function to the nation's forests. Accordingly, the Bipartisan Infrastructure Law invests billions of dollars in new funding for fuels reduction and forest restoration, including \$500 million to USDA and DOI for prescribed fire alone. The Forest Service's 10-year Wildfire Crisis Strategy also recognizes its critical importance and commits the agency to quadrupling fuels treatments over the next decade, including through use of prescribed fire (USDA Forest Service, 2022).

The use of prescribed fire varies considerably, with the Southeast accounting for 70% of acres burned annually (Lennon et al., 2022). Liability standards, burner qualifications, insurance regulations, and forest conditions also vary widely from state to state, complicating the overall landscape.

Despite the broad recognition of the importance of prescribed fire, multiple factors limit the ability to use it as a tool on federal, state, and private lands, including workforce capacity, qualifications and burn boss certifications, training, incentives, and leadership (Schultz et al., 2021; Wonkka, 2022). An emerging challenge is the decreasing availability of liability insurance, which can impact private landowners who burn, and the ability to use cooperative burners on or adjacent to federal land. Liability insurance has become scarce primarily because the insurance industry has responded to increasingly expensive wildfire damages and claims by largely dropping any policies that deal with fire. These claims are not due to prescribed fire but have increased the awareness of fire risks and perceived exposure among insurers.

If insurance for prescribed fire practitioners (NGOs and private contractors) vanishes altogether, it will be more difficult to meet the goals of the 10-year strategy, implement new Congressional funding, and increase the use of prescribed fire. The heightened sensitivity in the wake of the Hermits Peak escaped fire in New Mexico in 2022 underscores the need to address barriers to implementing prescribed fire, including insurance.

### **Liability Insurance – Importance & Statutory Environment**

Liability insurance is critical for private contractors and consultants that conduct prescribed fire, and for NGOs that own or manage private land or have staff that oversee or conduct burns (Wonkka, 2022). Insurance provides these entities legal and financial protection if a fire escapes and damages property or lives. It is important both for individuals who conduct a burn and those who plan and direct the work. Although the number of escaped burns is low, burners can be held liable for injury or property damage (Weir et al., 2019), and the fear of being held liable for losses has been shown to lessen interest in burning (Cary et al., 2022). Depending on the scale of damages and state regulations regarding liability, an escaped fire has the potential to financially ruin a non-profit or business.

State liability standards vary widely and determine the extent to which an NGO or contractor can be held liable for damages from an escaped burn. These standards are typically connected to “right to burn” acts (pioneered by Florida in 1990), which legally allow a landowner to conduct prescribed fire. Liability standards generally fall into three categories: strict liability, simple negligence, and gross negligence. Strict liability means a burner is responsible for any damages incurred regardless of precautions taken or the circumstances. Simple negligence means the burner needs to demonstrate reasonable care and can be held liable if they behaved in a negligent manner. Gross negligence means that if the burner follows clear plans and guidelines, they can only be held liable if proven to have behaved in a reckless manner – it reduces burden of proof and can encourage more use of fire. How gross negligence is applied depends on the state (in some states you must complete a certified burner program to be eligible). A fourth category, uncertain liability, includes states where there is no clear legal language. The 2018 National Prescribed Fire Use Survey states that five states have no prescribed fire law, 12 states operate under strict liability, 26 under simple negligence, and 7 under gross negligence (Melvin, 2018).

### **State of Insurance Industry**

Mounting losses and insurance claims associated with wildfire has led insurance companies to reconsider policies covering wildfire (Hinson, 2019). This re-examination of coverage extends beyond prescribed burning to include homeowner policy coverage, particularly in high wildfire risk areas.

Hostile fire<sup>1</sup> (wildfire or prescribed) is typically not included under general liability insurance. Instead, it is often covered under a separate logger or farmer policy and, until recently, was likely not given much thought by insurers. As wildfire claims have grown both in number and costs, insurers appear to have conflated wildfire risk and mounting losses generally (D. Jones, personal communication, July 15, 2022; Wonkka, 2022). Industry leaders appear to have questioned the risk of covering the intentional lighting of fires, especially when revenue generated from such policies is small – there is limited incentive and possible significant downside. As NGO and contractors’ policies came up for renewal in the past few years, the industry has scrutinized policies more closely, resulting in a loss of coverage. Unfortunately, little data exists regarding the number of insurance claims for prescribed fires, or the rate of spots or escapes from prescribed fires (Weir et al. 2019), making it difficult to empirically address industry concerns regarding risk and policy pricing. While data is limited, it is logical to presume that the apparently small pool of burners who need insurance likely limits market demand.

### **Solutions and Approaches in Play**

The variability of insurance markets, disparate regulatory environment across states, and complexity of the problem suggests that a multi-pronged, multi-scale approach to addressing the decreasing availability of liability insurance will be important. Practitioners and researchers have identified potential solutions and are working together through existing networks (such as the Fire Adapted Communities Learning Network) and local and state prescribed fire councils. Options identified so far include amending state liability standards, reviewing qualifications and certifications for burning, creating insurance pools, and establishing catastrophe funds to backstop insurance claims. In addition, collecting better data regarding the actual costs of claims related to escaped prescribed fires and clarifying the number of contractors and NGOs impacted by decreasing insurance will be important.

#### *Liability Standards*

Reducing exposure and liability of practitioners that conduct prescribed fire has been shown to decrease lawsuits and increase comfort with the use of fire (Lennon et al., 2022). Simple and gross negligence standards raise the burden of proof that a prescribed burn was conducted in a careless manner and provide more protection for burners, whereas strict and unclear liability standards are generally less conducive to the use of prescribed fire. To promote prescribed fire and create a more uniform legal standard for practitioners, states that have strict or unclear liability may wish to revisit these standards. Clarifying liability in states with uncertain liability could address uncertainty and more accurately help the insurance industry predict risk (Forest Stewards Guild, 2020). States that operate under simple negligence may also consider shifting to gross negligence, though they may do

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<sup>1</sup> Hostile fire is an insurance term used to represent a fire that cannot be controlled or escapes where it was confined, whereas friendly fire burns in a contained receptacle like a fireplace.

so with constraints. For example, California recently passed a bill that changed the liability to gross negligence around fire suppression costs, but simple negligence still applies to property damage.

### *Claims Fund*

The idea of establishing a claims fund (also sometimes referred to as a catastrophe fund) to serve as a “backstop” to insurance claims from escaped prescribed fires has gained traction recently. Yet there appears to be a fair amount of discrepancy in how practitioners are conceptualizing a fund and how it might be utilized. There are multiple ideas around how a fund would be structured and capitalized, who would be covered in the event of a loss, how it would be administered, and at what scale a fund might operate (single state, multi-state, or national). Researchers and practitioners have identified various approaches to capitalizing a claims fund, such as requiring activity fees (i.e. building in the Wildland Urban Interface), having burners pay into the fund, making it tax based, collecting fees from certification, or appropriating funding at a state or national level (Lennon et al., 2022). All these approaches have pros and cons, and any fund would need to be tailored to local, state, and/or federal regulations and forest and fire conditions.

Conceptually, a claims fund could complement, not supplant, traditional insurance and reassure property owners that they would be covered in the event of a loss. Such a fund could also create more public support for prescribed fire (Varner et al., 2022). Depending on how it was structured, a fund could also incentivize the industry to continue to write prescribed fire policies; for example, if a claims fund covered an initial amount of damages prior to private insurance kicking in. California is the first state to model a fund – the state legislature appropriated \$20 million in July 2021. Yet it was established through a line-item lacking detail, so specifics around operation, administration, and qualifications still need to be resolved. Policymakers and practitioners are actively working during the current legislative session to iron out details (Lake County News, 2022). Regardless of specifics, it will take several years to establish how the California fund is utilized (i.e., number, type, and size of claims).

### *Insurance Pools*

Insurance pools help diversify risk among multiple insurers. Pooling is a common approach in other sectors, like health care, and allows multiple small businesses or parties to join together to both create more demand and reduce premiums. Prior to establishing a claims fund, the state of California commissioned a prescribed fire working group to explore the concept of an insurance risk pool, with the intent to reduce costs of prescribed fire and maintain adequate liability protection (Sammut et al., 2019). The group concluded that the limited number of policies in the state did not make it financially viable. If risk pools are not viable at an individual state level, it could be worth exploring establishing larger, cross state pools, noting that there are likely to be significant constraints to this approach resulting from each state having unique insurance regulations.

### *Role of Burner Qualifications*

Qualification processes to become a certified burner, where such certifications are relevant, further complicate the landscape for both liability standards and insurance. For instance, in some states (Washington, Colorado, & Florida), gross negligence only applies to burners who finish a state certified burner program. Moreover, qualifying as a burn boss generally requires fire suppression experience – within the National Wildfire Coordinating Group (NWCG) standards there is currently no pathway to become a burn boss purely based on experience with prescribed fire. Groups such as the National Association of Prescribed Fire Councils and regional cohesive strategy coordinators have long advocated for a new set of qualifications; this is under consideration among leaders in the wildfire space, however it remains conceptual as such changes will require significant institutional change and political buy-in.

Addressing qualifications is important because it can determine applicability of state liability standards, eligibility for potential claims funds, and in the future could reassure the insurance industry that burners are experienced to an established and proven degree. Uniform qualifications may be useful to the insurance industry, yet could have adverse impacts on tribal organizations, private landowners, and others that currently conduct prescribed burns without certification requirements.

### *Clarifying Federal Policy*

Informal interviews and research used to develop this white paper revealed uncertainty around how the Federal Claims Torts Act would or would not apply to cooperative burners. In the event of an escaped fire, federal employees are protected from damage claims by the Act. Yet if an NGO or contractor cooperatively conducts a fire on federal land that then escapes and causes damages, partners remained unclear if they would be similarly protected. Language in a cooperative agreement might provide clarity, or the decision could be left to individual units. If a fire escaped, an NGO could be sued, and because this situation hasn't been tested in courts, the outcome is uncertain. The USDA Forest Service could consider providing a leaders' intent to address this uncertainty.

### *Establishing a Safety Record through Data Collection*

Clear data on the cost of damages caused by spots or escaped fires appears to be inconsistent or lacking in general, and the data that is tracked varies in quality from state to state. Some states collect this information on a voluntary basis, some do not (Wonkka, 2022). It is unclear what data the insurance industry used to weigh the costs and benefits of covering burners, if any. Most likely the perceived risk of insuring lighting fires outweighs any marginal financial benefits given the small market. Establishing a safety record by collecting better data on damages caused by prescribed fires could be an important strategy for assuring insurance companies of the actual risk of maintaining or investing in new insurance policies. Identifying a willing industry representative, or knowledgeable expert, to better understand industry considerations and calculations, and potentially improve data and tracking, could be useful.

### *Clarifying Scale of Problem*

Private contractors and NGOs fill critical capacity gaps on public and private lands, by adding workforce capacity or being able to burn on lands agencies cannot (Godwin, 2022). Yet there does not seem to be a clear understanding of the number of non-governmental organizations (such as The Nature Conservancy and Forest Stewards Guild) and private contractors that conduct burns, or how many have been impacted by recent changes in the insurance industry. Similarly, there is not clear data on which insurance companies are writing insurance, the costs, and their requirements. Improving data on both fronts will be essential to inform future policy writing and to establish potential risk pool or claims fund options. The state of Florida is addressing these data gaps at the state level by contracting an insurance expert to conduct a study on availability and affordability of insurance, and to explore the viability of a state backed insurance program.

### **Opportunities for Action**

Resolving the challenges with prescribed fire liability insurance will require both near and long-term actions, as well as more coordinated efforts across the forestry, wildfire, government, and insurance sectors. Members of the Council of Western State Foresters and National Association of State Foresters may wish to consider investing in one or more of the following opportunities. Acknowledging the progress prescribed fire practitioners, researchers, and other advocates have made on this topic will be key: supporting, rather than supplanting, work accomplished to date.

#### 1. Improve Data Collection

The decreasing availability of liability insurance is no doubt a critical issue, yet more empirical data is needed to clearly define the scale and impact of the problem. Better data collection on the number of escaped fires and the damages associated with those escapes; amount of prescribed fire acres treated (to determine relative risk of escapes); number and types of organizations and businesses impacted by lack of insurance; and existing insurers and insurance policies offered related to prescribed fire (and premium costs) would provide a solid foundation for future policy development. Some of the data collection will take time yet could be initiated in the short-term.

#### 2. Initiate Conversations with Insurance Representatives

How the insurance industry has, or is, making internal business decisions related to wildfire policies remains unclear – much of the information appears to be anecdotal and perhaps proprietary. A few insurance representatives and subject matter experts were interviewed for this white paper, yet more information would facilitate improved decision-making and development of innovative solutions.

#### 3. Connect with the National Association of Insurance Commissioners

Every state has an insurance commissioner responsible for regulating insurance in their state, and potentially have untapped ability to influence the trajectory of wildfire insurance. The National Association of Insurance Commissioners (NAIC) includes state regulators and helps to set model state laws and best practices in the insurance industry. The NAIC may be able to fill some of the data gaps,

such as the number of prescribed burners insured and which companies are offering insurance in which states. Their next annual meeting is in December 2022, which could present an opportunity for State Foresters to build a relationship with insurance regulators, create a shared understanding of current challenges, and begin identifying creative solutions.

#### 4. Convene Practitioner and Cross-Sector Conversations

The interview and literature review process for this white paper revealed that many people (i.e. burners, insurers, government representatives) are aware of the insurance challenge, yet are working together through informal, disconnected efforts. Convening more regional, and cross-sector, conversations could serve the dual purpose of connecting disparate conversations, sharing lessons learned and strategizing on new ideas (like risk pools and claims funds), and breaking down silos among traditionally disconnected fields.

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## People Interviewed

1. Sara Clark, Partner, Shute, Mihaly & Weinberger LLP
2. Zander Evans, Executive Director, Forest Stewards Guild
3. John Franchini, former Insurance Commissioner for New Mexico
4. Rob Galbraith, Founder and CEO, Forestview Insights (formerly with USAA Insurance)
5. Daniel Godwin, formerly with The Ember Alliance, since moved to the USDA Forest Service
6. Nick Goulette, Executive Director of The Watershed Research and Training Center
7. Jason Hartman, State Forester, Kansas
8. Emily Hohman, Director, Fire Learning Network, The Nature Conservancy
9. Dave Jones, former Insurance Commissioner for California
10. Jim Karels, Fire Director, National Interagency Fire Center
11. Laura McCarthy, State Forester, New Mexico
12. Mark Melvin, former chair of Coalition of Prescribed Fire Councils
13. Meghan Mullee, Vice President, Alliant Insurance Services
14. Lenya Quinn-Davidson, Area Fire Advisor with UC Cooperative Extension in Humboldt County, CA, and Director of the Northern California Prescribed Fire Council
15. Marek Smith, Director of North America Fire for The Nature Conservancy
16. Jack Tribble, former insurance writer based in Georgia