

Prescribed Fire Liability: Legal and Policy Proposals for the Promotion of Prescribed Fire Use on Small Non-Industrial Private Lands in the State of Oregon.\*

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**I. American Fire in Oregon: A brief history of wildland fire in the United States and Oregon.**

Before the establishment of the United States, unsuppressed wildland fires burned across nearly every ecosystem in North America.<sup>1</sup> Historic fires started from natural causes such as lightning, or from human ignitions by Native Americans for various cultural, utilitarian, and spiritual reasons.<sup>2</sup> For thousands of years, wildland fire shaped the habitats of numerous ecosystems, resulting in fire-adaptive species such as the lodgepole pine, black spruce, red-cockaded woodpecker, and even the giant sequoias.<sup>3</sup> An ecosystem's historic natural pattern of wildland fire is called a "fire regime" and varies in classification by fire frequency and severity.<sup>4</sup> For example, in Western Oregon, iconic for its rainforest-like conditions, wildland fire historically occurred infrequently (approximately every 100 years or more) at higher severity, resulting in what is called

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\* The proposals of this paper are intended to be applicable to small non-industrial private lands in Oregon. Small non-industrial private lands are typically 10 acres or less owned by a single landowner that does not operate major manufacturing or commercial facilities on site. This is in contrast to industrial or commercial lands that are large tracts of land used for generating significant land resource revenue and owned by a large group or organization.

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<sup>1</sup> A wildland fire is "[a]ny non-structure fire that occurs in vegetation or natural fuels." Fire Management Board, *Federal Wildland Fire Policy Terms and Definitions*, 1 (Oct. 11, 2019), <https://www.nwccg.gov/sites/default/files/docs/eb-fmb-m-19-004a.pdf>; see STEPHEN J. PYNE, *BETWEEN TWO FIRES: A FIRE HISTORY OF CONTEMPORARY AMERICA* 3 (2015).

<sup>2</sup> See Robert Boyd, *Strategies of Indian Burning in the Willamette Valley*, in *INDIANS, FIRE AND THE LAND IN THE PACIFIC NORTHWEST* 94, 100-09 (Robert Boyd ed., 1999).

<sup>3</sup> E.g., Richard N. Conner et al., *The Red-cockaded Woodpecker: Interactions With Fire, Snags, Fungi, Rat Snakes and Pileated Woodpeckers*, 56 *TEX. J. SCI.* 415, 416-17 (2004); e.g., Brian Clark Howard, *How Sequoias Survive Wildfires, in Yosemite and Beyond*, *NATIONAL GEOGRAPHIC* (Aug. 26, 2013), <https://www.nationalgeographic.com/science/article/130826-giant-sequoias-yosemite-rim-fire-forestry-science>.

<sup>4</sup> *What is a Fire Regime?*, OREGON EXPLORER, <https://oregonexplorer.info/content/what-fire-regime?topic=95&ptopic=62>.

a stand-replacement fire regime.<sup>5</sup> In contrast, the dry sagebrush rangelands and pine forests of Eastern Oregon historically experienced fire on a much shorter time scale with less severity, leading to a low-to-mixed-severity fire regime.<sup>6</sup>

Over the past century, ecosystems nationwide have experienced a dramatic shift away from their natural fire regimes.<sup>7</sup> This shift can be attributed to America's early relationship with and subsequent management of wildland fire in the 20th Century. During the summer of 1910, a lightning storm sparked fires across the forests of Western Montana and Northeastern Idaho causing a burning conflagration now known as "The Great Fire of 1910." In two days, strong winds pushed the fires and burned over 3 million acres of timber lands and mountain communities from Montana to Washington, causing 85 people to lose their lives.<sup>8</sup>

This large wildfire event spurred federal agencies, especially the budding U.S. Forest Service – having only been established five years earlier – into an all-out war on forest fires. That year, the Chief of the Forest Service declared fire suppression the "fundamental obligation of the Forest Service [taking] precedence over all other duties and activities."<sup>9</sup> The federal land agencies, led by President Theodore Roosevelt, rallied the American public around a message of wildfire suppression and prevention.<sup>10</sup> The subsequent industrialization of wildland firefighting made the United States one of the most effective firefighting forces in world history.

What followed were rapid advances in the methods for fighting wildfires and a dramatic reduction in the number of average acres burned each year. In California alone, scientists estimate that over 4 million acres burned each year prior to 1800.<sup>11</sup> Compare this to the current 1.1 million average acres burned per year between 2013-2018, and the power of the United States'

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<sup>5</sup> See Oregon Department of Fish & Wildlife, *Disruption of Disturbance Regimes*, OREGON CONSERVATION STRATEGY, <https://oregonconservationstrategy.org/key-conservation-issue/disruption-of-disturbance-regimes/>.

<sup>6</sup> *Id.*

<sup>7</sup> See generally STEPHEN PYNE, *THE PYROCENE: HOW WE CREATED AN AGE OF FIRE, AND WHAT HAPPENS NEXT* (2021).

<sup>8</sup> See generally, e.g., TIMOTHY EGAN, *THE BIG BURN: TEDDY ROOSEVELT AND THE FIRE THAT SAVED AMERICA* (2009).

<sup>9</sup> Henry Graves, *Protection of Forests from Fire*, U.S. Department of Agriculture, Forest Service – Bulletin 82 (Washington, D.C.: Government Printing Office, 1910), 7 quoted in DAVID CARLE, *BURNING QUESTIONS: AMERICA'S FIGHT WITH NATURE'S FIRE* 4 (2002).

<sup>10</sup> See Egan, *supra* note 8.

<sup>11</sup> Scott L. Stephens et al., *Prehistoric fire area and emissions from California's forests, woodlands, shrublands, and grasslands*, 251 *FOREST ECOLOGY & MGMT.* 205, 213 (2007).

firefighting force becomes abundantly clear.<sup>12</sup>

Yet, after spending over a century seemingly mastering the natural cycles of wildfire, the United States is now experiencing a significant rise in the average number of acres burned each year – fire seasons are longer, suppression costs are higher, and the number of homes and lives lost to wildfire continue to rise.<sup>13</sup> Fire scientists and practitioners cite many factors that have contributed to the current state of affairs, including the increase of human development in fire-prone areas,<sup>14</sup> the impact of climate change on fire weather and behavior,<sup>15</sup> the lack of effective resources for tackling these changing conditions,<sup>16</sup> and the historic suppression of the natural cycle of fire.<sup>17</sup>

This paper focuses on the final of these contributing factors: the suppression of the natural cycle of fire, and the legal and policy measures the State of Oregon could take to promote the restoration of wildland fire on its landscape. Specifically, this paper investigates legal and policy proposals for the promotion of prescribed burning on private non-industrial lands in the state. Among the proposals investigated are a shift in Oregon’s prescribed fire liability laws from a simple negligence standard to a gross negligence standard; the implementation of a certified burn manager program to support a limited liability standard; and the creation of unique government-

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<sup>12</sup> CAL FIRE, California Wildfire and Acres for all Jurisdictions (1987-2018), <https://www.fire.ca.gov/media/11397/fires-acres-all-agencies-thru-2018.pdf>.

<sup>13</sup> E.g., Jesse Roman et al., *The Wildfire Crisis: Greetings from the 2020 Wildfire Season*, NFWA JOURNAL, Nov. 1, 2020, <https://www.nfpa.org/News-and-Research/Publications-and-media/NFWA-Journal/2020/November-December-2020/Features/Wildfire> (citing data from the National Interagency Fire Center that annual average wildfire suppression costs in the United States have increased from approximately \$425 million between 1985 and 1999 to \$1.6 billion between 2000 and 2019); e.g. also, Kimiko Barrett, *Wildfires destroy thousands of structures each year*, HEADWATERS ECONOMICS (Nov. 16, 2020), <https://headwaterseconomics.org/natural-hazards/structures-destroyed-by-wildfire/> (stating that “[a]cross the country, the most damaging wildfire seasons have been in recent years, including 2017, 2018, and 2020, accounting for 62% of the structures lost of the last 15 years.”)

<sup>14</sup> E.g., Volker C. Radeloff et al., *Rapid growth of the US wildland-urban interface raises wildfire risk*, 115 PNAS 3314, 3314 (Mar. 27, 2018).

<sup>15</sup> E.g., A. Park Williams et al., *Observed Impacts of Anthropogenic Climate Change on Wildfire in California*, 7 EARTH’S FUTURE 892, 905-06 (Aug. 4, 2019).

<sup>16</sup> See, e.g., Sophie Quinton, *Lack of Federal Firefighters Hurts California Wildfire Response*, STATELINE, Jul. 14, 2021, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/14/lack-of-federal-firefighters-hurts-california-wildfire-response>; See, e.g. also, Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021) (describing the Biden Administration’s initiative to form a Civilian Climate Corps “to conserve and restore public lands and waters, bolster community resilience, increase reforestation . . . and address the changing climate.”)

<sup>17</sup> See e.g., Anne Danahy, *Suppression of naturally occurring blazes may increase wildfire risk*, PENN STATE NEWS (Mar. 26, 2013), <https://news.psu.edu/story/270206/2013/03/26/research/suppression-naturally-occurring-blazes-may-increase-wildfire-risk>.

supported options for prescribed fire liability insurance.

## II. Prescribed Fire in Oregon: A definition of prescribed fire, its benefits, and the barriers to its greater application on private non-industrial lands in the State of Oregon.

“Prescribed fire,” or controlled burning, is the planned ignition of a wildland fire in accordance with applicable laws, policies, and regulations for the purpose of meeting specific management objectives.<sup>18</sup> In Oregon, prescribed fire has been used by indigenous peoples since time immemorial for various ecological, spiritual, and cultural practices,<sup>19</sup> and by Europeans for land clearing, agricultural, and forestry purposes.<sup>20</sup> Today, prescribed fire continues to be an important tool for private, federal, state, and tribal land managers seeking specific management objectives. Presently, land managers use controlled burning to achieve a diverse list of objectives such as habitat restoration,<sup>21</sup> hazardous fuels mitigation,<sup>22</sup> restoration of indigenous ancestral practices,<sup>23</sup> reestablishment of natural fire regimes,<sup>24</sup> and even the reduction of insect-borne diseases.<sup>25</sup> For hazardous fuel treatment, land managers commonly rely on a combination of mechanical thinning and prescribed fire for the removal of dense hazardous vegetation,<sup>26</sup> and research suggests that the application of prescribed fire during these treatments is essential for

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<sup>18</sup> *Prescribed Fire*, NWCG.gov, <https://www.nwcg.gov/term/glossary/prescribed-fire>.

<sup>19</sup> See, e.g., Johnathon W. Long et al., *The importance of Indigenous cultural burning in forested regions of the Pacific West, USA*, 500 FOREST ECOLOGY AND MANAGEMENT 1, 3- (2021) (describing the multitude of historic and present day uses and benefits of cultural burning practices by indigenous communities).

<sup>20</sup> STEPHEN J. PYNE, FIRE IN AMERICA: A CULTURAL HISTORY OF WILDLAND AND RURAL FIRE 219-20 (Univ. of Wash. Press 1997) (1982) (describing the use of controlled burning for fuel reduction by white settlers).

<sup>21</sup> E.g., William M. Block et al., *Effects of Prescribed Fire on Wildlife and Wildlife Habitat in Selected Ecosystems of North America*, THE WILDLIFE SOCIETY TECHNICAL REVIEW 16-01 (Oct. 2016), <https://wildlife.org/wp-content/uploads/2014/05/TechManual16-01FINAL.pdf>.

<sup>22</sup> E.g., Paulo M. Fernandes et al., *A review of prescribed burning effectiveness in fire hazard reduction*, 12 INT’L J. OF WILDLAND FIRE 117, 117 (2003).

<sup>23</sup> E.g., Cory Eldridge, *Restoring fire: prescribed burn at Quamash Prairie reconnects land, culture and habitat*, METRO NEWS, Jan. 2, 2020, <https://www.oregonmetro.gov/news/restoring-fire-prescribed-burn-quamash-prairie-reconnects-land-culture-and-habitat>

<sup>24</sup> E.g., Max Bennett et al., *Prescribed Underburning in Southwest Oregon: A Case Study*, OREGON EXTENSION SERVICE EM 9226 (Dec. 2018), <https://catalog.extension.oregonstate.edu/sites/catalog/files/project/pdf/em9226.pdf>

<sup>25</sup> E.g., Elizabeth R. Gleim et al., *Frequent prescribed fires can reduce risk of tick-borne diseases*, SCI REP 9, Feb. 4, 2019, at 1.

<sup>26</sup> See Scott L. Stephens et al., *Forest fuel reduction treatments do a lot of good and not a lot of harm*, CALIFORNIA FIRE SCIENCE CONSORTIUM RESEARCH BRIEF FOR RESOURCE MANAGERS (Sept. 2012), [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5393869.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5393869.pdf).

accomplishment of restorative management objectives.<sup>27</sup>

In Oregon, prescribed fire is conducted across most jurisdictions of land ownership; however, recent research finds that the application of prescribed fire continues to fall short of the necessary levels needed to meet land management objectives.<sup>28</sup> In addition, the recent COVID-19 pandemic further impeded prescribed fire management objectives due to the shutdown of many state and federal burning operations during the 2020 burn season.<sup>29</sup>

Outside of the pandemic, landowners and fire practitioners cite many barriers to the increased application of prescribed fire, including concerns about air quality, funding and staffing capacities, liability, and unpredictable weather.<sup>30</sup> Of these concerns, liability is often-cited as a significant barrier to the increased application of prescribed fire on small non-industrial private lands.<sup>31</sup> The legal liability associated with prescribed fire is directly related to the fire liability laws of a specific state. In Oregon, the legislature and policymakers should work together to reform liability laws and implement programs that can alleviate some of this liability risk and ultimately increase the application of prescribed fire in the state.

### **III. Strict Liability, Simple Negligence, and Gross Negligence: Prescribed fire liability under American law.**

Fire can be the harbinger of life-sustaining warmth or life-threatening heat. Early British and American courts recognized this duality and implemented legal controls on the life-threatening aspects of fire. Under English common law, the “trespass” of fire onto another

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<sup>27</sup> See Crystal A. Kolden, *We’re Not Doing Enough Prescribed Fire in the Western United States to Mitigate Wildfire Risk*, 2 *Fire* 1, 6-8 (May 29, 2019); see also Tony Schick, *Efforts to reduce wildfire risk fall short, buck science*, OREGON PUBLIC BROADCASTING, Jul 24, 2018, <https://www.opb.org/news/article/west-wildfire-risks-fuels-treatment-thinning-burning/>.

<sup>28</sup> See Kolden, *supra* note 27, at 1.

<sup>29</sup> See, e.g., Jamie Parfitt, *Forest Service hits pause on prescribed burns throughout the Pacific Northwest*, KDRV, Mar. 25, 2018, <https://www.kdrv.com/content/news/Forest-Service-hits-pause-on-prescribed-burns-throughout-the-Pacific-Northwest-569096091.html>; see also, e.g., Newsroom Staff, *NBC KOB1 5 MEDFORD*, Apr. 17, 2020, <https://kobi5.com/news/fire-danger-is-rising-odf-warns-126729/> (describing that many prescribed burns were canceled in Spring 2020 due to the coronavirus pandemic).

<sup>30</sup> E.g., Courtney Schultz et al., *Prescribed Fire Policy Barriers and Opportunities: A Diversity of Challenges and Strategies Across the West*, ECOSYSTEM WORKFORCE PROGRAM WORKING PAPER NUMBER 2 (2018), [http://www.nwfirescience.org/sites/default/files/publications/WP\\_86.pdf](http://www.nwfirescience.org/sites/default/files/publications/WP_86.pdf).

<sup>31</sup> E.g., John Weir et al., *Liability and Prescribed Fire: Perception and Reality*, 72 *RANGELAND ECOLOGY & MGMT.* 533, 533 (2019).

person's land often carried harsh punishments under a system of strict or absolute liability for damages.<sup>32</sup> Even after some modification to this strict liability rule,<sup>33</sup> a landowner who intentionally applied fire to his land would have assumed the risk of being absolutely liable for any damages caused in the event of an escaped burn, regardless of his fault in causing the escape.

Early American law adopted this strict liability standard for the trespass of fire; however, as controlled burning became an established land management technique in America, jurisdictions established different liability standards to account for the varied levels of landowner risk and responsibility. Currently, there exist three standards of liability for prescribed fire escape in the United States: strict liability, simple negligence, and gross negligence. These liability standards vary from state-to-state and are established either through state common law or by state legislation.<sup>34</sup>

### *Strict Liability*

Similar to its English law precedent, under a strict liability standard, a property owner would be liable for damages caused by an escaped prescribed fire regardless of her level of care in executing the burn. The modern application of strict liability for prescribed fire emulates the historic definition and is usually established through a combination of state laws that create the essential *effect* of strict liability. Eleven states use a strict liability standard for prescribed fire.<sup>35</sup>

### *Simple Negligence*

Under a simple negligence standard, a property owner or burn operator would be liable for an escaped prescribed fire if she lacked a due standard of care towards the injured party, based on a reasonable person in a similar

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<sup>32</sup> David H. White, *Legal implications associated with use and control of fire as a management practice*, 17 FIRE ECOLOGY CONF. PROC 375, 376 (1991) (available at [https://talltimbers.org/wp-content/uploads/2018/09/375-White1991\\_op.pdf](https://talltimbers.org/wp-content/uploads/2018/09/375-White1991_op.pdf)).

<sup>33</sup> *Id.*

<sup>34</sup> Weir, *supra* note 31, at 534.

<sup>35</sup> AK, HI, IA, ME, MN, NE, NY, SD, ND, WI, WY. In 2021, California amended its liability standard to gross negligence and no longer uses a strict liability standard. Mark A. Melvin, *2018 National Prescribed Fire Use Survey Report*, COALITION OF PRESCRIBED FIRE COUNCILS, INC., 15, (2018), <https://www.stateforesters.org/wp-content/uploads/2018/12/2018-Prescribed-Fire-Use-Survey-Report-1.pdf> (depicting the states and their different standards of liability in 2018).

circumstance.<sup>36</sup> The simple negligence standard is often established through statute. For example, in Idaho, a person who is “willfully or *negligently* responsible for the starting or existence” of a fire shall be liable for damages and “the costs incurred by the state” in controlling the fire.<sup>37</sup> Twenty-six states use a simple negligence standard, including Oregon.<sup>38</sup>

### *Gross Negligence*

Under a gross negligence standard, a property owner or burn operator would be held liable only for the flagrant lack or intentional failure to provide due care to an injured party. The standard of care for gross negligence is lower than simple negligence thus reducing the burden of proof a court must find to hold a property owner liable. Similar to simple negligence, the gross negligence standard is usually established by statute, often after the enactment of prescribed fire legislation. For example, after recognizing the importance of prescribed burning in the state, Florida enacted the Prescribed Burning Act of 1990, which was amended in 1999 to establish a gross negligence standard of liability for prescribed fire escape.<sup>39</sup> Eight states, including Florida, now use a gross negligence standard for prescribed fire liability.<sup>40</sup>

A jurisdiction’s choice in liability standard depends on many factors, including the prevalence and social acceptability of prescribed burning in the state. For example, most of the states that use the lower gross negligence standard are in the Southeast, where public support for prescribed fire and the number of acres treated by controlled burning is significantly greater than

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<sup>36</sup> Carissa L. Wonkka et al., *Legal barriers to effective ecosystem management: exploring linkages between liability, regulations, and prescribed fire*, 25 *ECOLOGICAL APPLICATIONS* 2382, 2383 (2015).

<sup>37</sup> IDAHO CODE § 38-107 (2020) (emphasis added).

<sup>38</sup> AL, AR, AZ, DE, ID, IL, IN, KS, KY, LA, MD, MS, NC, NH, NJ, NM, OH, OK, OR, PA, TN, TX, UT, VA, WA, WV. Melvin, *supra* note 36.

<sup>39</sup> See Jim Brenner and David Wade, *Florida’s Revised Prescribed Fire Law: Protection for Responsible Burners*, Proceedings of Fire Conference 2000: The First National Congress on Fire Ecology, Prevention, and Management, 132-136 (2003), [https://www.srs.fs.usda.gov/pubs/ja/ja\\_brenner001.pdf](https://www.srs.fs.usda.gov/pubs/ja/ja_brenner001.pdf).

<sup>40</sup> CA, CO, FL, GA, MI, MT, NV, SC. Melvin, *supra* note 36.

in other parts of the country.<sup>41</sup>

The goal of these fire liability laws is to protect the public from the damaging aspects of fire while allowing responsible landowners to use prescribed fire for its multiple land management benefits. These laws attempt to do this by outlining a landowner's legal responsibilities when using prescribed fire. Of the three liability standards, strict liability provides the most clear definition of a landowner's legal responsibility: in the event of a prescribed burn escape, the landowner is absolutely liable for the damages and/or suppressions costs associated with the escaped fire. However, strict liability provides no limitations on liability for a landowner's good faith effort to contain the prescribed fire.

In contrast, the simple negligence standard gives landowners an opportunity for a limited liability standard but provides less clarity about a landowner's legal responsibilities during prescribed burning. Under simple negligence, a jurisdiction's standard for negligence is developed through state case law – a court will look to past cases of prescribed fire escape to help determine if a landowner's actions were negligent based on a reasonable person in a similar situation. However, there is often little to no legal precedent for the escape of a prescribed fire. The simple negligence standard may provide limited liability to a landowner who acted reasonably, but – given the lack of legal precedent – a court will likely be determining negligence for a prescribed fire for the first time. For this reason, a landowner's legal responsibility for a prescribed fire escape may be significantly subject to an individual court's comfort level and opinion about the safety of prescribed fire.<sup>42</sup>

Alternatively, the gross negligence standard provides a clear definition of a landowner's legal responsibility while providing a responsible landowner limited liability in the event of prescribed fire escape. When a state establishes a gross negligence standard of liability, it typically statutorily defines certain requirements a landowner must follow to receive coverage under the

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<sup>41</sup> See Kolden, *supra* note 27, at 7.

<sup>42</sup> "Judges, like others, may differ about such values; they can hardly be described as conclusions of law." *Koos v. Roth*, 652 P.2d 1255, 1261 (Or. 1982) (quoting Justice Hans Linde in an opinion involving liability for an escaped prescribed fire before Oregon's establishment of a simple negligence standard for prescribed burning); see Alissa Hinojosa et al., *Liability and the Use of Prescribed Fire in the Southern Plains, USA: A Survey of District Court Judges*, 9 LAND 1, 8-12 (2020) (describing the variability in answers obtained from judges about the application of simple negligence laws surrounding escaped prescribed fire cases in jurisdictions in Texas and Oklahoma)



lower standard of care. For example, for a landowner or burn operator to receive protection under Florida's gross negligence standard, she must have at least one certified prescribed burn manager present for the entire burn operation, a written and approved burn prescription, permission from the landowner, and certification that the burn area had been properly prepared to assure control of the fire.<sup>43</sup> These statutory requirements provide a court deciding liability for a fire escape the most clear definition of a landowner's legal responsibilities when conducting a prescribed burn. If these statutory requirements are satisfied, the landowner's liability for the escaped prescribed fire may be evaluated under the limited liability standard.

#### **IV. From Simple to Gross Negligence: amending Oregon's "simple negligence" standard for prescribed fire liability to a "gross negligence" standard.**

Oregon should amend its fire liability statute from a simple negligence to a gross negligence standard to provide landowners clear guidance as to their responsibilities during prescribed fire operations and to provide responsible landowners limited liability when they perform controlled burns in compliance with the legal requirements.

Oregon is among the states that use a simple negligence standard of liability for prescribed fire escape.<sup>44</sup> To satisfy a claim of negligence against a defendant, a plaintiff must prove that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty of care, (3) the plaintiff suffered actual injury, and (4) the defendant's breach of duty was the cause of the plaintiff's injury. In a simple negligence case for an escaped prescribed fire, the main factor the court will be deciding is whether the defendant, the landowner, breached her duty of care towards the plaintiff based on her actions during the course of a prescribed fire.

A landowner's duty of care will be determined based on the reasonable person standard – a court will ask whether the defendant acted as a reasonable person would have in a similar situation (e.g., a reasonable person applying a prescribed fire to her private property). If the person did not act reasonably, she would have breached the due standard of care and could be found negligent in conducting the prescribed burn and liable for the plaintiff's damages. The court will

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<sup>43</sup> See Brenner, *supra* note 40, at 135.

<sup>44</sup> OR. REV. STAT. § 526.360(4) (2019) (stating that "no person shall be liable for property damage resulting from [] burning unless the damage is caused by the negligence of the person").

use prior court cases, statutory definitions, and expert opinions to inform their finding of negligence based on whether the defendant acted reasonably under the circumstances.<sup>45</sup>

Since the enactment of the simple negligence standard there have been no reported cases involving escaped prescribed fires in Oregon. This means that in a case of contested liability for an escaped prescribed fire, a court in Oregon will first rely on state statutes to establish liability based on negligence. According to state law, a “fire on any forestland in Oregon burning uncontrolled or without proper action being taken to prevent its spread, notwithstanding its origin, is declared a public nuisance by reason of its menace to life, forest resources or property.”<sup>46</sup> Meaning, even if a fire was intentionally set for prescribed fire purposes, if the fire is found to be “burning uncontrolled” it is declared a public nuisance. To determine if a fire is “burning uncontrolled,” the statute explains that “[t]he spread of fire in forestland across an ownership boundary is *prima facie* evidence of fire burning uncontrolled.”<sup>47</sup> Meaning, if the prescribed fire burned across a property boundary this is automatic evidence that it was “burning uncontrolled” and is consequently a public nuisance. Once statutorily declared a public nuisance, a court will likely use this declaration to support finding the defendant was negligent because she breached her duty of care to the plaintiff and is now liable for the plaintiff’s damages.

A defendant can rebut that she did not breach her standard of care using evidence of her due diligence in controlling the prescribed fire; however, if the fire crossed a boundary, the law’s “prima facie” evidence standard does not allow the defendant to rebut the public nuisance declaration. Thus, regardless of the defendant’s due diligence in controlling the prescribed fire or her neighbors’ consent to conduct the burn on both properties, if the fire burns across a property boundary, the landowner is at greater risk of being declared negligent and potentially liable for her neighbor’s damages and up to \$300,000 in suppression costs.<sup>48</sup>

Recognizing the problematic language of this statute, the Oregon Legislature addressed the it in the 2021 Legislative Session with the passage of SB 762.<sup>49</sup> Section 25 of the Bill directs the State Forestry Department to “adopt rules to clarify that a person may . . . [c]onduct a prescribed

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<sup>45</sup> See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 3 (AM. LAW. INST. 2010).

<sup>46</sup> OR. REV. STAT. § 477.064(1) (2019)

<sup>47</sup> OR. REV. STAT. § 477.064(2) (2019) (emphasis added)

<sup>48</sup> OR. REV. STAT. § 477.120(4) (2019)

<sup>49</sup> S.B. 762, 81ST LEG., REG. SESS. § 25 (Or. 2021)

fire that burns across land ownership boundaries if the person obtains a permit for the fire . . . and complies with the conditions of the permit.”<sup>50</sup> The bill also states a person may “obtain a single permit” for this cross-boundary prescribed fire “if the person demonstrates to the department that the person has obtained consent to conduct the fire from all persons on whose lands the fire is planned to burn.”<sup>51</sup>

When adopted, the State Forestry Department’s new rules allowing property owners to burn their adjacent lands together will likely negate the prima facie evidence standard if the landowner obtains permission from her neighbors. However, in the absence of the removal of the prima facie language from the statute, a court could still use the defining attributes of an escaped prescribed fire – an intentionally set fire that has crossed its boundary – as prima facie evidence that the prescribed fire was burning uncontrolled, and thus, the person in charge of the burn acted negligently. Without greater guidance about a landowner’s legal responsibilities during prescribed burning, an Oregon court could be forced to rely on the current language of the statute.

To provide responsible landowners liability protection and well-defined responsibilities for prescribed burning, Oregon should both adopt clear statutory requirements for conducting prescribed fires in conjunction with changing to a gross negligence standard of liability. Other states have recognized the significant barrier liability can pose to landowners seeking to use prescribed fire on their private lands. Over three decades ago, Florida passed the Prescribed Burning Act of 1990 and acknowledged fire as a management tool for the benefit of public safety, the environment, and the economy of the state.<sup>52</sup> It proclaimed that, as the state’s population continues to grow, “pressures from liability issues and nuisance complaints [will] inhibit the use of prescribed burning.”<sup>53</sup> Recognized as a “right to burn” law, the Act was amended in 1999 to establish a gross negligence standard for prescribed burn liability.<sup>54</sup> Current Florida law states that no property owner conducting a prescribed burn in accordance with the Act is liable for damages

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<sup>50</sup> *Id.* at § 25(1)

<sup>51</sup> *Id.* at § 25(2)

<sup>52</sup> FLA. STAT. § 590.125(3)(a) (2021)

<sup>53</sup> FLA. STAT. § 590.125(7) (2021)

<sup>54</sup> See Brenner, *supra* note 40, at 135 (stating that conducting prescribed burns that adhere to the conditions outlined in statute are “considered to be a property right of the property owner”).

caused by the fire or its smoke unless gross negligence is proven.<sup>55</sup>

To conduct a prescribed burn in accordance with the Act, the statute requires that the burn manager acquire an authorization to burn from the State Forest Service.<sup>56</sup> To obtain authorization, the burn manager or organization must prepare a written burn prescription<sup>57</sup> and obtain the landowner's consent.<sup>58</sup> When conducting the prescribed burn, the statutes require that there be adequate firebreaks and sufficient personnel and equipment within the authorized burn area<sup>59</sup> and that a certified burn manager be present with a copy of the burn prescription for the entirety of the operation.<sup>60</sup> The statute provides that if fire spreads outside of the authorized burn area on the day of ignitions this not proof of insufficient firebreaks, personnel, or equipment,<sup>61</sup> and if the fire is contained within the burn area, there will be a strong rebuttable presumption that adequate resources were present.<sup>62</sup>

Florida's laws and the gross negligence standard were designed to eliminate the presumption that prescribed fire is inherently dangerous, but instead, encourage the responsible use of it in compliance with well-defined statutory standards and rules. Though accidents can occur,<sup>63</sup> the risk of a prescribed fire escape and significant property damage is exceptionally low. For example, a report from the Wildland Fire Lessons Learned Center (WFLLC) documented a 1% escape rate of the 23,050 prescribed fires surveyed, amounting to only one insurance claim of less than \$5,000 and no lawsuits.<sup>64</sup> The heavy liability enforced by a strict or simple negligence standard does not reflect the reality that the ecological benefits of carefully implemented prescribed fire greatly outweigh the risk of damages.

A recent bill passed by the California State Legislature now restricts liability for damages

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<sup>55</sup> FLA. STAT. § 590.125(c) (2021)

<sup>56</sup> FLA. STAT. § 590.125(b)(4) (2021)

<sup>57</sup> FLA. STAT. § 590.125(b)(2) (2021)

<sup>58</sup> FLA. STAT. § 590.125(b)(3) (2021)

<sup>59</sup> FLA. STAT. § 590.125(b)(5) (2021)

<sup>60</sup> FLA. STAT. § 590.125(b)(1) (2021)

<sup>61</sup> FLA. STAT. § 590.125(b)(5)(a) (2021)

<sup>62</sup> FLA. STAT. § 590.125(b)(5)(b) (2021)

<sup>63</sup> *E.g.*, DAVID CARLE, BURNING QUESTIONS: AMERICA'S FIGHT WITH NATURE'S FIRE 3 (2002) (describing a prescribed fire in New Mexico that escaped due to unexpected high winds).

<sup>64</sup> John R. Weir et al., *Prescribed Fire: Understanding Liability, Laws and Risk*, OKLA. COOPERATIVE EXTENSION SERV. NREM-2905, 2 (Mar. 2020), <https://extension.okstate.edu/fact-sheets/print-publications/nrem/prescribed-fire-understanding-liability-laws-and-risk-nrem-2905.pdf>.

caused by prescribed fire, so long as specific conditions are met by persons in control of the burn.<sup>65</sup> Among the conditions required, the purpose of the burn must be for fire hazard reduction, ecological maintenance and restoration, cultural burning, silviculture, or agriculture; a certified burn manager must review and approve the written burn plan; and, the burn must be authorized by the state, approved by the landowner, and in compliance with state air quality permits.<sup>66</sup> The legislature provides that “no person shall be liable for any fire suppression or other costs” if these conditions are followed, but a person would not be immune from liability if the person’s conduct was grossly negligent.<sup>67</sup> A unique feature of this legislation is its recognition of prescribed fire for the purposes of cultural burning by Native American tribes in the state. Not only does the legislation recognize cultural burning<sup>68</sup> as a legitimate use of prescribed fire, but it also provides an exemption from the required review and approval of a written prescribed fire prescription for “cultural fire practitioners.”<sup>69</sup> The legislation recognizes the cultural significance of prescribed burning for Native Americans, and is an important step towards not only the restoration of fire on the landscape, but also the restoration of fire as an expression of tribal sovereignty for the indigenous peoples.

#### **V. Trained and Ready: Implementing a Certified Burn Manager program in Oregon to support a limited liability standard for prescribed fire.**

The State of Oregon should institute a robust, accessible, and voluntary certified burn manager program to train private individuals in safe burning techniques. In addition, Oregon should grant limited liability to persons who complete the program so to provide an incentive to private individuals to get the training and conduct more prescribed burns on private lands in the state.

When a public agency or private practitioner conducts a prescribed fire, an experienced

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<sup>65</sup> S.B. 332, 2021-2022 LEG., REG. SESS. (Cal. 2021)

<sup>66</sup> *Id.* at Section 1, § 3333.8(b)(1)-(6)

<sup>67</sup> *Id.* at Section 1, § 3333.8(b) & (c)

<sup>68</sup> *Id.* at Section 1, § 3333.8(e) (defining a “cultural burn” as “the intentional application of fire to land by Native American tribes . . . to achieve cultural goals or objectives”).

<sup>69</sup> *Id.* at Section 1, § 3333.8(b)(2) & (f) (defining “cultural fire practitioner” as “a person associated with a Native American tribe or organization with experience in burning to meet cultural goals or objectives”).

person is often named the prescribed burn manager or burn boss.<sup>70</sup> The burn manager is in charge of the on-the-ground operations of the prescribed burn and is typically involved in the pre-planning and prepping of the burn.<sup>71</sup> Burn managers within public agencies, such as the U.S. Forest Service (USFS) or Oregon Department of Forestry (ODF), are required to be certified under the National Wildfire Coordinating Group (NWCG) qualification standards.<sup>72</sup> Private organizations and contractors participating on burns on federal land must also be NWCG-certified to participate on burns with the public agency.<sup>73</sup>

In Oregon there are no such training requirements for burn managers or landowners conducting prescribed burns on private lands. This lack of training is not uncommon in the United States – no state *requires* landowners to acquire training before conducting a prescribed fire on their private lands. However, twenty-one states do administer voluntary training programs for individuals planning to conduct prescribed burns on private lands.<sup>74</sup> Of these states, fifteen have implemented some variation of a certified burn manager (CBM) program.<sup>75</sup> A CBM program is a formal training curriculum that provides private individuals with a state certification in safe prescribed burning techniques.<sup>76</sup>

The implementation and administration of CBM programs differ depending on the jurisdiction but most typically outline the objectives, required coursework, burn experience, length of certification, and de-certification process of the program.<sup>77</sup> Typical requirements for certification include prior burning experience, online or in-person courses, live burn demonstrations, and written exams.<sup>78</sup> The requirements of existing programs vary depending on

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<sup>70</sup> See NATIONAL WILDFIRE COORDINATING GROUP, INTERAGENCY PRESCRIBED FIRE PLANNING AND IMPLEMENTATION PROCEDURES GUIDE 28 (2017), <https://www.nwcg.gov/sites/default/files/publications/pms484.pdf>.

<sup>71</sup> *Id.* at 10-12.

<sup>72</sup> See National Wildfire Coordinating Group, *NWCG Standard for Wildland Fire Position Qualifications, PMS 310-1*, <https://www.nwcg.gov/publications/pms310-1> (explaining “the NWCG Standards for Wildland Fire Position Qualifications establishes minimum NWCG position qualification standards for training, experience, physical fitness, and currency for national mobilization to wildland fire incidents”).

<sup>73</sup> See NATIONAL WILDFIRE COORDINATING GROUP, *supra* note 71, at 2.

<sup>74</sup> Megan S. Matonis, *Insights and Suggestions for Certified Prescribed Burn Manager Programs*, FOREST STEWARDS GUIDE 4 (Feb. 2020), <https://foreststewardsguild.org/wp-content/uploads/2020/03/InsightsRecommendationsCPMBprograms.pdf>.

<sup>75</sup> *Id.* at 6.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 4.

<sup>78</sup> *Id.* at 14 (explaining that an alternative certifications may include other NWCG qualification requirements)

the social, political, and environmental conditions of each jurisdiction, such as the risk of wildfire, type of fire behavior, public perception, and administrative capacity in each jurisdiction.<sup>79</sup> For example, in the southeastern United States, CBM programs are more prevalent and typically more lenient due to the widespread practice of prescribed fire, low-to-moderate risk of extreme fire behavior, abundance of private land, and legislative precedence establishing “right to burn” laws.<sup>80</sup> In contrast, programs in the western United States are less common and requirements are typically more stringent due to the public’s concerns about wildfires and the complexity of burning on western landscapes with high fuel loading, low relative humidity levels, abundant wildland urban interfaces (WUI), and unpredictable wind patterns.<sup>81</sup>

For example, in Colorado, a person seeking certification under the state’s CBM program must have prior burn experience, complete a 32-hour in-person course, pass a written exam, complete a task book, and have additional experience leading a certain number of prescribed burns.<sup>82</sup> Colorado’s program includes two tiers based on the complexity of the burns the person plans to conduct; a “Certified Burner B” can conduct low-complexity pile burns, while a “Certified Burner A” may conduct high-complexity broadcast burns after completing an additional certification under NWCG standards.<sup>83</sup>

Compare Colorado’s complex CBM program to the certification program in Alabama, where a person need only complete a 32-hour in-person course to acquire certification,<sup>84</sup> and experienced burners (those who have led at least five burns in the last two years) may apply for certification after taking an even shorter course.<sup>85</sup>

Regardless of the length and stringency of the certification process, these programs provide prescribed burn practitioners across all experience levels with training in the safe application of prescribed fire in their respective political and environmental climates. In addition to the safety and operational benefits provided by these certification programs, some states also

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<sup>79</sup> *Id.*

<sup>80</sup> See Brenner, *supra* note 40.

<sup>81</sup> See Matonis, *supra* note 75, at 14.

<sup>82</sup> *Id.* at 15.

<sup>83</sup> *Id.* at 17.

<sup>84</sup> *Id.* at 15.

<sup>85</sup> *Id.* at 16.

provide limited liability to persons who successfully acquire certification and burn within the limits of state law. Many certification programs have been instituted following state legislative action that explicitly declares the liability standard for damages caused by prescribed fire.<sup>86</sup> Typically, the legislation will establish two liability standards – the first, a higher standard (simple negligence) for non-certified individuals, and the second, a lower liability standard (gross negligence) for individuals certified through the CBM program.<sup>87</sup> For example, under Colorado law, a private landowner certified under the state CBM program “is not liable for any civil damages for acts or omissions made in good faith resulting in damage or injury caused by fire or smoke . . . [unless such] acts or omissions [were] grossly negligent or willful and wanton.”<sup>88</sup>

Turning back to Oregon, in 1992, the state legislature enacted ORS 526.360, which authorized the State Board of Forestry (“the Board”) to “establish by rule a Certified Burn Manager program.”<sup>89</sup> The statute outlines that the rule shall include standards, requirements, procedures, and actions for burn manager certification.<sup>90</sup> However, after its enactment, the Board did not take action on the authorization until this year. In July 2021, the state legislature finally forced action through Senate Bill 762 which mandates the Board, in consultation with the Oregon Prescribed Fire Council (OPFC), to establish best practices for conducting a CBM program within the state.<sup>91</sup> The OPFC is an organization of public and private prescribed fire practitioners and researchers dedicated to the promotion and facilitation of prescribed fire trainings and policy changes in the state.<sup>92</sup> OPFC’s expert guidance and resources will prove exceptionally valuable in the build-out of Oregon’s very own CBM program.

For this recent directive to have a meaningful impact on landowners’ ability to safely conduct greater prescribed burns on private lands, the Board and OPFC should balance the rigor of the program’s requirements with landowners’ practical capacity to gain the certification. The State of Oregon experiences many of the same social, political, and environmental conditions

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<sup>86</sup> *Id.* at 5.

<sup>87</sup> *Id.*

<sup>88</sup> COLO. REV. STAT. ANN. § 24-33.5-1217 (West 2021)

<sup>89</sup> OR. REV. STAT. § 526.360 (2019)

<sup>90</sup> *Id.*

<sup>91</sup> See S.B. 762, 81ST LEG., REG. SESS. § 26 (Or. 2021)

<sup>92</sup> Oregon Prescribed Fire Council, *About Us*, <https://www.oregonrxfire.org/about-us.html>.



affecting other western states with CBM programs. Certification is voluntary in other states, meaning landowners are not required to be certified to conduct prescribed burns on their private lands. However, the legal protection provided by the limited liability standard is an incentive for private landowners to acquire the certification before beginning to burn. In addition, the certification may be an incentive for private insurance companies to provide liability coverage for prescribed burns managed by a state-certified individuals who are protected under the state's limited liability standard. It will be important for Oregon's future program to encourage safety-enhancing practices without making the certification standards overly burdensome for private landowners with less fire experience and resources. The objective of Oregon's CBM program should be to advance safe burning practices while providing practitioners and landowners an incentive to conduct prescribed burns on their private lands. The incentive to conduct prescribed burns should come from a statutory provision providing a lower liability standard – gross negligence – to the persons who complete the certification program. Pairing the program's lessons in safe burning with well-defined statutory requirements under a gross negligence standard of liability will promote the safe application of more prescribed fires on private lands in the Oregon.

#### **VI. Insuring Prescribed Fire in the Future: Investigating options to enhance the accessibility of prescribed fire insurance for private landowners in Oregon.**

Governments and private insurance companies in Oregon should investigate options to enhance the accessibility of prescribed fire liability insurance for private prescribed fire practitioners and landowners in the state. Such investigated options should include liability coverage through unique private insurance company coverage options; State and private insurance company partnerships; State agency and private landowner partnerships; and state or national government-sponsored insurance markets.

As previously stated, liability is a commonly cited barrier to increasing prescribed burning on private lands, and an important element of this barrier is the lack of available liability insurance for controlled burning.<sup>93</sup> Without general or specific liability coverage, a landowner burning on her private lands is taking on significant financial risk when doing so without proper insurance. If found

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<sup>93</sup> See Weir, *supra* note 31, at 533.

liable for an escaped prescribed fire, a landowner in Oregon could be responsible for both the damages and suppression costs caused by the burn.<sup>94</sup> To mitigate this financial risk, landowners can either seek coverage for prescribed burning under their property insurance policy (e.g., home, ranch, or farm insurance) or attempt to acquire separate liability coverage from a private insurance company.<sup>95</sup> However, in Oregon and surrounding states, there are little-to-no options for private prescribed fire insurance policies.<sup>96</sup> There are likely multiple reasons for this lack of available policies, including concerns from insurers that the market is too small and unpredictable,<sup>97</sup> and fear stemming from damages caused by recent wildfires in the Pacific Northwest.<sup>98</sup> Insurance companies may also be wary to offer policies to landowners under Oregon’s simple negligence standard. A shift in the state’s liability standard, from simple to gross negligence, could encourage private insurers to cover more prescribed fire operations. Under a gross negligence standard, a landowner would be less likely to be found liable for the costs associated with an escaped prescribed fire, thus reducing the chance of the landowner’s insurer covering the losses. Unfortunately, even with a change in the prescribed fire liability law, the subsequent availability of private insurance may not increase because prescribed burning on private lands is still relatively uncommon – without a larger pool of purchasers to spread out the risk, insurance companies will have little incentive to increase their coverage options for prescribed fire.<sup>99</sup>

The State of Oregon and national organizations have recognized the need to understand

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<sup>94</sup> OR. REV. STAT. § 477.120(4) (2019)

<sup>95</sup> See John R. Weir et al., *Prescribed Fire: Understanding Liability, Laws and Risk*, OKLAHOMA COOPERATIVE EXTENSION FACT SHEETS NREM-2905, 3 (Mar. 2020), <https://extension.okstate.edu/fact-sheets/print-publications/nrem/prescribed-fire-understanding-liability-laws-and-risk-nrem-2905.pdf> (stating “a landowner’s general farm and ranch liability policy will cover damages incurred from prescribed burning. If you do not know or there is any doubt, ask your insurance provider and get an answer in writing”).

<sup>96</sup> See Sara A. Clark et al., *Good Fire: Current Barriers to the Expansion of Cultural Burning and Prescribed Fire in California and Recommended Solutions*, Report prepared for the Karuk Tribe, 24 (2021), [https://karuktribeclimatechangeprojects.files.wordpress.com/2021/03/karuk-prescribed-fire-rpt\\_final-1.pdf](https://karuktribeclimatechangeprojects.files.wordpress.com/2021/03/karuk-prescribed-fire-rpt_final-1.pdf).

<sup>97</sup> *Id.*

<sup>98</sup> Mike Rogoway, *Oregon wildfire insurance payouts will be a long process, state warns, so get started now*, THE OREGONIAN/OREGONLIVE (Sept. 20, 2020), <https://www.oregonlive.com/business/2020/09/oregon-wildfire-insurance-payouts-will-be-a-long-process-state-warns-so-get-started-now.html>.

<sup>99</sup> See Clark, *supra* note 97, at 24.

the inaccessibility of insurance coverage for prescribed fire.<sup>100</sup> In July 2021, the Oregon Legislature passed House Bill 2571, which directs the Department of Consumer and Business Services, in consultation with interested stakeholders and a representative from the insurance industry, to study the liability issues surrounding prescribed fire in Oregon.<sup>101</sup> This directive includes a mandate to study the accessibility of insurance coverage for prescribed fires, including insurance premium costs, the number of companies offering coverage, and minimum requirements imposed by insurance companies.<sup>102</sup> In addition, the Department must study the barriers to greater insurance coverage for prescribed fires, including whether the liability standards of gross or simple negligence make coverage more or less affordable for those looking for coverage.<sup>103</sup> House Bill 2571 is the first step towards understanding the insurance barriers affecting prescribed fire operations in the state. The next step is the implementation of bold and new ideas for this unique insurance market, and the options for solutions should be as vast and diverse as the landscapes needing more prescribed fire.

#### *Liability coverage through unique private insurance company coverage options*

To increase private insurance options, insurance companies should support more unique insurance policy options. For example, to increase the insurance risk pool, an alternative to providing insurance for strictly prescribed fire operations would be to link this market with other insurance markets, such as insurance for ranching, farming, forestry, or logging operations.<sup>104</sup> In the Southeast, where prescribed burning is more prevalent, insurance for prescribed fire is also

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<sup>100</sup> See Forest Stewards Guide, *Prescribed Fire Insurance*, <https://foreststewardsguild.org/prescribed-fire-insurance/> (describing a recent Forest Stewards Guide survey of prescribed fire organizations “to better understand insurance needs and potential solutions” from across the country).

<sup>101</sup> H.B. 2571, 81ST LEG., REG. SESS. (Or. 2021)

<sup>102</sup> *Id.* at § 1(1)(a).

<sup>103</sup> *Id.* at § 1(1)(b).

<sup>104</sup> See Outdoor Underwriters, LLC, *Prescribed Burning Insurance*, [http://www.outdoorund.com/prescribed\\_burning\\_liability.html](http://www.outdoorund.com/prescribed_burning_liability.html) (describing an example of an insurance company’s unique exclusive insurance offerings for prescribed burning operations).

more common and includes options for coverage under extended forester’s policies.<sup>105</sup> In addition, increasing options for “per burn” policies, which are less expensive than annual policies, may be more appropriate for private landowners who burn less frequently.<sup>106</sup>

### *Liability coverage through State and private insurance company partnerships*

The State of Oregon should also investigate options for state-private insurance partnerships that could provide support for prescribed fire insurance availability. For example, in the Southeast and the Great Plains, there are multiple Prescribed Burning Associations and other organization dedicated to the promotion and support of prescribed fire in the region.<sup>107</sup> A Prescribed Burn Association (PBA) is a partnership group of landowners and citizens that work together to share labor and equipment to conduct prescribed burns on each other’s lands.<sup>108</sup> In the past, some PBAs have worked with insurance companies to write prescribed fire insurance policies for its members; however, these policies have become rare.<sup>109</sup>

In Oregon and other western states, PBAs and other prescribed fire organization do exist,<sup>110</sup> but the options for insurance coverage through these groups are also limited. The State of Oregon should investigate supporting these prescribed fire organizations with grants to write

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<sup>105</sup> See Jennifer Evans, Prescribed Fire Insurance Options for Landowners and Consultants, NORTH CAROLINA PRESCRIBED FIRE COUNCIL NEWSLETTER, 1 (2013), [http://www.ncprescribedfirecouncil.org/newsletter\\_stories/Winter2013/NCPFC\\_Prescribed\\_Fire\\_Liability.pdf](http://www.ncprescribedfirecouncil.org/newsletter_stories/Winter2013/NCPFC_Prescribed_Fire_Liability.pdf); see also Outdoor Underwriters, LLC, *AFA Member Insurance Program*, [https://afa.outdoorunderwriters.com/prescribed\\_burning/](https://afa.outdoorunderwriters.com/prescribed_burning/) (describing the company’s multiple insurance offerings for professional foresters and wildlife biologists, in addition to private landowners).

<sup>106</sup> See Evans, *supra* note 106.

<sup>107</sup> E.g., OKLAHOMA PRESCRIBED BURN ASSOCIATION, <https://www.ok-pba.org/>.

<sup>108</sup> John Diaz et al., *The Value of forming a Prescribed burn Association (PBA)*, SOUTHERN FIRE EXCHANGE FACT SHEET 2016-2, 1 (2016), <https://southernfireexchange.org/wp-content/uploads/2016-2.pdf>.

<sup>109</sup> See Don Kearney, Building Prescribed Fire Capacity in NM: Response to New Mexico Rx Fire Council, New Mexico Prescribed Fire Council, 5 (Apr. 2013), <https://nmrxfire.nmsu.edu/documents/building-prescribed-fire-capacity-in-nm-2013---pdf-accessible.pdf> (describing that the Prescribed Burn Association of Texas (PBAT) pays the premium for a liability insurance policy for “sanctioned” prescribed burns conducted by its association members); *contra* Telephone Interview with Allen Ersch, Manager, Agritech Research, (Jul. 27, 2021) (relating the events involving an “unsanctioned” prescribed burn that subsequently ended the PBAT insurance policy offerings).

<sup>110</sup> See California PBA, *California’s Prescribed Burn Associations*, <https://calpba.org/connect-ca-pba> (listing California’s various regional prescribed burn associations); see also Vickie Aldous, *Regular people learn to do prescribe burns*, MAIL TRIBUNE, May 22, 2021, <https://www.mailtribune.com/top-stories/2021/05/22/regular-people-learn-to-do-prescribed-burns/> (describing the work of the Rogue Valley Prescribed Burn Association in southern Oregon).

and purchase insurance policies for members of these groups.<sup>111</sup> In addition, the State could partner with private insurance companies to support or create prescribed fire insurance policies through state agencies. For example, the State of Texas offers insurance options for Certified and Insured Prescribed Burn Managers (CIPBM) through the Texas Farm Bureau. The insurance is available to certified private landowners seeking to burn their private lands and receive limited liability coverage under state law.<sup>112</sup> In Texas, to become a CIPBM, the person must have at least \$1 million of liability insurance coverage for each occurrence of injury or destruction, with a policy period minimum of at least \$2 million.<sup>113</sup> To support this insurance requirement, the Texas Farm Bureau provides prescribed fire coverage options for ranch and farm owners.<sup>114</sup> The State of Oregon could explore similar options for providing such coverage under farm and ranch policies through the Oregon Farm Bureau's private insurance company partnerships.<sup>115</sup> To insure commercial prescribed fire operators working on private lands, the policy could include a clause extending coverage to commercial providers trained under the soon-to-be implemented CBM program in Oregon.<sup>116</sup>

#### *Liability coverage through State agency and private landowner partnerships*

Another option for state involvement in promoting prescribed fire insurance, would be to reinforce partnerships for prescribed burning between private landowners and the Oregon Department of Forestry (ODF). Currently, ODF may enter agreements with private landowners to

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<sup>111</sup> See, Kearney, *supra* note 110, at 4.

<sup>112</sup> See Texas Department of Agriculture, *Certified and Insured Prescribed Burn Managers*, <https://www.texasagriculture.gov/Home/ProductionAgriculture/PrescribedBurnProgram/CommercialCertifiedPrescribedBurnManager.aspx> (describing the responsibilities and different types of CIPBMs in Texas, including private, commercial, and non-profit categories).

<sup>113</sup> TEX. NAT RES. CODE ANN. § 153.082(1) (West 2019).

<sup>114</sup> See Michelle Mguyen, *The Importance of Controlled Burns in Texas*, TEXAS FARM BUREAU INSURANCE, <https://www.txfb-ins.com/blog/security-and-safety/the-importance-of-controlled-burns-in-texas> (listing the contact information for acquiring prescribed burning insurance from the Texas Farm Bureau); see also West Texas Rangeland, *Prescribed Fire Liability Insurance*, YOUTUBE (Apr. 3, 2020), <https://www.youtube.com/watch?v=iCGLju6eZRU> (showing a representative from the Texas Farm Bureau describing the policy insurance offered by the Bureau).

<sup>115</sup> Oregon Farm Bureau, *OFB and Country Financial*, <https://oregonfb.org/about/ofb-country-financial/> (describing the partnership between the Oregon Farm Bureau and Country Financial insurance company).

<sup>116</sup> See Or. Rev. Stat. § 526.360 (2019); see also S.B. 762, 81st Leg., Reg. Sess. § 25 (Or. 2021).

share resources and conduct prescribed fires on the landowner’s private property.<sup>117</sup> However, under these agreements, the landowner assumes liability for any injuries or damages caused by the burn.<sup>118</sup> Similarly, the State of California Department of Forestry and Fire Protection (CAL FIRE) may also contract with private landowners to conduct prescribed burns through the Vegetation Management Program (VMP).<sup>119</sup> However, in contrast with the Oregon, once an agreement is finalized, CAL FIRE assumes the liability of conducting the prescribed burn.<sup>120</sup> Historically, CAL FIRE has utilized only its own personnel when conducted these partnership burns.<sup>121</sup> However, California has recognized CAL FIRE’s limited capacity in meeting its prescribed fire goals while using only its own employees.<sup>122</sup> In response, recent legislation now allows the agency to have a smaller role on partnership burns,<sup>123</sup> while maintaining state liability protection for the private landowner.<sup>124</sup>

Oregon could emulate the actions taken by the State of California and grant ODF the explicit authority to enter into agreements with private landowners for the implementation of prescribed fires on private lands. Through this authority, Oregon could extend liability coverage to landowners who partner with the agency. This would give landowners liability protection and confidence that the burns conducted on their lands would be conducted by expert fire and forestry personnel. An important issue to consider when implementing such an authority is the current and future capacity of ODF to provide an increase in prescribed fire services for Oregonians. As stated earlier, California also recognized these capacity concerns and attempted to address them

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<sup>117</sup> Or. Rev. Stat. § 526.046 (2019); Or. Rev. Stat. § 477.406 (2019)

<sup>118</sup> See Or. Rev. Stat. § 477.410(1)(a) (2019)

<sup>119</sup> See CAL FIRE, *Vegetation Management Program*, WWW.FIRE.CA.GOV, <https://www.fire.ca.gov/programs/resource-management/resource-protection-improvement/vegetation-management-program/> (describing the cost-sharing Vegetation Management Program (VMP) between California private landowners and CAL FIRE).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See S.B. 1260, 2017-2018 Leg., Reg. Sess. (Cal. 2018) (stating that “[p]rescribed burning is recognized as an important tool in the Department of Forestry and Fire Protection’s 2010 Strategic Fire Plan for California”).

<sup>123</sup> “[T]o reach the statewide prescribed burn goals . . . to limit the threat of catastrophic wildfire, and to improve forest health, the department may have a smaller role on individual prescribed burns with a cooperators taking more control . . . [which] may range from creating the burn plan to being the burn boss and conducting the burn.” S.B. 1260, 2017-2018 LEG., REG. SESS. (Cal. 2018)

<sup>124</sup> The purchased insurance policy shall name the contractor and CAL FIRE as “joint policyholders.” If an insurance policy is not purchased the department, it will either “indemnify and hold harmless the person contracting with the department” or “provide a maximum dollar amount” or “proportionate share of liability” between the CAL FIRE and the contractor. *Id.*

by allowing its forestry department to take a smaller role on burns implemented by certified persons. Now that Oregon has mandated the implementation of its very own prescribed fire certification program, it could follow California’s model and safely provide certified private citizens more control on prescribed fires without losing liability protection.

#### *Liability coverage through a government-sponsored insurance market*

Given the concerns in the private insurance market, the State of Oregon should investigate the creation of a state-sponsored insurance program for prescribed burning and encourage its federal representatives to lead efforts to institute a national insurance program. A state or national insurance program could provide a larger insurance market and take advantage of the varying opportunities for prescribed burning at different times of the year in different areas of the state and country.

As stated previously, insurance companies have raised concerns about the limited size of the prescribed fire insurance market and thus have little incentive to increase their coverage options for controlled burning.<sup>125</sup> A state-sponsored insurance program could provide a larger insurance pool, especially if linked with a larger national insurance program. Other states have begun investigating the creation of government-sponsored insurance options for prescribed fire.<sup>126</sup> In 2018, the California Legislature passed Assembly Bill 2091, which directed the state Forest Management Task Force and Department of Insurance to develop recommendations for the implementation of an insurance pool for prescribed fire in the state.<sup>127</sup> However, similar to the concerns raised by the private insurance market, the recommendations found that the demand for prescribed fire insurance was too low to support a state insurance market.<sup>128</sup> In spite of these findings, the 2020-2021 California Legislature approved \$20 million in the state’s budget

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<sup>125</sup> See Clark, *supra* note 97, at 24.

<sup>126</sup> N. M. ENERGY, MIN. & NAT. RESOURCE DEP’T, FINAL REPORT ON EXPANDING THE USE OF PRESCRIBED FIRE IN NEW MEXICO, H.R. 54-42, 1st Sess., at 12 (2020) (available at [https://foreststewardsguild.org/wp-content/uploads/2020/08/CG49-HO-HM\\_42\\_Final\\_Report.pdf](https://foreststewardsguild.org/wp-content/uploads/2020/08/CG49-HO-HM_42_Final_Report.pdf)) (comparing the concept, “also known as an intergovernmental risk pool,” to other public programs such as the Patient Protection and Affordable Care Act).

<sup>127</sup> A.B. 2091, 2017-2018 LEG., REG. SESS. (Cal. 2018)

<sup>128</sup> See FOREST MGMT. TASK FORCE, RECOMMENDATIONS FOR THE IMPLEMENTATION OF AN INSURANCE POOL, Assemb. 2091, Reg. Sess., at 2 (Cal. 2020) (available at [https://urldefense.com/v3/\\_https://fmtf.fire.ca.gov/media/2459/fmtf-recommendations\\_rxwg\\_risk-insurance-pool.pdf\\_!!C5qS4YX3!W4ebYYPXwMriI8DkTTJk9Eqve7gReYOCWTOJ7r8T4qQ\\_W7uPzpbsiys3427hc4tg\\$](https://urldefense.com/v3/_https://fmtf.fire.ca.gov/media/2459/fmtf-recommendations_rxwg_risk-insurance-pool.pdf_!!C5qS4YX3!W4ebYYPXwMriI8DkTTJk9Eqve7gReYOCWTOJ7r8T4qQ_W7uPzpbsiys3427hc4tg$)) .

for a Prescribed Fire Liability Pilot Program to serve as a “backstop” to the private insurance market.<sup>129</sup> The program will create a “prescribed fire claims fund to support coverage for losses from permitted prescribed fires by non-public entities, such as Native American tribes, private landowners, and nongovernmental entities.”<sup>130</sup> The program will be the first of its kind in the nation and will serve as a model for what other states, such as Oregon, may do in the future to support state solutions to the prescribed fire liability issue.

The California Forest Management Task Force’s recommendations, cited above, found that the best alternative to a state-sponsored insurance market would be a “multi-state sustainable prescribed fire insurance solution.”<sup>131</sup> These recommendations described efforts made by the Forest Stewards Guide and The Nature Conservancy to partner with Alliant Insurance to create a prescribed fire insurance policy with multi-state participation so to diversify the risk and fund the insurance pool.<sup>132</sup> If the viability of a state-sponsored insurance program is questionable, an alternative would be to create a state-backed program for strictly extraordinary insurance claims (e.g., claims above \$1 million or greater).<sup>133</sup> Though this would leave many prescribed fires insufficiently insured, it could be a step towards encouraging more private insurers to offer lesser coverage amounts in their policies and encouraging more landowners to conduct prescribed burns.<sup>134</sup>

Given these concerns about the insufficiency of a state-sponsored program, Oregon should encourage its national representatives and organizations such as the Western Governors Association or Western Council of State Foresters,<sup>135</sup> to investigate options for creating large-scale national or regional insurance programs for prescribed fire. In addition to a larger market pool, a national or regional program could also provide greater options for prescribed fire insurance coverage during all times of the year, thus allowing more opportunities for safe and insured

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<sup>129</sup> S.B. 170, 2020-2021 LEG., REG. SESS. § 48 (Cal. 2021); Heather Gately, *The Nature Conservancy applauds passage of California budget plan to boost prescribed fire efforts that reduce wildfire damage*, THE NATURE CONSERVANCY (Sept. 13, 2021), <https://www.nature.org/en-us/newsroom/california-budget-prescribed-fire/>.

<sup>130</sup> S.B. 170, 2020-2021 LEG., REG. SESS. § 48(1) (Cal. 2021)

<sup>131</sup> FOREST MGMT. TASK FORCE, *supra* note 129, at 1.

<sup>132</sup> *Id.* at 2.

<sup>133</sup> *See* Clark, *supra* note 97, at 25.

<sup>134</sup> *Id.*

<sup>135</sup> *See* N. M. ENERGY, MIN. & NAT. RESOURCE DEP’T, *supra* note 127, at 14.



prescribed fires across the country. Nationwide, opportunities for prescribed burning are limited to specific times of the year in specific locations due to seasonal conditions and the area-specific management outcomes.<sup>136</sup> Meaning, that at any given time of the year, conditions for prescribed burning are ideal in certain areas, while not in others. A national program could provide financial support for coverage opportunities for prescribed burning across every ecosystem in United States – all of which are starving for the reintroduction of a fire.

## VII. Conclusion: Keeping the prescribed fires burning and encouraging landowners to burn.

For the State of Oregon to benefit from the increased use of controlled burning, it needs private landowners using more prescribed fire. For private landowners to use more prescribed fire, they need legal encouragement and protection via state law. For there to be greater legal protection under state law, there needs to be a shift in the liability standard for prescribed fire. For there to be a shift in the liability standard, there needs to be clearly defined rules and accessible training on responsible burning. And for landowners to use these rules and training, there needs to be adequate insurance coverage for their actions so to give everyone confidence that fires will be managed safely and securely. Whether the liability standard or the insurance issue is tackled first, the aforementioned proposals should not be implemented in isolation – like fuel building up on the forest floor, each proposal builds on and supports the others in keeping future prescribed fires burning in the State of Oregon.

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<sup>136</sup> See Bobwhite Quail Initiative, *Prescribed Burning*, GA. DEP'T OF NAT. RESOURCES (2019), <https://georgiawildlife.com/sites/default/files/wrd/pdf/quail/4-BQI%20Prescribed%20Burning.pdf> (describing winter and spring burning for quail habitat in Georgia); see also Felicity Barringer, *Gaining in Public Acceptance, Can Prescribed Fires Head Off Devastating Wildfires?*, & THE WEST, <https://west.stanford.edu/news/blogs/and-the-west-blog/2019/can-prescribed-fires-head-off-devastating-wildfires> (explaining that California prefers to burn in Fall, based on the number of acres burned each month).