LEGAL IMPLICATIONS ASSOCIATED WITH USE AND CONTROL OF FIRE AS A MANAGEMENT PRACTICE

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ABSTRACT

Despite its destructive capabilities, fire plays a vital role in the ecology of wildland habitats. Legal implications associated with the use or control of fire as a management practice include potential liability for damages caused by escaped fires and creation of smoke hazards. Either common law or statutory law may create an affirmative obligation to use prescribed fire to manage wildlands. Proper planning and exercise of due care are essential criteria for avoiding risk of liability for use or control of fire as a management practice.

INTRODUCTION

Despite its destructive capabilities, fire plays a vital role in the ecology of wildland habitats. Use of prescribed burning, defined here as fire applied in a planned and controlled manner in a specific area under carefully selected weather conditions for purposes of achieving desired management objectives, is becoming recognized as an integral component of modern wildland ecosystem management. This is particularly true in the Piedmont and Coastal Plain of the South, where prescribed burning is applied to approximately 8 million acres each year.[1] Deliberate use of fire, however, is an inherently dangerous undertaking which may potentially expose wildland owners or managers to substantial risk of liability for escaped fires or creation of hazards due to excessive smoke. This paper will explore several legal theories for potential liability related to fire management, including ways to reduce the risk of liability through the use of proper planning and the exercise of due care. Also addressed is the contention that under certain circumstances, either under the common law or by stature, affirmative obligations to use prescribed fire to manage wildlands may be created.

COMMON LAW THEORIES OF LIABILITY FOR DAMAGES CAUSED BY FIRE

Strict Liability

Courts have long recognized that use of fire, while having legitimate applications, is an inherently dangerous activity. American jurisprudence regarding liability for the otherwise legitimate use of fire can be traced back to early English common law.[2] Prior to the eighteenth century, English common law imposed something close to strict liability, or absolute liability regardless of fault, for fire that "trespassed" onto another's land.[3] This common law rule was modified somewhat in 1707 by the promulgation of the Statute of Anne.[4] This statute added to the strict English common law the requirement that some fault for the start, spread, or trespass of fire must be shown before liability for damage would attach. As a practical matter, however, the Statute of Anne had little effect in many cases because English courts refused to apply it in cases where the escaped fire was started intentionally.[5] Thus, landowners who continued to use fire to manage their land assumed the substantial risk of absolute liability for damages caused by escaped fire, regardless of fault or the exercise of caution.

Negligence

American courts have adopted and somewhat modified the Statue of Anne as part of our common law, and as a general rule require a finding of negligence in order to establish liability. Negligence is a legal concept that generally constitutes the failure to exercise that degree of care which a person of ordinary prudence (e.g., a "reasonable man") would exercise under the same circumstances. The phrase "reasonable man" is another legal concept that refers to a hypothetical person who exercises "those qualities of attention, knowledge, intelligence, and judgement which society requires of its members for the protection of their own interests and the interests of others."[6]

The burden of proof for showing negligence in most cases is on the person claiming damages. Thus, one seeking to recover restitution against another under a claim of negligence must prove by a preponderance of the evidence that the latter failed to exercise the degree of care that a reasonable person would be expected to exercise under the same circumstances.[7]

Negligence per se is a major exception to the general rule of negligence that shifts the burden of proving negligence in cases where a statute or ordinance specifically lays down a rule or regulation of conduct designed for the protection or safety of persons or property. Violation of such a statute or ordinance that proximately results in injury to the person or property of another constitutes negligence per se,[8] and specific acts of negligence do not have to be proven by the claimant but are presumed.

In 1926, the Florida Supreme Court applied these principles to the prescribed use of fire:

> The mere setting out of a fire for the lawful purpose and under prudent circumstances is not negligence per se. And mere proof of damage resulting from the setting out of a fire will not entitle the injured one to recover. But fire is a dangerous agency. Its treacherous propensities are within the common knowledge of all prudent persons, and one setting out a fire must use due care to prevent it from damaging his neighbor in proportion to the risk reasonably and ordinarily to be anticipated by a prudent person under the circumstances.[9]

Thus, the common law rule in most American courts is that when an owner of property sets a fire on her own premises for a lawful purpose, and not in violation of any statute, she is not, in the absence of a statute to the contrary, liable for damages caused by the spread of fire to the property of another unless she was negligent in starting or negligent in controlling the fire. In the event that a statute or ordinance governs conduct with respect to the use or prevention of fire, however, violation of any aspect of such conduct may constitute negligence regardless of fault.

Although no cases have been found where a court has applied these principles to the issue of hazards caused by or related to smoke from an otherwise lawful fire, because of the necessarily interrelated nature of smoke and fire it would appear that the same rationale would apply to liability for smoke hazards. Assuming this to be the case, and because of the dearth of case law dealing specifically with smoke hazards, unless a specific distinction is required, all subsequent discussion of liability for escaped fire will include liability for creation of smoke hazards.

Thus, negligence, simply stated, is the failure to exercise due care under the circumstances, or the failure to comply with specific requirements designed to protect the safety or property of others from hazards associated with the use of fire as a management practice. Perhaps the most common example of negligence is the careless starting of a fire during logging operations or other activities. Negligence may also result from intentionally setting a fire during hazardous conditions such as during high or unpredictable winds or periods of low humidity. Landowners have been found negligent for allowing dangerously high levels of flammable material, such as slash or other debris, to accumulate on their property.[10] As discussed later in this paper, this basis of negligence may arguably create an affirmative obligation to use prescribed burning or other techniques of ground fuel reduction to prevent the creation of hazardous situations. Finally, negligence may be imparted for failure to control an otherwise lawful fire, for example, failure to have enough personnel or equipment on hand to properly maintain the scope or intensity of the burn or failure to completely monitor or extinguish the fire. Damages recoverable under a cause of action for negligence generally include compensation for loss of timber and immature forest growth and, if applicable, costs of fire suppression.

Trespass and Nuisance

While other common law theories such as trespass and nuisance may also form the basis for a cause of action for damages due to escaped fires or smoke hazards, by far the vast majority of claims for relief in the United States are brought as negligence actions. Because of their limited applicability in modern legal practice, trespass and nuisance will only be briefly addressed here.

Trespass is a form of action instituted to recover damages for the unlawful entry and subsequent injury to the person or property of another.[11] In present usage, trespass most often connotes a wrongful interference with or disturbance of the property of another. In the context of fire management, the claim would be that fire started either intentionally or accidentally on an adjoining landowner's property, regardless of fault, was allowed to trespass unlawfully and interfere with the use of the property of another. A successful claimant would normally be entitled to collect damages for lost timber resources, structures, equipment, livestock, and similar losses, but probably not for the costs of fire suppression.

Nuisance is a broad concept which includes "anything which annoys or disturbs the free use of one's property, or which endangers life or health, gives offense to the senses, or obstructs the reasonable or comfortable use of [neighboring] property."[12] It thus refers to a wrong arising from an unreasonable or unlawful use of property to the discomfort, annoyance, inconvenience, or damage of another. Under this common law theory, an aggrieved party alleges that the activities of a neighboring landowner, e.g., conducting burning operations and creating smoke, either enters into or otherwise interferes with the complaining party's use and enjoyment of her land, thus entitling her to relief. Normal relief for nuisance generally consists of an injunction abating the objectionable activities. A claim of nuisance may be the only cause of action for smoke hazard to adjacent landowners for impairment of use and enjoyment of due to the temporary nature of the hazard. Actual physical harm, for example an injury caused by smoke obscuring a highway, by contrast, would more properly be brought under a claim of negligence.

STATE STATUTORY PROVISIONS FOR USE AND CONTROL OF FIRE

Many jurisdictions have enacted statutes to reduce the risk of forest fires which may also prescribe conduct governing the use or control of fire. These statutes serve as the beginning point for evaluation of potential risk of liability for use and control of fire since, as previously discussed, acts or omissions which violate any substantive provisions of these statutes may constitute negligence per se, thereby shifting the burden of proof. Moreover, as will be discussed, statutes may be construed to create strict liability, regardless of fault, for failure to control otherwise lawfully ignited fires.

It is important to remember, however, that these statutes merely supplement the common law and do not replace it. Thus, one may comply fully with the requirements of applicable laws and still be found to be negligent for failure to exercise due care under the circumstances.

The scope and content of state regulations governing use of fire vary widely. Some may simply require the obtaining of permits or notification of fire control authorities prior to prescribed burning, while others may be extremely comprehensive, setting forth weather or seasonal requirements and equipment or personnel requirements. Examples of state statutes from the states of Georgia and Florida will be considered here only for illustrative purposes. Discussion of these statutes herein is not intended to be exhaustive and sections of these statutes are presented for comparison only. Many of the provisions have not been conclusively interpreted by state courts; thus, analysis of these provisions is necessarily limited to some extent.

Georgia Forest Fire Protection Act

Georgia has enacted the Georgia Forest Fire Protection Act[13] which essentially requires notification to, and in some cases a written or oral permit from, a forest ranger or other official prior to prescribed burning.[14] Controlled burning of forest land is specifically allowed upon securing an oral or written permit, so long as the fire is not allowed to spread to adjoining land.[15] Uncontrolled fire is declared to be a public nuisance, and anyone responsible either for the ignition or existence of such fire is required to control or extinguish it. Failure to do so, either willfully or negligently, may subject that person to costs of suppression by any "organized fire suppression force."[16]

Under Georgia law, it is unlawful to undertake prescribed burning without taking necessary precautions before, during, and after the fire to prevent the escape of fire onto the lands of another.[17] Thus, Georgia essentially codifies the common law of negligence with respect to fire management of wildlands.[18] However, Georgia law extends the common law by providing that the mere fact fire escaped constitutes prima facie evidence that proper measures to control the fire were not take, thus shifting the burden of proving reasonable care to the burner.[19] This burden may be rebutted, however, by a showing that the burner took reasonable and prudent precautions to prevent the escape of fire.

Florida Forest Protection Statute

Florida law also requires permits from the Division of Forestry authorizing prescribed burning, makes it unlawful to burn without adequate firelines, manpower (sic), and firefighting equipment necessary to control the fire, and further requires the burner to monitor the fire until it is extinguished.[20] However, Florida law differs from Georgia law in several important respects. Unlike Georgia, Florida law specifies that anyone violating any provisions of the law shall be liable for all damages caused by the violation.[21] Thus, one using prescribed fire may be liable for damages caused by escaped fire

not just for failure to exercise due care in starting and controlling the fire, as in Georgia, but also by failing to follow strictly procedural rules, such as failing to obtain a permit. Moreover, Florida law makes escaped fire a crime regardless of the exercise of due care in ignition or controlling the fire.[22] Thus, the Florida legislature had apparently abrogated common law by imposing a standard of strict liability for all damages resulting from escaped fires, regardless of fault or negligence.

Florida law also differs significantly from Georgia law by imposing strict liability for all suppression costs due to escaped fires, or for burning without a permit, regardless of fault.[23] In actual practice, however, the Florida Division of Forestry will not normally require reimbursement for suppression costs for escaped fires in the absence of negligence. Under Florida's Law Enforcement guidelines,[24] if the prescribed burning was otherwise authorized and reasonable precautions have been taken, escaped fire caused by unpredicted weather changes will only result in a notice of violation.[25]

It is important to recognize, however, that although the states of Florida and Georgia, discussed here for illustrative purposes, have enacted different strategies for allocating the risk of liability, the standard of care is the same: exercise of due care under the circumstances. The difference is one of policy, which is basically a legislative value judgment of who should bear the loss if property is damaged when no fault for the loss can be attributed. Georgia, in its legislative wisdom, has come down on the side of the land manager in incorporating the common law of negligence. Florida, in making its policy choice, has sided with the adjacent property owner, shifting the responsibility to the land manager regardless of the exercise of due care. The important point is that by exercising due care, as the dearth of case law suggests, the ultimate issue of liability will remain largely an academic issue. Whether in states that have adopted either the theory of negligence or strict liability, the provision of comprehensive liability insurance to cover losses in the event of escaped fire will substantially reduce the incidence of liability.

AFFIRMATIVE OBLIGATIONS FOR PRESCRIBED BURNING

Common Law

Among professional forest managers it is fairly common knowledge that excessive buildup of naturally occurring forest fuels in large contiguous stands constitutes a dangerous situation which can lead to catastrophic wildfires. In southern Coastal Plain pine stands, for example, dangerous levels of ground fuel can accumulate in as little as 5 to 6 years, creating a serious threat from wildfire to forest resources and public safety.[26] Prescribed burning as a regular management practice can reduce dangerous accumulations of inflammable ground fuels, making catastrophic wildfires less likely. Wildfires that do occur under regular burning treatments will cause less damage and are generally easier to control.

As previously discussed, the common law theory of negligence contemplates a failure to comport with a standard of conduct which society requires of its members for the protection of their own interests and the interests of others. Can failure to remove hazardous levels of ground fuels through regular prescribed burning state a claim for relief for damages under the common law of negligence? A number of cases, although not directly related to the buildup of forest fuels, indicate that it would not be unreasonable to advance a cause of action sounding in the common law theory of negligence.

In *United States v. Denver and Rio Grande Western R. Co.,*[27] the court found that a railroad had negligently allowed inflammable materials to accumulate along its right-of-way; even absent a finding of the railroad's responsibility for starting the fire, the railroad was liable for damages from the fire by reason of its failure to maintain its right-of-way in a fire-safe condition; and finally, this unsafe situation furnished a condition by which the direct cause, the ignition of debris, was made possible.[28] In *Arneil v. Schnitzer,*[29] the court found a mill operator liable for damages to neighboring forest resources for negligently allowing debris to accumulate around the mill, even though the direct cause of the fire was accidental ignition by a trespasser.[30] Other causes have resulted in similar findings.[31]

Although these cases are not directly on point, they support the common law rule that liability may be imposed where the landowner, in the exercise of ordinary care, should anticipate that due to the condition of her premises a fire is likely to start and cause damage to others. Can it be said in this age of modern forest management that a prudent person would knowingly allow dangerous levels of forest fuels to accumulate on her land when cost-efficient and effective methods for reducing these hazards are readily available? It seems at least arguable that the line of reasoning described in the foregoing cases could be extended to this type of situation.

Endangered Species Act

The Endangered Species Act (ESA)[32] was adopted by Congress to ensure the preservation of wildlife and plant species facing extinction. The ESA's stated purposes are "to provide a means whereby the ecosystems upon which [protected species] depend may be conserved, [and] to provide a program for the conservation of such [protected species]. . ."[33] This general statement of purposes is supplemented by a policy directive that all federal agencies "shall seek to conserve [protected species] and shall utilize their authorities in furtherance of the purposes of this [Act]."[34]

The strength and commitment to these purposes is illustrated by the ESA's definition of "conserve:"

> [T]he use of all methods and procedures which are necessary to bring any [protected species] to the point at which the measures provided pursuant to this [Act] are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as,. . . habitat acquisition and maintenance,. . . [etc.][35]

Thus, the ESA creates a comprehensive scheme intended to deal fully and effectively with all threats to protected species. Many of these species have evolved in a fire-dominated environment, and changes in the "natural" fire pattern as a result of attempted fire exclusion have led to dramatic decreases in many of these fire-tolerant or fire-dependent species.[36] To the extent that the habitats of any of these protected plant or wildlife species are located on federally owned or controlled land, or are influenced by federal agency actions, the ESA arguably imposes an affirmative duty on the managing agency to use prescribed burning to conserve the habitats of protected species that depend on periodic fires at the ecologically correct season.

In the recent case *Sierra Club v. Lyng*,[37] the court reached this same conclusion. In *Sierra Club,* various environmental groups filed suit against the U.S. Forest Service seeking injunctive relief to restrain certain timber management activities which allegedly had adverse impacts upon the endangered red-cockaded woodpecker (*Picoides borealis*). The court, in holding that the Forest Service's management techniques jeopardized the red-cockaded woodpecker in violation of the ESA, specifically found "[t]he causes of the rapid decline in the red-cockaded woodpecker populations over the past ten years in Texas national forests include... failure to employ regular prescribed fire in colony and foraging areas to control hardwood and young pine encroachment...," which activities were specifically required for maintenance of adequate habitat for the endangered birds.[38] As part of the court's injunctive relief, to avoid what it termed imminent extirpation of the red-cockaded woodpecker, the court ordered the Forest Service, inter alia, to implement and adopt "[a]n aggressive prescribed burning program within woodpecker colonies and woodpecker colonies and colony home ranges... [every two to four years]... as soon as those sites will support a burn."[39]

It is apparent then, that the ESA may create an affirmative obligation to use prescribed burning when such activities are necessary to conserve the habitat of protected species of plants and wildlife that have adapted to and actually thrive in fire-dominated environments.

CONCLUSIONS

The use of fire to manage wildlands is becoming a widely recognized management technique with many important natural resource benefits, including reduction of hazardous fuels, improving wildlife habitat, perpetuating fire-dependent species, and conserving endangered species. It is also apparent, however, that use of fire, particularly high intensity fires, imposes a substantial risk of liability for damages caused by escaped fires. Under the common law and in states that incorporate the standard of negligence, these risks can be considerably reduced through proper planning and the exercise of due care. In states that have adopted a standard of strict liability without fault, exercise of due care and adequate insurance to cover losses in the event of escaped fire will substantially reduce the incidence of liability.

NOTES

[1]United States Forest Service, A Guide for Prescribed Fire in Southern Forests, USDA Technical Publication R8-TP11, February 1989.

[2]Common law, as contrasted with statutory law which is promulgated by a legislative body, is the general, unwritten law of a community based on ancient and universal usage, and embodied in commentaries and reported cases, or, simply, judge-made law.

[3]Prosser, W., and W. Keaton, The Law of Torts §77, at 543 (5th ed. 1984).

[4]6 Anne, ch. 31, §6 (1707).

[5]*Filter v. Phippard,* 11 Q.B. 347, 116 Eng. Rep. 506 (1847).

[6]Restatement, Torts [2d] §287 (1966).

[7]*Cobb v. Twitchell,* 108 So. 186 (Fla. 1926).

[8]*Bushnell v. Telluride Power Co.,* 145 F.2d 950 (10th Cir. 1944).

[9]*Cobb v. Twitchell,* 108 So. 186 (Fla. 1926).

[10]*United States v. Burlington Northern, Inc.,* 500 F.2d 1974 (9th Cir. 1974).

[11]Prosser, Law of Torts 29 (4th ed. 1971).

[12]Id., 571.

[13]Ga. L. 1949, p. 937, §9.

[14]Ga. Code Ann., §12-6-90 (1988).

[15]Ga. Code Ann., §12-6-91 (1988).

[16]Ga. Code Ann., §12-6-21 (1988).

[17]Ga. Code Ann., §12-7-28 (1988).

[18]*Accord, McMichael, et al. v. Robinson, et al.,* 290 S.E. 169 (Ga. App. 1982).

[19]Ga. Code Ann., §12-7-28 (1988).

[20]Fla. Stat. §590.12(1) (a-c) (1985).

[21]Fla. Stat. §590.13 (1985).

[22]Fla. Stat. §590.12(d) (1985).

[23]Fla. Stat. §590.26 (1985).

[24]Florida Division of Forestry Regulations, §5.019(4) (1987).

[25]Id.

[26]United States Forest Service, A Guide for Prescribed Fire in Southern Forests, USDA Technical Publication R8-TP11, p. 3, February 1989.

[27]547 F.2d 1101 (1977).

[28]Id., at 1104.

[29]144 P.2d 707 (1944).

[30]Id., at 717-718.

[31]See, e.g., *Hesse v. Century Home Components, Inc.,* P.2d 871 (1973); *Pacific N.W. Bell Tel. Co., v. Century Home Components, Inc.,* 514 P.2d 874 (1973); *Aune v. Oregon Trunk Railway,* 51 P.2d 707 (1935).

[32]16 U.S.C. §1531 et seq. (1973).

[33]Id. §1531(b).

[34]Id. §1531(c).

[35]Id. §1532(2).

[36]United States Forest Service, A Guide for Prescribed Fire in Southern Forests, USDA Technical Publication R8-TP11, p. 7, February 1989.

[37]694 F. Supp. 1260 (E.D. Tex. 1988).

[38]Id., at 1265-66.

[39]Id., at 1268.