



Prescribed Fire in the Southern Great Plains: District judges' perspectives of prescribed fire

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INTRODUCTION

Prescribed burning is important for maintaining healthy rangelands and reversing the negative impacts of woody plant encroachment that is threatening native floral and faunal diversity in the Great Plains.

However, many landowners are hesitant to use this land management tool because of perceived liability risks and the potential for lawsuits resulting from escaped fire and smoke hazards^{1,2,3}.

County Judges in Texas and Oklahoma (also known as District Court Judges and hereafter referred to simply as Judges) are most likely to hear cases in which one party is suing another for negligence in causing an escaped fire.

Determining what factors Judges use in reaching decisions in prescribed burning lawsuits can be important for improving clarity about liability risk of using prescribed fire and reducing uncertainty about potential outcomes of lawsuits.

Obtaining clarity about their understanding of simple and gross negligence standards for prescribed fire is also important for understanding how changes in these statutes might affect outcomes in escaped fire cases.

Simple negligence standards require the burner to practice reasonable care in applying a prescribed burn while gross negligence liability standards provide that, if a burner follows a set of codified regulations regarding burning, a plaintiff must show reckless disregard of the duty of care owed others by the burner⁴.

Liability for escapes of prescribed fire is currently determined by simple negligence standards in both Texas and Oklahoma, but the language of the statutes differ.

METHODS

One hundred randomly selected Judges in both Texas and Oklahoma (total 200), or about 27% of District Judges in the Southern Plains section of the states, were mailed a survey questionnaire to ascertain their knowledge of prescribed fire, differences between gross and simple negligence in relation to prescribed fire cases, and awards for damages from escaped fires.

In the survey questionnaire, Judges were provided with the items in Table 1 as basis for determining negligence in the case of an escaped fire.

Nine questionnaires were undeliverable resulting in a survey sample of 192 Judges, 39 of whom returned a completed questionnaire (~20% response), with slightly more responses being received from Texas (57%) than Oklahoma (43%).

A second one-page questionnaire was sent to the Judges who did not respond asking them to indicate why they declined to participate in the study and to ascertain if there was a non-response bias; 36 of these Judges returned a questionnaire (~24% response rate).

Table 1. Texas and Oklahoma judges were asked to rank the importance of failing to observe fourteen factors when considering a negligence ruling. Factors are paraphrased from those on the survey.

- Submit prescribed burn notification plan to nearest rural fire department.
- Have a certified burn manager on site during the burn (TX only, not required by law).
- Have a crew member with previous burn experience on site during a burn.
- Create a firebreak next to adjacent property or alongside a busy roadway.
- Have a written burn plan.
- Notify the local fire department in advance of igniting a prescribed burn.
- Notify adjacent landowners in advance of igniting a prescribed burn.
- Check the weather continuously during the burn.
- Have cell phones available for communicating with local fire department.
- Contact the fire department immediately when weather changes out of prescription.
- Cease ignition immediately when weather changes out of prescription.
- Stay within burn prescription (especially humidity range).
- Cease burning beyond mid-day.

RESULTS

The most common reasons Judges declined to participate in the study were insufficient knowledge of prescribed burning laws and regulations to adequately respond (37%); and, importantly, concerns about being able to preside over future prescribed burning cases without jeopardy (29%).

There were no statistically significant differences between responses provided by the initial 39 and subsequent 36 responding Judges for any of the six questions included in the non-response bias questionnaire. Therefore, the responding Judges in the initial survey represent an unbiased subset of the randomly selected 192 Judges in the survey sample and the findings of this study can be extrapolated to the target population of County Judges in the Southern Plains counties in Texas and Oklahoma.

Only four of the responding Judges (10%) had heard a case involving prescribed fire. Two cases were bench trials (hearing in front of a judge only), one was a jury trial, and details about one were not disclosed. Of these cases, one (a bench trial) resulted in dismissal, two (including one bench trial and one jury trial) resulted in adjudicated dispositions, and in the fourth case, the respondent did not report the disposition of the case.

Approximately an equal proportion of the responding Judges reported being at least somewhat familiar (57%) and unfamiliar (47%) with prescribed fire, whereas

almost 75% identified positive and negative aspects of prescribed fire. This difference indicates either there was a higher level of familiarity than reported or there is uncertainty about the Judges' knowledge regarding the benefits of prescribed fire. Identified benefits were wildfire control, vegetation management (both woody plant control and better rangeland condition), and invasive species control, while identified detriments were fire escape, smoke hazards, weather and liability constraints, and undesirable effects on flora and fauna.

Twenty-five percent of the Judges responded that they were familiar with state statutes regarding open and agricultural burning. Under the current simple negligence standards, Texas Judges were most likely to consider failure to construct a firebreak and failure to cease ignition during unfavorable weather changes as evidence of negligence, whereas the Oklahoma Judges cited failure to check the weather throughout the burn or notify the fire department about the burn as the most important evidence of negligence. Furthermore, violations of state open or agricultural burning law were considered as negligence per se by about two-thirds of the 28 Judges responding to that question, and as evidence of negligence by the remaining third.

Both Texas and Oklahoma Judges identified fewer factors that would constitute evidence of gross negligence than simple negligence. The difference between number of factors that would constitute evidence of simple negligence and those that constitute evidence of gross

negligence was greater for Texas than Oklahoma Judges. Rankings of items in Table 1 differed between liability standards for Texas Judges as well, with failure to have a burn plan most often selected as evidence of gross negligence. This suggests that changing prescribed fire statutes from simple to gross negligence standards is likely to have a greater effect on liability for applicators of this land management tool in Texas than in Oklahoma, although there is some indication that it would affect findings in Oklahoma escaped fire cases as well (fewer items were also listed as evidence of gross negligence in Oklahoma).

Judges were also asked to identify the expert witnesses they would most like to present evidence in a prescribe fire case (Table 2). Certified Prescribed Burn Managers (CPBM) and Professional Wildlife Fire Fighters (PWFF) ranked in the top two places in both states, but CPBM was the top ranked category of witnesses in Texas whereas PWFF was the top ranked category in Oklahoma.

In a case involving escaped fire, Judges were asked how they would instruct the jury in awarding damages for various items (Table 3). The state specific standard instructions used by Judges are the Texas Pattern Jury Charge Instructions (Pattern Law) and Oklahoma Uniform Jury Instructions (OUJI).

Table 2. Types of expert witnesses judges would most like to present evidence during a prescribed burning case rank on a scale of 1 (least preferred) to 5 (most preferred).

Witness Type	Judges' preference	
	TX	OK
Certified Prescribed Burn Manager	2.93	2.53
Professional Wildland Fire Fighter	2.21	2.67
Rural Fire Chief	1.21	2.20
University Academic or Extension faculty	1.86	1.27
Agency Personnel	1.36	1.47

In all instances, except crop losses, the Judges most frequently chose the standard instructions for juries to use when awarding damages. Actual value of losses is most likely to be applied to crop losses; cost of replacement is equally likely to be applied to losses of structures; and diminished value or none are equally likely to be applied to wildlife losses.

All Judges who indicated actual value as the instruction they would give to a jury were from Oklahoma, and all Judges who indicated diminution of value were from Texas. To consider loss of trees from an escaped fire, Judges most frequently (>75%) picked loss of income productivity and specific value of tree lost for valuing damages.

Table 3. Instruction judges would give to juries to assess damages in cases involving escaped fires. (Totals >100% are due to rounding errors.)

Injury/Damage	Standard	Actual Value	Diminuation of Value	Cost to Repair or Replace	None	Other
Wrongful Death	82					19
Personal	78					22
Property	74					26
Vehicle	30	22	15	19	0	15
Equipment	30	19	15	22	0	15
Structures	30	11	15	30	0	15
Crops	30	33	7	15	0	15
Livestock	33	26	7	19	0	15
Trees	33	20	15	19	0	15
Wildlife	26	0	26	0	26	15

IMPLICATIONS

Landowners often mention fear of liability as a reason for not conducting prescribed burns on their land^{1,2,3}. Case law involving escaped fire is extremely sparse and provides little guidance in understanding the legal risks of damages from escaped prescribed fires in the Southern Great Plains.

Survey responses indicate that Texas Judges perceive differences between simple and gross negligence while Oklahoma Judges would not greatly alter their opinions if gross negligence were the applicable liability standard rather than the current simple negligence standard. Therefore, to reduce landowners' uncertainty about the legal risk of applying prescribed fire, Texas legislators could consider changing the state statute from simple to gross negligence, as in the cases of Florida and Georgia where prescribed fire is applied more broadly than in adjacent states with simple negligence statutes⁴.

Judges' perceptions of prescribed burning are influenced by factors such as negative publicity surrounding escaped fire and positive experiences with participation

in a prescribed burn. For example, prevalence of prescribed burning influenced a judge who stated, "because it [prescribed fire] is a widely accepted practice in our area, unless a structure was damaged, no one ever seeks damages."

The implication is that to encourage a more positive perspective on prescribed fire, Judges should be invited to participate in prescribed fires, especially those conducted by prescribed burn association members.

As woody invasive species continue to spread across Southern Plains, prescribed burning is a highly effective tool that is needed for managing rangelands. A pro-fire legal culture, in which fire is viewed as a safe and effective land management tool can reduce the loss of grassland ecosystems and mitigate encroachment of flammable woody plants that is exacerbating the accumulation of volatile fuel loads, and contributing to more frequent catastrophic wildfires⁵.

References

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