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A Dangerous Servant and a Fearful Master: Why Florida's Prescribed Fire Statute Should be Amended

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NOTE

A DANGEROUS SERVANT AND A FEARFUL MASTER: WHY
FLORIDA'S PRESCRIBED FIRE STATUTE SHOULD BE
AMENDED

*Stephen McCullers**

Abstract

Fire will not be denied its opportunity to burn through Florida's forests. The citizens of Florida, however, can accept the responsibility of deciding how the forest will burn. Fire can be purposefully ignited under exact weather conditions, acting as a controlled but dangerous servant with a slim chance of escape or harm. Or, if Floridians refuse to accept any responsibility in proactively managing forest fire, nature will determine when the forest will burn. The fire will be a fearful master, raging through the forest with the potential to cause great harm to people, property, and the environment.

In recognition of the important role that the intentional use of fire has in reducing wildfire hazard, not to mention its important ecological and economic functions, the Florida legislature enacted laws protecting fire practitioners from liability. These laws protect practitioners from liability as long as they are not grossly negligent in conducting the fire and meet certain requirements. Although this law is extremely important to fire practitioners, it can be interpreted as providing no protection if a legally set fire unexpectedly escapes and causes harm. This has the effect of discouraging landowners from conducting fire operations. This Note argues that, in order to encourage the men and women who are willing to accept the challenge of using intentional fire to reduce wildfire risk, the prescribed fire statute should be amended.

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INTRODUCTION

On January 8, 2008, a certified prescribed burn manager¹ with the Florida Fish and Wildlife Conservation Commission (FWC) requested authorization to conduct a prescribed fire² on the Hilochee Wildlife Management Area in Polk County.³ Due to an extended period of dryness, the burn manager was required to receive approval from the Division of Forestry⁴ Area Supervisor.⁵ The burn manager described the ignition plan

1. A “Certified Prescribed Burn Manager” is someone who has completed the Division of Forestry certification program as outlined in FLA. ADMIN. CODE ANN. r. 5I-2.006(2)(c)1-5 (2008). FLA. ADMIN. CODE ANN. r. 5I-2.003(5) (2008). The burn manager on this fire had been certified for approximately eighteen years and had conducted twenty-seven prescribed fires. Memorandum from Major Allan R. Johnson, Bureau of Investigative Servs., to Colonel Darrel Liford, Office of Agric. Law Enforcement 2 (Feb. 5, 2008) [hereinafter AgLaw Memo] (on file with author).

2. “Prescribed fire” refers to the intentional use of fire to complete specific land management goals such as increasing forest health or reducing forest fuels to prevent wildfires. Prescribed fires are conducted under specific weather conditions in order to predict and control fire behavior. A wildfire, however, is a fire that is uncontrolled and started by nature, accident, or arson. FLA. STAT. § 590.125(1)(a) (2005). The large forest fires, frequently shown on the news with flames that race through the tree tops and consume everything in its path, are examples of wildfires. In contrast, prescribed fires are typically characterized by very short flame lengths and extremely slow spread rates. These fires slowly creep on the forest floor, consuming the top layer of forest leaf litter. Prescribed fires rarely harm intermediate and mature trees but may thin out understory saplings and kill diseased or dying trees. *See* DALE D. WADE & JAMES D. LUNSFORD, A GUIDE FOR PRESCRIBED FIRE IN SOUTHERN FORESTS 2 (1988). Because the general public typically has had no experience with prescribed fire but has seen video of raging wildfires, many people have difficulty understanding both how a prescribed fire can be controlled and how it can actually benefit the forest, the environment, and society. Dale Wade et al., *Rx Fire Laws: Tools to Protect Fire: The ‘Ecological Imperative,’* in FIRE IN EASTERN OAK FORESTS: DELIVERING SCIENCE TO LAND MANAGERS 239, 242–43 (Matthew Dickinson ed., 2006) (discussing the public confusion created by the seemingly mixed messages caused by land managers preaching the benefits of prescribed fire but news outlets focusing solely on destructive wildfires). The application of fire to the landscape in a controlled manner is a highly technical skill that requires much study and hands-on experience. It is typically described as both an art and a science. *See id.* at 236.

3. Keith Mousel et al., Hilochee Wildlife Mgmt. Area Prescribed Fire Review for Prescribed Burn Conducted: January 8, 2008 2 (2008). This management area is located on the north side of Interstate 4 near Old Grade Road in Polk County. AgLaw Memo, *supra* note 1, at 1.

4. The Florida Division of Forestry is currently undergoing a name change to the Florida Forest Service. This change has already been implemented on the Florida Forest Service website.

for the day, stating that he would be using a combination of backing and flanking fire techniques.⁶ Furthermore, he explained that there would be six people on site with fire control equipment conducting the burn.⁷ Perimeter fire lines twelve to fifteen feet wide had been established around the burn area.⁸ After discussing the plan, the Area Supervisor agreed that weather conditions were favorable for burning ten acres⁹ and authorized the burn permit.¹⁰

At about 10:00 a.m., the burn manager conducted a field weather test.¹¹ A test fire was also ignited before commencing the actual burn.¹² The prescribed fire was started at 10:15 a.m. and initially burned as predicted.¹³ At approximately 11:00 a.m., however, the weather began to change with an increase in wind speed, a change in wind direction, and a rapid drop in humidity.¹⁴ The burn manager found a spot fire¹⁵ outside the burn area and

Florida Forest Service, <http://www.floridaforestservice.com/index.html> (last visited Oct. 21, 2012). Legislation has been introduced to update the Florida Statutes with this new name. *See, e.g.*, S. 900, 114th Leg., Reg. Sess. (Fla. 2012). Because this name change has not yet taken effect in the Florida Statutes and because this Note generally discusses the past acts of the Division of Forestry, the terms Division of Forestry, or simply Division, will be used.

5. The burn manager initially called the Lakeland District Office of the Division at 7:30 a.m. and was referred to the Area Supervisor. Mousel et al., *supra* note 3, at 2.

6. *Id.* at 3. A backing fire is a firing technique where the fire is allowed to move across the landscape *against* the wind. This creates a low intensity fire that creeps slowly along the forest floor and produces relatively little smoke. A flanking fire is when the fire moves *perpendicular* to the wind. Flanking fires move more quickly than backing fires, have a longer flame length, and produce more smoke. Head fires move *with* the wind, can travel extremely quickly depending on the wind speed, and are more intense with longer flame lengths than flanking or backing fires. *See WADE & LUNSFORD, supra* note 2, at 21–23.

7. The equipment included two brush trucks (one with a 250 gallon water tank and the other with a 500 gallon tank), 1000 gallons of water in reserve, a farm tractor with harrow, and three all-terrain vehicles with 25 gallon water tanks. Mousel et al., *supra* note 3, at 3.

8. *Id.* at 2. Also known as “fire breaks,” a typical method for containing prescribed fires is to plow or scrape a perimeter around the burn area down to the mineral soil. When the fire reaches the fire break, the soil will not burn and the fire stops. *See WADE & LUNSFORD, supra* note 2, at 51.

9. An acre is 43,560 square feet of surface area and is nearly equivalent to the size of a standard football field, not including the end zones. *See Acre, WIKIPEDIA, http://en.wikipedia.org/wiki/Acre* (last visited Feb. 19, 2011).

10. Mousel et al., *supra* note 3, at 2–3. Authority was actually given for a total of fifty acres but the burn plan prescribed two separate ten acre blocks to be burned. Only one of these blocks was ever ignited. AgLaw Memo, *supra* note 1, at 2.

11. AgLaw Memo, *supra* note 1, at 3. The weather test showed a relative humidity of 63% with south-southeast winds from 2 to 7 miles per hour.

12. *Id.* Small test fires are conducted before the actual fire in order to ensure that the fire will behave as predicted. *See WADE & LUNSFORD, supra* note 2, at 43.

13. *See* AgLaw Memo, *supra* note 1, at 3.

14. *Id.* As the humidity drops the fire becomes more intense, consumes vegetation more rapidly, and becomes more difficult to contain. *See WADE & LUNSFORD, supra* note 2, at 15–16.

15. The heat of the fire can lift burning ash which is carried downwind. A spot fire is started when this burning ash lands outside the burn perimeter and starts a new fire. *See WADE & LUNSFORD, supra* note 2, at 53.

quickly suppressed it.¹⁶ Shortly thereafter, multiple spot fires were found outside the burn area.¹⁷ The fire crew vigorously attacked these spot fires but was unable to successfully suppress them.¹⁸ By this point the fire had become established outside the burn perimeter and was spreading rapidly.¹⁹ At 11:45 a.m. the burn manager notified the Division of Forestry that the fire had escaped.²⁰

The Division launched a massive response, calling in heavy equipment, a helicopter, and approximately twenty wildland firefighters.²¹ While the fire raged adjacent to Interstate 4, the Florida Highway Patrol (FHP) and Department of Transportation (DOT) were contacted regarding the potential for smoke on the highway.²² FHP began patrolling that portion of the interstate to ensure that road conditions were safe and DOT put out signs warning motorists of the potential for smoke on the interstate.²³ Meanwhile, the Division continued to fight the fire and by approximately 7:00 p.m. established a new fire break around the escaped fire.²⁴ With a fire break around the fire, the Division allowed the fire to consume the remaining fuel within the perimeter which continued into the night.²⁵ At this point, the Division had suppressed the fire, but the area within the perimeter still continued to smolder overnight.²⁶

During the early morning hours of January 9, a mixture of fog and smoke from the prescribed fire followed the terrain, creeping along the low-lying areas of the landscape before settling on the interstate.²⁷ Early daytime travelers on Interstate 4 encountered a thick blanket of fog and smoke that reduced visibility on the roadway to nearly zero.²⁸ At some point, a minor vehicle accident occurred, which began a deadly domino

16. Mousel et al., *supra* note 3, at 4–5.

17. *Id.*

18. AgLaw Memo, *supra* note 1, at 3.

19. *See id.*

20. DIV. OF FORESTRY, FLA. DEP'T OF AGRIC. & CONSUMER SERV., INCIDENT REPORT 2008-14-0012 53 TURKEY ROOST COMMAND 3, 10 (2008) [hereinafter Incident Report].

21. *See generally id.* at 11.

22. AgLaw Memo, *supra* note 1, at 3; Incident Report, *supra* note 20, at 13, 17–19.

23. AgLaw Memo, *supra* note 1, at 3; Incident Report, *supra* note 20, at 13.

24. Incident Report, *supra* note 20, at 13. A common method of fighting wildfire is to establish a new fire break downwind of the fire and setting a backing fire from the newly established line. The backing fire will move against the wind consuming forest debris. When the wildfire, which is running with the wind, reaches the backing fire, the backing fire will have already consumed the available forest debris and the wildfire will stop. *See WADE & LUNS福德, supra* note 2, at 22 (discussing using this method to control prescribed head fires).

25. Incident Report, *supra* note 20, at 13.

26. Jennifer M. Collins et al., *Geographical, Meteorological, and Climatological Conditions Surrounding the 2008 Interstate-4 Disaster in Florida*, 32 PAPERS OF THE APPLIED GEOGRAPHY CONFERENCES 153, 156 (2009).

27. *Id.* at 158–59.

28. *Id.* at 153, 155.

effect.²⁹ Vehicles travelling at interstate speeds entered the fog and crashed into previous wrecks.³⁰ Oil and gas from the accidents ignited, adding smoke to the scene and decreasing already poor visibility conditions.³¹ Emergency response personnel struggled to reach and assist victims in the blinding smoke and fog.³² In all, seventy cars and trucks were involved in the accident which resulted in five deaths and thirty-eight injuries.³³ In terms of the number of fatalities, the Interstate 4 accident was the second deadliest fog-related vehicle accident in the nation's history.³⁴

An investigation into the cause of the wildfire was launched by the Office of Agricultural Law Enforcement.³⁵ This investigation found that an unpredictable change in weather caused spot fires from the prescribed fire which resulted in the wildfire.³⁶ Furthermore, the investigation found that the burn was authorized and conducted in accordance with Florida's prescribed fire laws and that there was no evidence of criminal violations or gross negligence by the prescribed fire burn manager or crew.³⁷ Based on the results of the investigation it seems that the prescribed fire crew followed the law and took all available precautions in executing the burn. The escape of the fire and subsequent tragic events on the interstate were the result of a completely unpredictable change in weather conditions.³⁸

Fire is a natural part of Florida's ecology and has been intentionally used as a land management tool since before the arrival of Europeans.³⁹ Florida has recognized the benefits of applying fire to the land and is one of the leading states in the use of prescribed fire.⁴⁰ By using prescribed fire, land managers in Florida are able to realize the benefits from fire while reducing the negative aspects, such as property damage, ecological degradation, and harm from smoke, that are associated with wildfire.⁴¹

29. Jeremy Maready, *Deputies Detail Horror of I-4 Crash Scene*, THE LEDGER.COM (Jan. 15, 2008, 12:57 PM), <http://www.theledger.com/article/20080115/NEWS/801150408?p=1&tc=pg>.

30. *Id.*

31. *Id.*

32. *Id.*

33. Collins et al., *supra* note 26, at 153.

34. *Id.* at 154.

35. See AgLaw Memo, *supra* note 1, at 1.

36. *Id.*

37. *Id.*

38. *Id.* at 2–5.

39. See Wade et al., *supra* note 2, at 233–35; Robert E. Martin, *Prescribed Fire as a Social Issue*, in PROCEEDINGS OF THE ENVIRONMENTAL REGULATION & PRESCRIBED FIRE CONFERENCE: LEGAL AND SOCIAL CHALLENGES 141, 142–43 (Dana C. Bryan ed., 1997).

40. Jim Brenner & Dale Wade, *Florida's Revised Prescribed Fire Law: Protection for Responsible Burners*, in PROCEEDINGS OF FIRE CONFERENCE 2000: THE FIRST NATIONAL CONGRESS ON FIRE ECOLOGY, PREVENTION, AND MANAGEMENT 132, 133–34 (Galley et al. eds., 2003).

41. See WADE & LUNSFORD, *supra* note 2, at 2–12; D. A. Cleaves & T. K. Haines, *Regulation and Liability Risk: Influences on the Practice and the Pricetag of Prescribed Burning*, in PROCEEDINGS OF THE ENVIRONMENTAL REGULATION & PRESCRIBED FIRE CONFERENCE: LEGAL AND

Despite the benefits of using prescribed fire, however, there are many obstacles to its application. Land managers and prescribed fire practitioners view potential liability as the biggest obstacle to using prescribed fire.⁴² Although incidents like the Interstate 4 disaster are extremely rare, practitioners are hesitant to conduct prescribed fire operations for fear of liability.⁴³ This fear of liability can lead to a vicious cycle. As the exposure to liability from escaped prescribed fires increases, land managers become less willing to conduct prescribed fire operations.⁴⁴ This leads to increases in the forest fuel load and a greater likelihood of catastrophic wildfire. When the wildfire ignites, it will be extremely difficult to control and will pose an even greater hazard to human health, property, and the natural environment. The scale and damage of the resulting wildfire will lead to a greater fear of liability for escaped prescribed fires.

In recognition of the benefits Florida receives from prescribed fire and to encourage the use of fire as a management tool, the Florida legislature passed laws in 1990 which statutorily defined the liability standard of prescribed fire users as negligence.⁴⁵ This statute was updated in 1999 to raise the liability standard to gross negligence as long as the prescribed fire user meets certain requirements.⁴⁶ One of these requirements is “that there

SOCIAL CHALLENGES 166 (Dana C. Bryan ed., 1997) (discussing the benefits and costs of using prescribed fire).

42. Terry K. Haines & David A. Cleaves, *The Legal Environment for Forestry Prescribed Burning in the South: Regulatory Programs and Voluntary Guidelines*, 23(3) S. J. APPLIED FORESTRY 170, 174 (1999).

43. *Id.*

44. *Id.*

45. FLA. STAT. § 590.026 (1990), repealed by 99-292 (June 8, 1999). *See generally* Brenner & Wade, *supra* note 40, at 132.

46. FLA. STAT. § 590.125 (2005). *See generally* Brenner & Wade, *supra* note 40, at 135–36. Section 590.125(3)(b) states that a prescribed fire user is only liable if gross negligence is proven where the fire meets the following requirements:

1. May be accomplished only when a certified prescribed burn manager is present on site with a copy of the prescription from ignition of the burn to its completion.
2. Requires that a written prescription be prepared before receiving authorization to burn from the division.
3. Requires that the specific consent of the landowner or his or her designee be obtained before requesting an authorization.
4. Requires that an authorization to burn be obtained from the division before igniting the burn.
5. Requires that there be adequate firebreaks at the burn site and sufficient personnel and firefighting equipment for the control of the fire.
6. Is considered to be in the public interest and does not constitute a public or private nuisance when conducted under applicable state air pollution statutes and rules.
7. Is considered to be a property right of the property owner if vegetative fuels are burned as required in this subsection.

[are] adequate firebreaks at the burn site and sufficient personnel and firefighting equipment for the control of the fire.”⁴⁷

Unfortunately, this provision of the statute adds confusion to prescribed fire law and actually decreases land managers' willingness to conduct prescribed fires. Prescribed fire practitioners are concerned that this provision will act to bar them from taking advantage of the statutory liability protection.⁴⁸ By not defining what “adequate firebreaks and personnel” means, the statute can be interpreted to mean that any fire escape or smoke damage is per se evidence that the practitioner did not follow the statutory requirements of having sufficient personnel, fire breaks, and equipment to control the fire. In fact, even though the Office of Agriculture Law Enforcement found that the burn crew of the prescribed fire described above followed the requirements of Florida's prescribed fire statute and were not grossly negligent in their conduct, the investigation was unable to determine if the “adequate firebreaks and personnel” requirement was met.⁴⁹ The question becomes, is the fact that the fire escaped due to an unforeseen weather event proof that the statutory requirements were not met—and the responsible party is therefore unable to take advantage of statutory liability protection?⁵⁰

It is imperative that the “adequate firebreaks and personnel” provision be deleted from the statute or amended to make it clear that the “adequacy” is based on preignition weather predictions. As rare as prescribed fire accidents are,⁵¹ cases concerning prescribed fire are even rarer.⁵² There has not been a single District Court of Appeal or Florida Supreme Court case concerning the prescribed fire statute.⁵³ Therefore, it is unlikely that the courts will clarify practitioners' statutory responsibilities anytime soon.

FLA. STAT. § 590.125(3)(b) (2005).

47. FLA. STAT. § 590.125(3)(b)(5) (2005). This subsection will be referred to as the “adequate firebreaks and personnel” provision within this Note.

48. Interview with Zachary Prusak, Florida Fire Manager, The Nature Conservancy (Mar. 30, 2012). Since 1979, the Nature Conservancy has been involved with prescribed fire operations on over 600,000 acres in Florida. *Id.* The Nature Conservancy is an active partner with other conservation organizations in using and promoting prescribed fire on private, state, and federal lands in Florida. *Id.*

49. AgLaw Memo, *supra* note 1, at 1–2.

50. William D. Eshee, Jr., *Legal Implications of Using Prescribed Fire*, in PROCEEDINGS OF THE ENVIRONMENTAL REGULATION & PRESCRIBED FIRE CONFERENCE: LEGAL AND SOCIAL CHALLENGES 126, 130 (Dana C. Bryan ed., 1997) (noting that where mandatory prescribed fire requirements are set forth by law, failure to meet those requirements can give rise to a lawsuit based on negligence per se).

51. Across the Southern states from 1979 to 1988 there were twenty-seven vehicle accidents attributed to smoke from prescribed fires. These accidents accounted for twenty-seven fatalities and over fifty incidents of serious injury. Cleaves & Haines, *supra* note 41, at 172.

52. See Eshee, *supra* note 50, at 130.

53. A thorough search of both LexisNexis and Westlaw did not reveal a single Florida case which cites to the prescribed fire law.

Prescribed fire practitioners provide a valuable service to the citizens of Florida and to the environment. These practitioners are highly trained individuals who use scientific methods to determine the safest and most effective times and methods to apply fire to the landscape. They work closely with the Florida Division of Forestry which oversees prescribed fire across the state and approves prescribed fire plans before they are implemented. By conducting prescribed fires, practitioners decrease the likelihood of wildfire and therefore protect Floridians' property and lives from wildfire and smoke. It is therefore essential that Florida has a legal framework which encourages the use of prescribed fire and protects practitioners from liability when unforeseen accidents occur. In order to improve Florida's prescribed fire law the "adequate firebreaks and personnel" provision must be deleted. If not deleted, the provision should be amended to clarify that adequacy is based on pre-ignition weather and fire behavior predictions. Florida's landscape has been burning for hundreds if not thousands of years and will continue to burn periodically. The question is whether we want the forests to burn under controlled and deliberate conditions, or if we are going to allow the landscape to burn unpredictably and out of control.

I. FIRE ECOLOGY AND THE HISTORY OF FIRE USE IN THE UNITED STATES

Fire is a natural process that is a part of most terrestrial ecosystems.⁵⁴ At its core, fire is basically an extremely rapid form of decomposition.⁵⁵ Vegetation that may take years or decades to decompose can be rapidly oxidized by fire in a matter of hours. This rapid decomposition will release nutrients into the environment which can result in an explosion of new growth. Furthermore, fire may greatly alter the landscape structure, allowing different plants and animals to colonize the site.

How often fire returns to the landscape can vary greatly between different ecosystem types. The return interval can be anywhere between every couple of months to every few centuries.⁵⁶ In the Southern United States, there is a greater amount of cloud to ground lightning strikes than in any other North American region.⁵⁷ This high incidence of lightning results in increased chances of naturally occurring fire. Due to the frequent occurrence of natural fire and the high use of fire by prehistoric societies, the South has one of the shortest fire return intervals in the United States.⁵⁸ Overtime, the frequent return of fire to the Southern landscape has resulted in an ecosystem made up of plants and animals that depend on fire.⁵⁹

54. Wade et al., *supra* note 2, at 235.

55. *Id.*

56. *Id.*

57. *Id.* at 233.

58. *Id.*

59. *Id.* One Florida native animal species that depends on frequent fire is the gopher tortoise

Despite the importance of naturally occurring fires, anthropogenic fires are at least of equal importance.⁶⁰ Fire has been used by humans for thousands of years.⁶¹ For prehistoric societies, fire was by far the most powerful tool available for manipulating the natural environment.⁶² Early societies purposely set landscape fires to augment the frequency of naturally occurring fires started by lightning or drought conditions in order to achieve desired results.⁶³ Fire was a tool that these societies used to shape and alter the environment around them in order to create a landscape in which they could more effectively survive.

Native Americans burned the land regularly and used fire extensively to promote an open landscape and improve hunting.⁶⁴ The frequency of natural and Native American fire in the Southeast created a landscape of savannas and open forests.⁶⁵ European settlers adopted the use of prescribed fire from the Native Americans and used it to achieve similar land management goals.⁶⁶ Early settlers used fire in clearing the land to provide open space for crops and livestock.⁶⁷ With European use of fire, the overall use of fire in the landscape increased.⁶⁸ Fire has been used as a land management tool continually from prehistoric Native American use to today.⁶⁹

Use of fire by early Americans, however, was not always conducted in a responsible manner. Overuse of fire resulted in cataclysmic wildfires and the repeated use of fire led to soil infertility.⁷⁰ Furthermore, the expansion of the railroad system created an ever present source of sparks that could ignite a forest fire and increased the likelihood of uncontrolled wildfires.⁷¹

(*Gopherus polyphemus*). The gopher tortoise is a keystone species that creates underground burrows which are used by many other species of conservation concern such as the indigo snake, pine snake, gopher frog, and burrowing owl. The exclusion of fire from gopher tortoise habitat can alter the ecosystem so that it is no longer suitable for the tortoise. Thomas Ankersen, *The Gopher Tortoise and Upland Habitat Protection in Florida, Legal and Policy Considerations*, University of Florida Conservation Clinic Center for Governmental Responsibility Levin College of Law 5–6, Feb. 2003, available at http://www.gophertortoise.org/tortoise/pdf/conservation_law_ufl_gopher.pdf; see also Joan E. Diemer, *The Ecology and Management of the Gopher Tortoise in the Southern United States*, 42 HERPETOLOGICA 125, 125 (1986) (discussing the importance of the gopher tortoise in the ecosystem).

60. Wade et al., *supra* note 2, at 233.

61. Martin, *supra* note 39, at 142.

62. *Id.*

63. See Wade et al., *supra* note 2, at 233.

64. Martin, *supra* note 39, at 142.

65. Wade et al., *supra* note 2, at 233.

66. Martin, *supra* note 39, at 143.

67. *Id.*

68. Wade et al., *supra* note 2, at 233.

69. Mason C. Carter & C. Darwin Foster, *Prescribed Burning and Productivity in Southern Pine Forests: A Review*, 191 FOREST ECOLOGY & MGMT. 93, 93 (2004).

70. Martin, *supra* note 39, at 143.

71. Wade et al., *supra* note 2, at 236.

Starting around the end of the nineteenth century, the American public began to recognize the danger and negative consequences of fire and petitioned policy makers for a solution to the fire problem.⁷² The solution was quite simple. If forest fires were bad, then excluding fire from the forest and completely suppressing all wildfires was the answer.⁷³ Near the start of the twentieth century, policy makers implemented a regime of complete forest fire suppression.⁷⁴

As part of the suppression policy, government officials made great efforts to educate the public concerning the evils of forest fire.⁷⁵ One of the most successful of these education programs was the Smokey Bear campaign.⁷⁶ The public education campaigns, like the suppression policy itself, failed to distinguish between prescribed fire and wildfire.⁷⁷ Therefore, the public mistakenly believed that all forest fire is inherently bad and destructive.⁷⁸

Along with the education programs, various levels of government made incredibly effective efforts to suppress all forest fires.⁷⁹ The success of the fire suppression policy resulted in altered fire regimes which greatly changed the ecology of the forests.⁸⁰ Dead vegetation accumulated on the forest floor at levels greater than historic amounts which resulted in ideal

72. *Id.*

73. *Id.*

74. Martin, *supra* note 39, at 143. The start of the fire suppression era coincided with the particularly destructive Great Idaho fires in 1910 and, ironically, with the start of the science of forestry in the United States. Early American foresters received education based on established German and French forestry methods where fire is not a component of forest ecosystems. The application of the Western European forestry framework to American forests eventually proved inappropriate because it failed to address fire as a part of the ecosystem. *See id.*

75. *Id.*

76. *Id.* The roots of Smokey Bear are in advertising by the Forest Service during World War II aimed at alerting the public to potential wildfires caused by enemy bombing and the lack of fire fighting personnel. The first Smokey poster was created in 1944 by Walt Disney. In 1950, a badly burned black bear cub was rescued from a forest fire and became the living symbol of the Smokey Bear campaign. This bear lived in the National Zoo until 1977. RONALD E. RICE & CHARLES K. ATKIN, PUBLIC COMMUNICATION CAMPAIGNS 276 (3d ed. 2001). The Smokey Bear advertising campaign continues to this day and Smokey has his own website at www.smokeybear.com (last visited Dec. 16, 2012).

77. Martin, *supra* note 39, at 143–44.

78. *Id.* The Smokey Bear fire suppression campaign has been incredibly effective at disseminating the fire suppression message but many forest managers and ecologists argue that this effectiveness has actually been a detriment to American forests. Numerous scholars have spoken out against Smokey Bear as erroneously teaching the nation that all forest fires should be suppressed. *See, e.g.,* Geoffrey H. Donovan & Thomas C. Brown, *Be Careful What You Wish For: The Legacy of Smokey Bear*, 5 FRONTIERS IN ECOLOGY AND THE ENV'T 73, 73 (2007); Roberta Robin Dods, *The Death of Smokey Bear: The Ecodisaster Myth and Forest Management Practices in Prehistoric North America*, 33(3) WORLD ARCHAEOLOGY 475, 476 (2002).

79. Martin, *supra* note 39, at 143.

80. Hayley Hesseln, *The Economics of Prescribed Burning: A Research Review*, 46 FOREST SCI. 322, 322 (2000).

conditions for catastrophic wildfire.⁸¹ The decades of fire suppression resulted in more severe fire seasons, fires that were more difficult to suppress, and increases in fire suppression costs.⁸² Instead of excluding fire from the landscape, the suppression policy merely postponed the occurrence of fire.⁸³ When the forest finally did burn, the increased fuel load created extremely intense fire conditions that could destroy the forest and threaten human safety and property.⁸⁴

Meanwhile, while the rest of the nation decried the evils of forest fire and energetically implemented the policy of complete suppression, landowners in the Southeast continued to follow the traditions of using fire as a management tool. Rural Southerners recognized the importance of periodic fires and that any attempt to completely suppress fire would result in ecosystem degradation and, eventually, uncontrollable wildfires.⁸⁵ The practices of the South did not go unnoticed and the federal government made targeted efforts to convince communities in the Southeast of the evils of forest fire. One group, known as the Dixie Crusaders, was sent by the Forest Service to the South to spread the gospel of fire suppression.⁸⁶ Despite the general "success"⁸⁷ of the fire suppression policy in convincing people that forest fire is an evil force of nature, the South continued to use prescribed fire as a management tool.⁸⁸

81. *Id.*

82. Changyou Sun, *State Statutory Reforms and Retention of Prescribed Fire Liability Laws on U.S. Forest Land*, 9 FOREST POL'Y & ECON. 392, 392 (2006).

83. The accumulation of vegetative debris on the forest floor has been contrasted with deposits made to a bank. Unlike a bank where money can be deposited and stored indefinitely, vegetation debris cannot be stored indefinitely on the forest floor. Periodic withdrawals of vegetation by fire are required on a regular basis and if those withdrawals are stopped, eventually a catastrophic fire will come that removes both the vegetative debris and the forest itself. Brenner & Wade, *supra* note 40, at 132.

84. Ecosystems where fires historically moved across the forest floor consuming leaf litter were experiencing fires that climbed into the tree tops and completely consumed and destroyed the forest. Wade et al., *supra* note 2, at 237; Brenner & Wade, *supra* note 40, at 132.

85. Wade et al., *supra* note 2, at 234. The use of prescribed fire by Southerners was often in direct violation of state and federal laws. Brenner & Wade, *supra* note 40, at 132.

86. Wade et al., *supra* note 2, at 234. Sociologists and psychologists were also sent south to delve into the psyche of the Southern burner in the hope that a cure to the burning proclivity could be found. These experts characterized the continued use of fire as the ignorant practice of a disadvantaged segment of society. *Id.* (citing J. Shea, *Our Pappies Burned the Woods*, 46 AM. FORESTS 159 (1940)).

87. One supporter of prescribed fire has called the suppression policy the single greatest negative ecosystem alteration by humans in North America. *Id.* at 237 (citing George Wuerthner, *Smokey the Bear's Legacy on the West*, in 1 CASCADIA FIRE ECOLOGY EDUCATION PROJECT (1994)).

88. The benefits of the South's general rejection of the suppression policy could be seen in the later portion of the twentieth century when the incidence of wildfire increased across all Forest Service Regions except the Southeast. Martin, *supra* note 39, at 144. Although the incidence of wildfire may not have increased, the South typically has more wildfires annually than any other

It has only been relatively recently that the rest of the nation began to recognize the negative consequences of the fire suppression policy and accept what land managers in the South had known all along: that fire suppression does not mean no forest fire, it means no uncontrollable forest fires.⁸⁹ Fire prevention messages began to specifically target wildfire, leaving room for the proper application of prescribed fire to the landscape.⁹⁰ Policy shifted as well, with various federal agencies embracing the use of fire as a tool for forest fuel reduction and ecosystem health.⁹¹ Other states outside of the Southeast are beginning to accept that extensive use of prescribed fire plays an important role in overall wildfire protection strategies.⁹² Today, particularly in the South, the benefits of prescribed fire are recognized by law and land managers are given legal protection to encourage the use of prescribed fire.⁹³

II. PRESCRIBED FIRE

Prescribed fire is simply the intentional application of fire to a landscape. Florida regulations define prescribed fire as “the application of fire, in accordance with a written prescription for vegetative fuels, under specified environmental conditions while following appropriate precautionary measures that ensures public safety and that the fire is confined to a predetermined area to accomplish planned fire or land management objectives.”⁹⁴ The essential elements of prescribed fire are the application of fire in a knowledgeable and skillful manner to a specific piece of land under precise weather conditions for a specific goal.⁹⁵

Prescribed fire is used as a cost-effective tool to accomplish a number of land management goals,⁹⁶ the most important of which is probably

region. These fires are usually smaller than the wildfires of other regions but number at more than 45,000 per year and cover an average of 1 million acres annually. Wade et al., *supra* note 2, at 234.

89. Wade et al., *supra* note 2, at 237; Jonathan Yoder et al., *Economics & Prescribed Fire Law in the United States*, 25(1) REV. AGRIC. ECON. 218, 218 (2003); Martin, *supra* note 39, at 144.

90. Even Smokey Bear’s slogan was eventually updated to reflect changing attitudes in fire use. In 2001, Smokey’s slogan was changed from “Only YOU Can Prevent Forest Fires” to “Only You Can Prevent Wildfires.” The term “Forest Fires” encompassed all fires in the forest where as “Wildfires” are any “unwanted, unplanned, uncontrolled outdoor fire[s].” Campaign History of Smokey Bear: American Icon, http://www.smokeybear.com/vault/history_main.asp (last visited Feb. 19, 2011). This subtle distinction between forest fire and wildfire, however, is probably completely lost on the vast majority of the American public who still probably do not understand that fire is actually an important component of many forested ecosystems. See Wade et al., *supra* note 2, at 242–43.

91. Wade et al., *supra* note 2, at 237–38.

92. *Id.* at 236.

93. See *infra* Part III.

94. FLA. ADMIN. CODE ANN. r. 5I-2.003(21) (2008).

95. WADE & LUNSFORD, *supra* note 2, at 2.

96. *Id.* at 3–12 (discussing many of the various benefits of prescribed fire); see also Sun, *supra* note 82, at 392; Hesseln, *supra* note 80, at 325–26.

forest fuel reduction to decrease the chance of wildfire.⁹⁷ The benefits of prescribed fire have been more widely recognized in recent years and the use of prescribed fire has increased nationwide.⁹⁸ Unfortunately, prescribed fire use has actually decreased in some states, including Florida.⁹⁹ Due to the benefits of prescribed fire, particularly in decreasing the threat of wildfire, legislators have attempted to encourage its use by crafting fire-friendly laws.¹⁰⁰ Their efforts have targeted the number one concern of landowners in the use of fire: liability.¹⁰¹

A. *The Benefits of Prescribed Fire*

Landowners use prescribed fire for a number of reasons including site preparation,¹⁰² vegetation control,¹⁰³ wildfire hazard reduction, increasing wildlife habitat,¹⁰⁴ increasing habitat for endangered and threatened species, and controlling invasive species.¹⁰⁵ The purpose for burning depends on the landowner's objectives and varies among different landowner types.¹⁰⁶ For both publicly and privately owned lands, wildfire hazard reduction is the most commonly identified purpose for conducting a prescribed fire.¹⁰⁷ Due to the nonmarket nature of many of the benefits of prescribed fire, quantifying the exact value of prescribed fire to landowners and society is difficult.¹⁰⁸ Despite the lack of solid economic figures, it is

97. Terry K. Haines, Rodney L. Busby & David A. Cleaves, *Prescribed Burning in the South: Trends, Purpose, and Barriers*, 25(4) S. J. APPLIED FORESTRY 149, 151 (2001).

98. Sun, *supra* note 82, at 392–93.

99. Cleaves & Haines, *supra* note 41, at 178, 180.

100. Eshee, *supra* note 50, at 130.

101. *See infra* Part III.

102. Site preparation refers to using prescribed fire to prepare the landscape for a land management activity, like harvesting timber or replanting seedlings. Prescribed fire can be used before timber is harvested to open up the forest, improving visibility and creating a safer work environment. After a harvest, prescribed fire can be used to remove logging debris, recycle nutrients, and improve the planting conditions. WADE & LUNSFORD, *supra* note 2, at 4; Kenneth L. McNabb, Ala. Coop. Extension Sys., *Prescribed Burning in Alabama Forests*, ANR-331 1, 1 (2001).

103. Vegetation control refers to using prescribed fire to kill weeds or competing seedlings. Usually, vegetation control is conducted to keep unwanted hardwood trees from encroaching on sites that are more suitable for pine forests. WADE & LUNSFORD, *supra* note 2, at 5.

104. Wildlife habitat improvements are typically aimed at game species such as deer, turkey, quail, and doves. *Id.* at 11–12; McNabb, *supra* note 102, at 2.

105. WADE & LUNSFORD, *supra* note 2, at 2–34 (discussing many of the various benefits of prescribed fire); *see also* Sun, *supra* note 82, at 392; Hesseln, *supra* note 80, at 322; Haines & Cleaves, *supra* note 42, at 170.

106. Haines, Busby & Cleaves, *supra* note 97, at 151.

107. Improving wildlife habitat was ranked high as a primary purpose for prescribed fire on national, state, and private lands. National lands also ranked threatened and endangered species management high, whereas state and private lands ranked reforestation and vegetation control high. *Id.*

108. Hesseln, *supra* note 80, at 324–25.

estimated that the benefit–cost ratio for prescribed fire is nearly two-to-one.¹⁰⁹

One of the most important benefits from prescribed fire is the reduction of wildfire hazard.¹¹⁰ Forests produce a constant accumulation of vegetative debris that, if left untreated, can ignite and cause devastating wildfires.¹¹¹ Prescribed fire offers a cost effective tool for removing this vegetative debris.¹¹² Furthermore, proactive treatment of forest fuel with prescribed fire is significantly cheaper than attempting to control an unplanned fire.¹¹³ The policies from the era of fire suppression have left many forests with fuel loads much greater than historic levels.¹¹⁴ Prescribed fire is an economic tool that can be used to reduce these fuel loads and return ecosystems to historic fire patterns.¹¹⁵

With benefits that accrue to both landowners and the public at large, prescribed fire can result in decreased chances of wildfire, improved forest health, and improved wildlife habitat.¹¹⁶ Additionally, because prescribed fire is a relatively inexpensive forest management tool,¹¹⁷ it improves forest management economics and probably encourages landowners to maintain their land as forests instead of converting the land to a more intense land use such as crop land or development. The cost of prescribed fire, however, is tied directly to the level of regulation and the threat of liability.¹¹⁸ Increased regulation, liability risks, and insurance costs have driven up the cost of prescribed fire.¹¹⁹ Between 1982 and 1994, the cost of prescribed fire in the Southeast increased at twice the rate of inflation.¹²⁰ The rate of cost increase for mechanical and chemical forestry treatment alternatives was less than the rate increase for prescribed fire.¹²¹

Despite the benefits of prescribed fire, there are also inherent risks and negative consequences such as air pollution,¹²² smoke impacts leading to

109. Wade et al., *supra* note 2, at 235.

110. There are many accounts of wildfires spreading to an area where the vegetative debris has already been reduced by a previous fire and become ground fires that are less intense, cause less damage, and are easier to suppress. *Id.* at 237 (listing scholarly articles that contain such accounts).

111. Martin, *supra* note 39, at 145.

112. *Id.*

113. Fire control can be anywhere from 10 to 1,000 times more expensive than prescribed fire. *Id.*

114. Sun, *supra* note 82, at 392.

115. Martin, *supra* note 39, at 146.

116. Haines & Cleaves, *supra* note 42, at 170; Cleaves & Haines, *supra* note 41, at 166.

117. Prescribed fire is considered the least expensive forest management tool and one of the most effective. Sun, *supra* note 82, at 392; Wade et al., *supra* note 2, at 235.

118. Hesseln, *supra* note 80, at 324; Cleaves & Haines, *supra* note 41, at 178.

119. Hesseln, *supra* note 80, at 324.

120. *Id.*; Cleaves & Haines, *supra* note 41, at 175, 178.

121. Cleaves & Haines, *supra* note 41, at 177.

122. Although prescribed fire has an immediate negative impact on air quality, prescribed fire is viewed as decreasing overall air pollution by reducing wildfires which have more significant

decreased visibility on roadways, and the danger of fire escape.¹²³ These risks and impacts are important factors for land managers in determining how fire will be used to achieve management goals. Other factors include the cost of planning and conducting the fire and the potential for damage to timber resources if the fire becomes too hot or escapes.¹²⁴ One of the biggest factors in determining whether or not fire is an appropriate tool to achieve an objective is the risk of liability if something goes wrong.¹²⁵ Other land management tools such as herbicides, pesticides, and mechanical treatments can achieve similar objectives to varying degrees.¹²⁶ Land managers must consider the objectives, costs, anticipated results, and potential for negative consequences before deciding what tool will be used.

B. *The Use of Prescribed Fire*

Nationwide, prescribed fire use has increased over the last few decades as the public and governments have recognized the fallacy of the suppression policy.¹²⁷ On Federal National Forest land, prescribed fire use increased 76% between 1985 and 1994, with an annual average of 0.91 million acres burned.¹²⁸ From 1995 to 2000, the use of prescribed fire continued to increase to an average of 1.44 million federal acres burned.¹²⁹

Despite the level of use on federal property, the use of prescribed fire on private land¹³⁰ and nonfederal governmental land, particularly in the South, is even more significant. In the South between 1985 and 1994, private and nonfederal government prescribed fire represented 89% of the annual acreage burned.¹³¹ During this time, an average of 4.4 million acres¹³² was prescribed burned each year in the South across all

negative impacts on air quality. McNabb, *supra* note 102, at 2. See also Robert W. Adler, *Balancing Compassion and Risk in Climate Adaptation: U.S. Water, Drought, and Agricultural Law*, 64 FLA. L. REV. 201 (2012) (discussing the interaction between air pollution regulation and environmental policy regarding water use and agriculture).

123. Cleaves & Haines, *supra* note 41, at 166.

124. *Id.*

125. See *infra* Part III.

126. These alternatives, however, are typically more expensive than prescribed fire and present their own risks to the environment and human health. Haines & Cleaves, *supra* note 42, at 174.

127. Sun, *supra* note 82, at 392–93; see *supra* notes 89–93 and accompanying text.

128. Sun, *supra* note 82, at 393.

129. *Id.*

130. Private land for forestry reporting purposes is typically broken down into private industrial landowners, such as paper and timber companies, and nonindustrial private forest owners (NIPF). Industrial landowners typically burn more frequently than NIPF owners. NIPF landowners, however, own nearly twice as much pine forest land as private industry and ten times more than the national forests. Haines, Busby & Cleaves, *supra* note 97, at 149, 150, 153.

131. Cleaves & Haines, *supra* note 41, at 175.

132. The amount of land burned annually in the South is a small portion of the total 534 million acres that makes up the thirteen Southern states. The majority of this land area burned periodically a few centuries ago. It is estimated that only 35% of state lands and 1% to 5% of

landownership types.¹³³ Alabama led the South during this time period with approximately one million acres burned annually.¹³⁴ Florida and Georgia followed closely behind with 901,000 and 806,000 acres, respectively.¹³⁵ Overall, more acres are treated with prescribed fire in the South than in the rest of the nation combined.¹³⁶

Florida's ecosystems are particularly dependent on fire.¹³⁷ Furthermore, Florida's flat topography is particularly well suited for prescribed fire.¹³⁸ Florida is a national leader in the use of prescribed fire and, according to one study, has been the highest user of prescribed fire every year.¹³⁹ The peak of prescribed fire use in Florida occurred in the 1970s with a high of 3.9 million acres.¹⁴⁰

Despite the significant amounts of land burned in the South, annual acreage burned has actually decreased in the last few decades for many states, including Florida.¹⁴¹ These decreases were attributed to increases in complaints by the public, some well-publicized fire accidents, air quality restrictions, and increasing regulation and restriction by local governments.¹⁴² Due to the benefits that society receives from prescribed fire, especially in terms of decreasing wildfire risk, it is imperative that the use of prescribed fire be encouraged. Legislative efforts to encourage increased use of prescribed fire have focused on addressing the number one concern of landowners and prescribed fire practitioners: prescribed fire liability.¹⁴³

private forest lands are being burned often enough for proper wildfire hazard management. Wade et al., *supra* note 2, at 234, 238.

133. Haines & Cleaves, *supra* note 42, at 170; Cleaves & Haines, *supra* note 41, at 173. See also Haines, Busby & Cleaves, *supra* note 97, at 150 (reporting comparable but slightly different numbers). According to state agency officials, 7.5 million acres per year should be burned. *Id.* at 153.

134. Cleaves & Haines, *supra* note 41, at 173.

135. *Id.* Most prescribed fire is used to treat pine forests and during this time period approximately 13% of the pine forests in Alabama and 12% in Florida were treated with prescribed fire annually. The Southern average was 7%. *Id.* at 175. The Forest Service also burned approximately 12% of its pine forest annually. Haines, Busby & Cleaves, *supra* note 97, at 150.

136. Wade et al., *supra* note 2, at 234.

137. Brenner & Wade, *supra* note 40, at 132.

138. Haines, Busby & Cleaves, *supra* note 97, at 150.

139. Brenner & Wade, *supra* note 40, at 133.

140. *Id.*

141. Cleaves & Haines, *supra* note 41, at 178. While total acres of forest treated with prescribed fire decreased, the use of prescribed fire on national forests in the South either increased or remained the same. *Id.* at 180.

142. Even though the use of prescribed fire decreased, the demand for prescribed fire services by private nonindustrial forest owners could not be met due to a reduction in available state funds for fire assistances and a shortage of insured private burning contractors. *Id.* at 165, 178.

143. Brenner & Wade, *supra* note 40, at 134.

III. PRESCRIBED FIRE LIABILITY

The use of prescribed fire is directly affected by the perceptions of landowners and practitioners concerning potential liability.¹⁴⁴ Efforts to decrease liability risk by purchasing insurance or increasing available personnel or equipment increases the cost of burning and further reduces landowners' willingness to burn.¹⁴⁵ Many landowners would prefer not to use prescribed fire in order to avoid the liability risk, but they recognize the danger of allowing forest fuels to accumulate untreated.¹⁴⁶

Population growth and human development patterns are also increasing the cost and potential for liability for prescribed fire.¹⁴⁷ Living within or on the edge of natural areas is very popular, but by doing so people establish their homes in areas of high fire risk.¹⁴⁸ Increasing development in forested areas and the desire of people to live in the wilderness increases liability risks and public pressure against prescribed fire in areas where prescribed fire practitioners previously had no problems.¹⁴⁹ Rural landowners are expected to somehow provide their new neighbors with a pristine wilderness without any of the negative impacts from prescribed fire or wildfire.¹⁵⁰

During the 1970s and 1980s there appeared to be a trend toward strict liability for harm caused by prescribed fire.¹⁵¹ This trend, however, was reversed beginning in the 1990s with states statutorily defining the liability standard of prescribed fire as simple negligence.¹⁵² Florida has been a leader in crafting pro-prescribed fire laws and was one of the first states to give burn practitioners liability protection by law.¹⁵³ Many states have followed Florida's lead, and these prescribed fire laws have been greatly welcomed by the forestry and landowner community.¹⁵⁴

Prescribed fire is now highly regulated by most states and landowners are typically required to obtain permission in the form of a burn permit

144. Landowners who use prescribed fire are exposed to liability from the potential of the fire escaping, from smoke intruding into nearby communities, or by smoke related vehicle accidents. Haines & Cleaves, *supra* note 42, at 172; Cleaves & Haines, *supra* note 41, at 167, 172. See Benjamin J. Steinberg & Dwayne Antonio Robinson, *Making BP's Blood Curd-Le: Duty, Economic Loss, and the Potential Cardozian Nightmare after Curd v. Mosaic Fertilizer*, 63 FLA. L. REV. 1245, 1245 (2011), for a discussion of liability in another environmental context: oil spills.

145. Cleaves & Haines, *supra* note 41, at 178.

146. Wade et al., *supra* note 2, at 236–37.

147. *Id.* at 240.

148. *Id.*

149. Cleaves & Haines, *supra* note 41, at 181.

150. See Hessel, *supra* note 80, at 329–30 (discussing the complexity of using fire in the interface between residential and natural areas).

151. Sun, *supra* note 82, at 396; Eshee, *supra* note 50, at 130.

152. Sun, *supra* note 82, at 396; Eshee, *supra* note 50, at 127, 130.

153. Eshee, *supra* note 50, at 129, 130.

154. *Id.* at 127, 130; Sun, *supra* note 82, at 395.

from the state forestry agency prior to starting a landscape fire.¹⁵⁵ In order to take advantage of the statutorily defined negligence standard, fire practitioners in the South must meet further requirements. These requirements typically include a written prescription, approval from the state forestry agency, and status as a certified prescribed burner.¹⁵⁶ A certified burner who follows the statutory requirements will be protected from liability unless they are proven negligent, or in the case of Florida and Georgia, grossly negligent.¹⁵⁷ Whether Florida and Georgia's adoption of the gross negligence standard represents a new trend in prescribed fire legislation or is merely an outlier remains to be seen.

A. Prescribed Fire Liability in Florida

Historically, civil liability in Florida for an intentionally set fire that caused damage was based on the common law principles of negligence. In *Cobb v. Twitchell*, the Florida Supreme Court recognized that landscape fires can be lawful and prudent and that damage resulting from a lawful fire is not negligence per se.¹⁵⁸ An injured party seeking recovery was required to prove negligence on the part of the defendant but such negligence would not be presumed.¹⁵⁹ The plaintiff therefore had the burden of proving negligence.

The court stated that the dangerous properties of fire were well recognized and that anyone choosing to use it for lawful purposes must use reasonable care to prevent injury to others.¹⁶⁰ This responsibility extended not only to the setting out of fire but in controlling the fire as well.¹⁶¹

155. Haines & Cleaves, *supra* note 42, at 171; Eshee, *supra* note 50, at 127. In obtaining a permit the prescribed fire crew leader will typically discuss the details of the fire with the state forestry official. These details usually include the fire location, size of the fire, land ownership information, description of the forest and fuel conditions, goal of the fire, and the desired weather conditions for the burn. Eshee, *supra* note 50, at 127. The state forestry official will evaluate the prescribed fire plan and may approve the plan, suggest modifications, or deny the issuance of a fire permit. See Haines & Cleaves, *supra* note 42, at 171–72.

156. Cleaves & Haines, *supra* note 41, at 173. A notable exception to the certification requirement is Georgia which merely requires that the burn supervisor have previous burning experience. GA. CODE ANN. § 12-6-148 (2000); Cleaves & Haines, *supra* note 41, at 173. State regulations and guidelines further limit when and how prescribed fire may be used. These regulations typically include planning regulations, scheduling requirements, burn parameter guidelines, and safety precautions. Haines & Cleaves, *supra* note 42, at 171–72. These regulations and guidelines are typically created in conjunction with prescribed fire liability statutes. Sun, *supra* note 82, at 396.

157. Eshee, *supra* note 50, at 130; Sun, *supra* note 82, at 395.

158. 108 So. 186, 187–88 (Fla. 1926).

159. *Id.* at 188.

160. *Id.* at 187.

161. *Id.* at 187–88; see also *Weis-Patterson Lumber Co. v. King*, 177 So. 313, 320 (Fla. 1937) (stating three situations in which an individual may be held liable for fire spreading to the property of another: in the negligent origin of the fire, negligent control of the fire, and, under some

Anyone using fire was therefore required to “manage and attend it with reasonable prudence and ordinary care appropriate to the circumstances.”¹⁶² The duty standards laid down by *Cobb* are probably still applicable and would apply in a case where the defendant was not a certified burn manager and therefore could not take advantage of the prescribed fire statutes.¹⁶³

Florida courts had few occasions to discuss prescribed liability in the years following *Cobb*. In 1990, the Florida Supreme Court ruled on a case concerning a vehicle accident allegedly caused by smoke from a prescribed fire. In *Midyette v. Madison*, the court addressed the liability of a landowner who hired a contractor to burn his property.¹⁶⁴ The supreme court held that because prescribed fire and its accompanying smoke is inherently dangerous, the principal remains vicariously liable for the contractor's acts of negligence.¹⁶⁵ Despite the fact that the court declared that its decision would not “undermine the responsible use of fire,”¹⁶⁶ the *Midyette* decision surely discouraged landowners from contracting prescribed fire operations and therefore would have decreased the use of prescribed fire as a land management tool. This was particularly true for private, nonindustrial forest owners who relied on private contractors to conduct prescribed fires on their property.¹⁶⁷ During this time, many contractors were ceasing prescribed fire services for fear of liability and increasing insurance costs.¹⁶⁸

Although not directly responsible for the subsequent legislation, *Midyette* did instill fear in the land management community that prescribed fire was in danger of disappearing as a land management option.¹⁶⁹ Florida fire practitioners recognized that they needed legal protection to ensure that

circumstances, failing to extinguish the fire); *Bush v. City of Dania*, 121 So. 2d 169, 171 (Fla. 2d Dist. Ct. App. 1960). Governmental entities, however, have no duty to warn the public about the danger of smoke from an improperly suppressed forest fire. See Gerald T. Wetherington & Donald I. Pollock, *Tort Suits against Governmental Entities in Florida*, 44 U. FLA. L. REV. 1, 56 (1992).

162. 108 So. 186, 188 (Fla. 1926).

163. See Fla. Dep't of Agric. & Consumer Servs. v. United States, No. 4:09-cv-386/RS-MD, 2010 WL 3469353, at *4 (N.D. Fla. Aug. 30, 2010). This federal case involved a prescribed fire initiated by the U.S. Forest Service on the Osceola National Forest in Florida which escaped and damaged thousands of acres of forest. *Id.* at *1. The Forest Service employee in charge of the burn was not a certified burner and could therefore not take advantage of Florida's prescribed fire statute. Plaintiff's Motion for Final Summary Judgment and Supporting Memorandum of Law at 9, Fla. Dep't of Agric. & Consumer Servs. v. United States, 2010 WL 3469353 (N.D. Fla. 2010) (No. 4:09-cv-386/RS-MD), 2010 WL 2842116. The federal district court stated that the ordinary care standard set forth in *Cobb* would apply in determining liability. 2010 WL 3469353, at *4.

164. 559 So. 2d 1126, 1127 (Fla. 1990).

165. *Id.* at 1128.

166. *Id.*

167. Cleaves & Haines, *supra* note 41, at 180.

168. Haines & Cleaves, *supra* note 42, at 170; Cleaves & Haines, *supra* note 41, at 180.

169. Brenner & Wade, *supra* note 40, at 133.

there would be a continuing right to use prescribed fire.¹⁷⁰ Luckily for the land management community, Florida's first prescribed fire statute was enacted a few short months after the *Midyette* decision.¹⁷¹

1. Florida's First Prescribed Fire Statute

During the 1970s and 1980s, society put increasing pressure on Florida landowners concerning the use of prescribed fire.¹⁷² Nationwide there appeared to be a legal trend of strict liability for harm caused by prescribed burners.¹⁷³ Furthermore, there was concern that due to increasing environmental regulation, prescribed fire would become obsolete as a land management tool.¹⁷⁴ In the early 1990s, legislators from various states who recognized the importance of prescribed fire as a land management tool took action by statutorily defining the level of fault for prescribed fire practitioners.¹⁷⁵ These laws set forth requirements for practitioners that, if followed, set the standard for liability in prescribed fire cases as simple negligence.¹⁷⁶ The prescribed fire laws, by legally establishing that prescribed fire is beneficial to society and a right of the landowner, were extremely important to the land management community.¹⁷⁷

With groundbreaking legislation in 1990, Florida was one of the first states to enact a prescribed fire law.¹⁷⁸ The Florida Prescribed Burning Act of 1990¹⁷⁹ included extensive legislative findings that affirmed the benefits of prescribed fire for reducing wildfire risk, improving and maintaining natural communities, and its contributions to the state economy.¹⁸⁰ The

170. *Id.*

171. *Id.* at 134.

172. Steve Gatewood, *How the Florida Prescribed Burning Act was Passed*, in PROCEEDINGS OF THE ENVIRONMENTAL REGULATION & PRESCRIBED FIRE CONFERENCE: LEGAL AND SOCIAL CHALLENGES 155, 155 (Dana C. Bryan ed., 1997).

173. Eshee, *supra* note 50, at 130.

174. Gatewood, *supra* note 172, at 155.

175. Eshee, *supra* note 50, at 130.

176. *Id.*

177. *Id.*

178. *Id.* Efforts to pass the first Florida prescribed fire law began with the Forestry Forum, which was a coalition that identified the continued use of prescribed fire as the number one issue of concern for the forestry industry. In 1989, the Forestry Forum began efforts to pass a prescribed fire law. The Nature Conservancy, Florida Division of Forestry, and Florida Forestry Association joined the effort which was successful and Florida's first prescribed fire law became effective on October 1, 1990. Gatewood, *supra* note 172, at 155; Sun, *supra* note 82, at 395; *see also* Brenner & Wade, *supra* note 40, at 133–34 (discussing the creation of the 1990 prescribed fire act).

179. FLA. STAT. § 590.026 (1990), *repealed by* 1999 Fla. Sess. Law Serv. Ch. 99-292 (West). Florida's current prescribed fire law is found at FLA. STAT. § 590.125 (2005) (effective June 8, 1999).

180. § 590.026(2)(a). *See* Sun, *supra* note 82, at 395 (discussing the importance and general characteristics of Florida's first prescribed fire law); Brenner & Wade, *supra* note 40, at 133–34; Yoder et al., *supra* note 89, at 230.

stated purpose of the act was “to authorize and promote the continued use of prescribed burning for ecological, silvicultural, wildlife management, and range management purposes.”¹⁸¹ Most significantly, the act established that a property owner or their agent who follows the burn requirements of the act will not be liable for damage or injury unless negligence is proven.¹⁸²

The requirements were rather simple and straightforward.¹⁸³ The two main requirements were that a certified prescribed burn manager be on the site while the burn was being conducted, and that a written prescription be completed before the Division authorized the fire.¹⁸⁴ The two remaining requirements were not actually requirements but rather established that prescribed fire was in the public interest, did not constitute a nuisance, and was a property right when used to reduce naturally occurring vegetation.¹⁸⁵

2. The 1999 Statutory Amendment

The summer of 1998 brought one of the worst droughts to Florida since the 1950s.¹⁸⁶ The drought resulted in severe wildfires which consumed approximately a half-million acres.¹⁸⁷ Fire suppression costs exceeded \$130 million and required the support of more than 10,000 firefighters and

181. § 590.026(2)(b).

182. The statute stated:

(a) Prescribed burning conducted under the provisions of this section shall:

1. Be accomplished only when at least one certified prescribed burn manager is present on site while the burn is being conducted.
2. Require that a written prescription be prepared prior to receiving authorization to burn from the Division of Forestry.
3. Be considered in the public interest and shall not constitute a public or private nuisance when conducted pursuant to state air pollution statutes and rules applicable to prescribed burning.
4. Be considered a property right of the property owner if naturally occurring vegetative fuels are used and when conducted pursuant to the requirements of this subsection.

(b) No property owner or his agent, conducting a prescribed burn pursuant to the requirements of this subsection, shall be liable for damage or injury caused by fire or resulting smoke, unless negligence is proven.

§ 590.026(5).

183. Because § 590.026 was repealed and replaced by § 590.125, the details regarding the requirements for taking advantage of the statutorily defined liability standard are discussed more completely in the portion of the note concerning § 590.125. *See infra* Part III.

184. § 590.026(5)(a)1-2.

185. § 590.026(5)(a)3-4.

186. Brenner & Wade, *supra* note 40, at 134. *See* Sun, *supra* note 82, at 393 (discussing the severe Florida fire season and its subsequent effects on the law).

187. Fla. H.R. Comm. On Agric., CS/HB 1535 (1999) Final Analysis 1 (June 15, 1999) [hereinafter Agriculture Committee Analysis].

emergency personnel from forty-seven states.¹⁸⁸ One of the key reasons for the severity of the wildfires was the unnaturally large accumulation of vegetative debris in Florida forests.¹⁸⁹

In early 1999, a group of public and private land managers met to discuss obstacles to treating more acreage with prescribed fire.¹⁹⁰ This group identified the top reasons why private landowners were hesitant to use prescribed fire and found that the top four reasons all involved concern about potential liability.¹⁹¹ With the results of this meeting and weather predictions showing an extended forecast for continued drought, the Florida legislature amended the 1990 Prescribed Burning Act.¹⁹²

The most significant change to the prescribed fire law was the change in liability standard from negligence to gross negligence.¹⁹³ Therefore, a property owner or their agent who conducts a certified prescribed fire will not be liable for any harm unless gross negligence is proven.¹⁹⁴

The statute lists seven requirements for a certified prescribed fire, and therefore seven requirements in order to take advantage of the gross negligence liability standard. First, there must be a certified prescribed burn manager on site from ignition to completion with a copy of the fire prescription.¹⁹⁵ Second, a written prescription must be prepared before

188. *Id.*

189. Brenner & Wade, *supra* note 40, at 134.

190. *Id.*

191. *Id.*

192. *Id.* Technically, the new legislation actually repealed the previous laws and combined and reorganized the laws pertaining to prescribed fire in § 590.125. Agriculture Committee Analysis, *supra* note 187, at 1, 9. The statute is made up of the following sub sections:

§ 590.125(1)—Definitions of prescribed burning, certified prescribed burn manager, prescription, and extinguished.

§ 590.125(2)—Regulations concerning noncertified burning

§ 590.125(3)—Regulations concerning certified burning and the legislature's findings and purpose.

§ 590.125(4)—Authority for the Division to conduct hazardous fuel reduction treatment.

§ 590.125(5)—Requirement of the Department of Education to incorporate prescribed fire issues into educational materials.

193. Agriculture Committee Analysis, *supra* note 187, at 1, 4. The initial bill language included a \$100,000 damage cap for certified prescribed burns that were found to be negligent. This damage cap was removed and now someone who conducts a certified prescribed burn can only be found liable if gross negligence is proven. *Id.* at 13, 14.

194. *Id.* at 8.

195. § 590.125(3)(b)1. There are a couple of different options for becoming a certified prescribed burn manager, all of which require a training course, hands-on experience, and the completion and review of an actual prescribed fire. FLA. ADMIN. CODE ANN. r. 5I-2.006(2)(c)(1)-(3) (2008). There is a continuing education or experience requirement for maintaining certification. FLA. ADMIN. CODE ANN. r. 5I-2.006(2)(d)(1)-(4) (2008). Some prescribed fire practitioners have found the statutory requirement for certification too stringent and have abandoned using prescribed

receiving authorization to burn.¹⁹⁶ Third, specific consent of the landowner to conduct the burn is required.¹⁹⁷ Fourth, authorization to burn from the Division is required.¹⁹⁸ Fifth, there must be “adequate firebreaks at the burn site and sufficient personnel and firefighting equipment for the control of the fire.”¹⁹⁹ The last two “requirements,” like the 1990 act, merely establish that prescribed fire is in the public interest and a property right of the landowner.²⁰⁰

As can be seen, the requirements for taking advantage of the gross negligence liability standard are quite stringent. The individual conducting the burn must first be certified, which requires significant training, experience, and testing. The prescribed fire supervisor must create a written prescription which will be discussed with the Division before authorization will be given. All of these requirements are designed to ensure that the supervisor has proper training and experience, has carefully planned the fire, and that the plan has been reviewed by experts with the Division. The “adequate firebreaks and sufficient personnel”²⁰¹ provision, however, only adds confusion to the requirements. Although the Division believes the amended prescribed fire law removes any concern of liability held by landowners,²⁰² that is not the case.

B. National and Regional Prescribed Fire Liability Trends

In 1990 Florida was the first Southern state to enact a prescribed fire law that limited civil liability.²⁰³ Other states have used Florida's law as guidance for crafting their own laws.²⁰⁴ Within a couple of years of Florida's law, Georgia, Mississippi, Louisiana, South Carolina, and Alabama all passed similar laws.²⁰⁵ Georgia also followed Florida's lead in

fire. Others, however, have decided to continue to burn without becoming certified. This is still allowed, FLA. STAT. § 590.125(2), but the burner will not be able to take advantage of the statutorily defined liability standard if the fire causes harm. Brenner & Wade, *supra* note 40, at 134; *see also id.* at 135–36 (describing the options for becoming a Florida certified prescribed burn manager).

196. § 590.125(3)(b)2. The written prescription is required at a minimum to include nine items including a forest description, map, desired weather factors (which must additionally cover at least eight specific factors), and desired fire behavior among others. Also required is the number of personnel and the type of equipment that will be used on the burn. FLA. ADMIN. CODE ANN. r. 5I-2.006(2)(a) (2008).

197. § 590.125(3)(b)3.

198. § 590.125(3)(b)4.

199. § 590.125(3)(b)5. What this exact requirement means, however, is unclear.

200. § 590.125(3)(b)6-7.

201. § 590.125(3)(b)5

202. Brenner & Wade, *supra* note 40, at 135.

203. Cleaves & Haines, *supra* note 41, at 173.

204. Sun, *supra* note 82, at 393; *see* Wade et al., *supra* note 2, at 233 (advocating the use of Florida's prescribed fire law as guidance for other states).

205. Haines & Cleaves, *supra* note 42, at 173; Cleaves & Haines, *supra* note 41, at 173; *see* GA. CODE ANN. § 12-6-148 (West, enacted in 1992); MISS. CODE ANN. § 49-19-307 (West, enacted

amending its prescribed fire law in 2000 to establish a gross negligence standard.²⁰⁶

A 2005 study analyzed the prescribed fire liability rules for all the states and divided states into four liability categories: strict liability, uncertain liability, simple negligence, and gross liability.²⁰⁷ Six states were identified as having strict liability prescribed fire laws.²⁰⁸ Eighteen states, including the majority of the Southern states, had prescribed fire laws where proof of simple negligence is required before there can be a finding of civil liability.²⁰⁹ In twenty-two states, the liability from a prescribed fire that causes harm was uncertain.²¹⁰

Despite Florida's status as a leader in prescribed fire legislation, it was not the first state to adopt the gross negligence standard for prescribed fire.²¹¹ Nevada adopted the gross negligence standard in 1993, but it only applies to the Nevada government and its employees.²¹² In 2005, Michigan changed its negligence standard to gross negligence.²¹³ Therefore, there are currently four states—Florida, Georgia, Nevada, and Michigan—which have adopted a gross negligence standard for prescribed fire in some context.²¹⁴

Of the Southern states' statutes, Georgia is probably the friendliest to prescribed fire practitioners.²¹⁵ Not only has Georgia adopted a gross negligence standard, but compared to other states, Georgia has few

in 1993); LA. REV. STAT. ANN. § 3:17 (West, enacted in 1993); S.C. CODE ANN. § 48-34-40 (West, enacted in 1994); ALA. CODE § 9-13-273 (West, enacted in 1995).

206. GA. CODE ANN. § 12-6-148 (West, enacted in 1992); *see* Sun, *supra* note 82, at 395 (discussing Georgia's adoption of the gross negligence standard).

207. Sun, *supra* note 82, at 394–96.

208. These states include Delaware, Hawaii, Minnesota, Pennsylvania, Rhode Island, and Wisconsin. *Id.* at 394.

209. *Id.* at 395, 401. The majority of the states that have adopted a negligence or gross negligence standard are in the South and East. The demand for prescribed fire liability statutes is probably greater in the Southern states due to the large number of private forest landowners. *Id.* at 400.

210. *Id.* at 394. Tennessee was the only Southern state identified as having uncertain liability rules. *See id.*

211. *Id.* at 395.

212. NEV. REV. STAT. ANN. § 527.126 (West, enacted in 1993); Sun, *supra* note 82, at 395.

213. MICH. COMP. LAWS ANN. § 324.51503b (West, enacted in 2005); Sun, *supra* note 82, at 395.

214. Wade et al., *supra* note 2, at 236; Sun, *supra* note 82, at 394–95.

215. Georgia, however, is not without its own prescribed fire issues. In 1989, after an escaped fire smoked in an interstate, a bill was introduced to ban all open burning. This bill was defeated and Georgia subsequently passed its prescribed fire statute based on Florida's. More recently, Georgia has banned prescribed fire during the summer months in certain counties in an effort to improve air quality. Georgia chose to ban prescribed fire despite the fact that prescribed fires contribute less than one-tenth of one percent to the total amount of greenhouse gases produced in Georgia. *Id.* at 238–39.

requirements.²¹⁶ Someone with previous burning experience must be in charge of the fire, be on site until “the fire is adequately confined to reasonably prevent escape,” and have received a burn permit from the state.²¹⁷ Furthermore, Georgia’s statute is one of the few that have been tested in court.²¹⁸ A Georgia appellate court construed Georgia’s statute liberally in favor of the prescribed burner and reversed the trial court’s denial of the burner’s motion for summary judgment.²¹⁹

Florida, unlike Georgia, has extensive statutory requirements for taking advantage of its prescribed fire statute. Compared to other Southern states, Florida has more requirements than many, if not all, of the other states. Table 1 shows a comparison between the prescribed fire requirements of Florida and the surrounding states. As can be seen, Florida is the only state with the additional requirement of “adequate firebreaks and personnel.”²²⁰ This additional requirement is duplicative and only adds confusion to the law.

The requirement is duplicative because other requirements already indirectly concern firebreaks and personnel. A prescribed burn manager is required to develop a written prescription for a prescribed fire. This prescription will include a description of the predicted fire behavior, how the fire will be ignited and controlled, and what personnel and equipment will be available.²²¹ The plan will be reviewed and approved by the Division before a burn permit will be issued.²²² Therefore, firebreaks and personnel are already covered by other requirements of the prescribed fire law. The statute could be made much more effective in its goal of encouraging prescribed fire use by deleting the specific requirement for “adequate firebreaks and sufficient personnel.” The law should instead allow the Division to make a determination of whether or not the firebreaks and personnel are adequate on a case by case basis at the time that the burn

216. GA. CODE ANN. § 12-6-148 (West, enacted in 1992).

217. *Id.*

218. *See Morgan v. Horton et al.*, 707 S.E.2d 144 (Ga. Ct. App. 2011), cert. denied (June 27, 2011).

219. In ruling for the prescribed burner, the court held that the burner was entitled to the protections of the prescribed fire statute even though the landowner who received the permit had no experience with prescribed fire. The court found that by having a state forestry official on site making the critical decisions, an individual with prescribed fire experience was “in charge” of the fire for purposes of the statute. Furthermore, the court defined gross negligence as “the failure to exercise that degree of care that every man of common sense, however inattentive he may be, exercises under the same or similar circumstances; or lack of the diligence that even careless men are accustomed to exercise,” and found that there was no evidence from which a jury could conclude that the landowner failed to exercise slight diligence. *Id.* at 149, 150, 154.

220. § 590.125(3)(b)5.

221. FLA. ADMIN. CODE ANN. r. 5I-2.006(2)(a) (2008).

222. FLA. ADMIN. CODE ANN. r. 5I-2.006(1)-(2)(a)(8)-(9) (2008).

permit is issued.²²³

Table 1: Comparison of prescribed fire statute requirements.²²⁴

	Ala.	Fla.	Ga.	La.	Miss.	N.C.	S.C.
Written prescription	X	X			X	X	X
Certified Burn Manager on site	X	X		X	X	X	X
Experienced or trained burner on site			X				
Burn permit	X	X	X	X	X	X	X
Specific consent of the landowner		X					
Adequate firebreaks and personnel		X					

CONCLUSION

Fire can be either a dangerous servant or a fearful master. Floridians must ensure that those few individuals who choose to harness fire’s power will be protected in the event that an unpredictable accident occurs. By protecting practitioners from liability, more prescribed fire operations will be conducted and the overall wildfire risk will decrease.

Currently, fire practitioners who want to take advantage of statutory protection are required to complete rigorous training and gain hands-on experience before being certified. In setting out fire, those practitioners must develop detailed plans that cover numerous weather and fire behavior factors. Experts with the Florida Division of Forestry must then approve these plans before a practitioner can receive authorization to burn. The required training, experience, preignition planning, and Division oversight

223. See Wade et al., *supra* note 2, at 242 (advocating for prescribed fire laws that are general and allow the state forestry agencies to develop the more detailed rules).

224. ALA. CODE § 9-13-273 (1995); FLA. STAT. § 590.125 (2005); GA. CODE ANN. § 12-6-148 (West, enacted in 1992); LA. REV. STAT. ANN. § 3:17 (2010); MISS. CODE ANN. § 49-19-307 (1993); N.C. GEN. STAT. ANN. § 113-60.43 (West, enacted in 1992); S.C. CODE ANN. § 48-34-40 (West, enacted in 1994).

are sufficient to ensure that fire will be used in a responsible manner as safely as possible.

Florida has more requirements for taking advantage of statutorily defined liability protection than any of the other neighboring states. It is also the only state to require “adequate firebreaks and sufficient personnel.” This requirement is duplicative because the adequacy of firebreaks and personnel is considered by the required fire plan and will be reviewed by the Division before a burn permit is issued.

The “adequate firebreaks and sufficient personnel” requirement only adds confusion to the statutory requirements. Fire practitioners are afraid that any accident will be per se proof that the requirement was not met. Even the Florida Office of Agricultural Law Enforcement, despite determining that the fire escape associated with the I-4 disaster was caused by an unpredictable change in weather, was unable to determine if the “adequate firebreaks and sufficient personnel” requirement was met.²²⁵

Fire practitioners provide a valuable service to Florida. Floridians, through their legislative representatives, must amend the current prescribed fire law. The “adequate firebreaks and sufficient personnel” provision is unnecessary and must be deleted. If it is not deleted it should at least be amended so that it is clear that adequacy is determined based on preignition predicted weather conditions and fire behavior. By clarifying the prescribed fire statute, Floridians will encourage practitioners to burn more which will result in decreased wildfire risk and increased ecosystem health.

225. See *supra* notes 35–38, 49 and accompanying text.