

Building Prescribed Fire Capacity in NM:

Response to New Mexico Rx Fire Council

Submitted by Don Kearney

April 2013

Problem: Prescribed fire is used by both private and government organizations to achieve their land management goals. While not without some problems, the sharing of fire resources is common between government agencies. In the private sector there are often shortfalls with concerns of the knowledge, labor, and equipment needed to implement a successful prescribed fire.

Task: Explore options to build prescribed fire capacity in New Mexico especially within the private sector.

- Look at current NM State laws concerning prescribed fire
- Look how other states have built capacity and regulate prescribed fire on Private lands
- Explore liability issues
- How to validate experience/training in the private sector

Intro: Arguably the two biggest obstacles to building prescribed fire capacity are the fear of liability and lack of funding. In the private sector most landowners do not have the labor, equipment and expertise necessary to conduct prescribed burns in a safe and effective manner. Natural resource agencies have limited resources and mandates available to assist landowners in planning and implementing prescribed burns. Most of the states contacted for this exercise face the same problems but have far less public land than in New Mexico. They have been successful at the local, state, and regional levels when focused on the needs and protection of the private landowner/burner. This document will attempt to frame the current situation in New Mexico and offer potential avenues that are working in other areas that could be adapted here.

Current NM State law: State law allows prescribed fire but there is little language specific to the practice. The New Mexico State Forestry is the arm of state government that interfaces with private land owners concerning fire and forestry issues. The policy and purpose law reads;

“N.M. Stat. Ann. § 68-2-24 (Michie 1998) sets forth public policy on forest management principles to be used in New Mexico. The statute recognizes that forests in New Mexico provide various benefits such as young tree growth, wood products, jobs, grazing areas, good

quality water and wildlife habitats. The statute then declares that it is the public policy of New Mexico to adopt forest practices that maintain and enhance such benefits. Such practices include silviculture planning, fire prevention, *and controlled burning* to remove trees and ensure regeneration of commercial tree species.”

The NM State Forestry is also tasked to use fire prevention and suppression techniques to minimize resources damage on state and private lands. While the NM State Forestry provides information and technical assistance to the private sector and units of local government (volunteer fire departments) concerning prescribed fire it does not actively participate in private land burns.

Liability: The fear of liability is an overriding concern among both private landowners and government agencies. The use of fire as a management tool is inherently dangerous and may impose risk upon others. Escaped fires can damage neighboring properties and in extreme cases take life. Smoke released from fires may also cause health and safety issues. For many private landowners, the possibility of getting sued and potential litigation costs have been the main worry in considering prescribed fire. The liability issue related to prescribe fires falls into the category of tort law. A tort is a civil wrong which is the result of some types of socially unreasonable and unacceptable behavior. New Mexico does not have specific statutes about prescribed fires and its liability. Because of this, the liability burden on private land prescribed fire practitioners in New Mexico is usually between the strict liability rule and simple negligence.

Strict liability is liability without fault. It holds a prescribed burner liable for actions even if they were entirely unintentional and not negligent. Under strict liability, if the prescribed fire causes an injury or damage the burner who engaged in the activity will always be held liable regardless of precautionary measures. Simple negligence rule permits the prescribed burner the defense that the damage occurred in spite of the fact that the he took all the applicable measures to prevent the escape. A rule of negligence requires the victim to prove harm and fault. Negligence, is defined as “carelessness or the lack of the exercise of due care toward others or their property.” The standard for measuring whether or not a person is simply negligent is the reasonable prudent person. Under the simple negligence rule there is the possibility to reduce or even avoid the liability.

A New Mexico state statute that places prescribed fire under the simple negligence rule would benefit the burning community. Several states have enacted statutory reforms related to prescribe burning. The State of Florida has been a leader in prescribed fire legislation. Florida law protects the landowner’s right to use fire as a management tool. Under the Prescribed Burning Act, a landowner or burner is not civilly liable for damages unless simple negligence in using prescribed fire is found. This Act was later modified so that a landowner or burner cannot be found civilly liable unless a court demonstrates that the burner was “grossly negligent”. The "gross negligence" condition provides substantially more protection to landowners and certified burners than under previous law. To allow this liability protection, the Florida

Administrative Code was also revised and burners must be certified and comply with an additional set of conditions and rules. Conditions that must be followed for all prescribed fires in Florida (according to FS 590.125) are:

1. Be authorized by the local Department of Forestry (DOF) office or its designated agent before the fire is ignited. The permit must be in writing if the burn area is within an area of severe drought emergency (FS 590.081).
2. Have adequate fire breaks around the planned burn area, and sufficient personnel and firefighting equipment for controlling the fire must be on site.
3. Remain within the boundary of the authorized area.
4. Have someone present at the burn site until the fire is extinguished (which is defined as no spreading flame).
5. Have the specific consent of the landowner or his or her designee. The DOF issues a burning authorization or permit once they determine that air quality and fire danger are favorable for safe burning. The DOF can cancel authorizations if those conditions change. Burning in a manner that violates any of the requirements is a second-degree misdemeanor.

To be eligible for protection of the “gross negligent condition”, certified prescribed fires have additional requirements (FS 590.125,). They are:

1. A written prescription must be prepared before a burning authorization is received from the DOF.
2. A certified prescribed burn manager must be on site with a copy of the written prescription from ignition of the burn to its completion.

To become a “certified prescribed burn manager” an individual must satisfactorily complete the DOF certification program. This program can be completed as a correspondence course or through a one week classroom training course. The candidate must additionally have direct experience managing or helping conduct at least three prescribed burns to become certified. Recertification is every five years. Certification renewal requires a minimum eight hours of approved training or participation in approved Fire Council meetings and use of the certified burner's number on at least two burns or documented participation in five burns. Additional rules about the Florida certification and prescribed burning rules can be found in (FAC 51-2.006)

There are also statutes in the Florida Administrative Code (Chapter 51-2, F.A.C.) concerning the use of prescribed fire. Many of these are similar to New Mexico’s smoke management rules in regards to ignition times, pile location, visibility and smoke in sensitive areas. Setting standards and conditions is an avenue other states have taken to encourage safe responsible burning and reduce private burners liability risk. Validating experience/training in the private sector is an open topic in most states. Some like Florida have developed a system. Most states are still looking at ways to bridge the gap between the NWCG community and the private landowner prescribed fire practitioner. Florida’s system which categorizes burns seems like a good example to follow. Private landowners who become certified get the increased liability

protection. The system however, still allows for non-certified burning. Whatever process New Mexico decides to adopt, it should guard against over regulation. The point is to educate in order to qualify for reduced liability/insurance - not restrict burning. NWCG standards such as for a prescribed fire burn boss 2 (RXB2) would be too time consuming and expensive for most private burners to achieve. The US Fish and Wildlife Service has a RXB3 qualification that could be a better fit for private land burners. The pesticide applicator program as administered by the NM Department of Agriculture might provide an instate template for how training and certification could be managed. There is one overall test covering the basics that everyone takes for a NM pesticide applicator license. Then individual tests specific to the type of application an individual needs to perform are taken (e.g., agricultural, aquatic, rangeland, rodenticide). One general prescribed fire test to educate and individual tests based on complexities (fuel types, urban interface) might work in NM to create levels of certification/competence. Any higher certification would need some level of on the ground burning experience. It would seem the NM State Forestry would be the logical organization to spearhead a NM certification process and maintain the system.

Prescribed Burn Associations: A successful method for building RX capacity and professionalism in other states has been the formation of prescribed burn associations. These associations are a partnership between landowners, government agencies, conservation groups and other interested individuals and organizations that come together with the common goal of expanding the use of prescribed burning in a specific geographic region. In New Mexico the NE portion of the state with its high percentage of private land might have the greatest potential for this type of organization. Much of NM is a patchwork of interspersed private and federal (BLM Forest Service) lands. In many cases the private lands in these areas are included within federally ignited burn blocks reducing the need for a landowner to burn on his own. Generally prescribed burn associations are set up as a tax exempt not-for-profit corporation. A board of directors manages the association affairs and annual meetings are held. Membership requirements vary association to association. Listed below is an example of one association's (Southeastern Illinois Prescribed Burn Association) member requirements:

- Landowner or a representative must be present and assist when a burn takes place on their land
- Help on at least one burn each year on someone else's property or pay a fee of \$100 so labor may be hired to take their place
- Landowners are responsible for installation of suitable firebreaks
- Attend at least one day of training in the first year of membership
- Pay annual membership dues of \$25

Some of the benefits that a member of an active prescribed burn association might receive include; guidance and assistance in preparing for burns, access to specialize prescribed burn equipment, and help on burns from experienced/trained personnel. Associations can also apply for grants and purchase liability insurance as a group. Various grants are available to non-profit burn associations through federal, state, and conservation organizations. An example of this is the Kansas Prescribed Fire Council. They were able to secure a grant by working with a regional KS-OK grazing group. The National Fish and Wildlife Foundation grant enabled them to

place two regional fire coordinators in the NRCS Lesser Prairie Chicken Initiative area in KS (western ½ of the state). With the grant money they can support the prescribed burn associations that currently exist and help organize new prescribed burn associations within the initiative area. New Mexico is also home to the Lesser Prairie Chicken.

Some burn associations purchase insurance which allows members to insure a burn through the association. The Prescribe Burn Alliance of Texas (PBAT) is an organization with similar goals as our NM Prescribe Fire Council. It serves all burn associations within the state of Texas. The PBAT pays the insurance premium for a liability policy. The policy covers every “sanctioned” prescribed burn done by a Texas burn association member in excess of \$1 million. To set up this arrangement the PBAT put together policies, standards, and procedures for conducting safe prescribed fire that were deemed acceptable by the insurance industry. To be covered under the PBAT umbrella insurance policy a member of a participating burn association prescribed fire must be sanctioned. To qualify the member must comply with PBAT standards, have a burn plan that is reviewed and approved, and filed on their website.

Building Capacity: New Mexico is different than most of the states that have established prescribed fire councils. There is a larger percentage of public land and less private forestry. Burning agricultural fields and rangeland make up the majority of private land burning. In areas where private and public lands intermix many prescribed fires are funded and executed by the government agencies. An agreement between the private landowner and the agency is signed. Generally it releases the agency from being sued by the landowner and agrees to repair or provide materials in the event of range improvement damage (e.g., fences, wells, corrals). The Wyden Act allows the federal agencies to include and/or fund projects on private lands if it benefits the public land. In those areas of NM where public and private land intermix, efforts should be made to include both in landscape burns. Areas of intermixed land status are often in or near the urban interface or rural dwellings. These areas generally rate higher in the agency processes used to prioritize burn/fire projects. The fire/fuel budgets of the federal agencies have been declining and projections are for more reductions. In some cases non-federal money helps to co-fund projects (e.g., Rocky Mountain Elk Foundation, SIKES Acts, Turkey Federation). Co-funded burns are also given higher priority. The NM Prescribed Fire Council members could serve as a conduit to encourage the inclusion of private land into public land burns where the opportunity exists. This works on a local level where agency fire folks are engaged with the community.

Establishing an agreement that allowed agency equipment and personnel to work on private land prescribed fires seems unlikely in this time of reduced budgets and hypersensitivity to taking on liability. If as a state we are able to implement a set of standard operating procedures that both shows a degree of professionalism to the agencies, and is acceptable with the private landowners the chance of agency involvement on private land increases. To justify agency involvement burn objectives may need to include some resource benefit language. Smaller private land burns could be used as training exercises for agency personnel. There is some coordination on going between states (NE, KS, OK, and TX) to work towards a region-wide agreed upon set of standard burning procedures and a burn plan template for prescribed on

private land. Agreed upon regional standards might make the agencies more inclined to enter into an agreement.

Eastern New Mexico has the best potential in the state for the formation of burn associations. This area has the highest percentage of private land and there is an acceptance for the use of fire as a management tool. If there is the local interest, establishing a burn association would be a step towards building capacity. New Mexico is a large state. The NM Prescribed Fire Council can be an effective state wide advocate for prescribed fire. Ideally the best RX capacity we produce would be dispersed across the state. If successful, a burn association of private landowners at the local level could generate momentum for additional associations and increased local capacity. Establishing a prescribed fire module that could both help implement burns and also provide training would be something the NM Prescribed Fire Council might consider sponsoring. Taking an inventory of what local capacity already exists is a first step. All sections of the state have VFDs and current red carded wildland firefighters. How many of these would be able and willing to participate on local RX burns? What equipment is available?

Conclusion/Recommendations: Compared to other states New Mexico is just getting started in the realm of private land prescribed fire. Most of the southeastern states have legislation that affirms the private landowners' right to burn. These states have an active state fire council and multiple local burn associations. This put New Mexico in a good position. We can learn what has worked in there and adapt it to fit our needs. Taking an inventory of what private capacity already exists is needed. The capacities on the agency side are well known. What constitute a local area should be defined. Breaking it down along county lines might be best. Most county fire marshals are familiar with the fire organizations and backups in their areas. The New Mexico Prescribed Fire Council should continue to serve as an advocate for prescribed fire at the state level. We need to look at what are our best options to address private landowner training, capacity building, and liability concerns.

- The council should be the interface with the NM State Legislature. When the time comes we should influence/write the bill and find a legislator who will champion private land right to burn law.
- As in the Texas example, the council can be an umbrella organization in terms of liability insurance. Affordable coverage for the private landowner will only be available if the insurance industry can be put at ease on two points. Is there a large enough premium pool to be worth the risk? Is there a common and agreed on set of training, burn plan, and general RX operating procedures to be followed by each insured member. New Mexico should consider joining with the Texas and the other states that are exploring a regional approach to affordable insurance.
- Developing a statewide certification procedure is needed to ensure private landowners have the necessary knowledge to safely implement prescribed fire. It is recognized that private practitioners do not follow the same paper trail of classes and documented experience as agency NWCG standard. New Mexico should look at the regional standards being developed by the group of neighboring states.