

PRESCRIBED FIRE

State Law and Liabilities





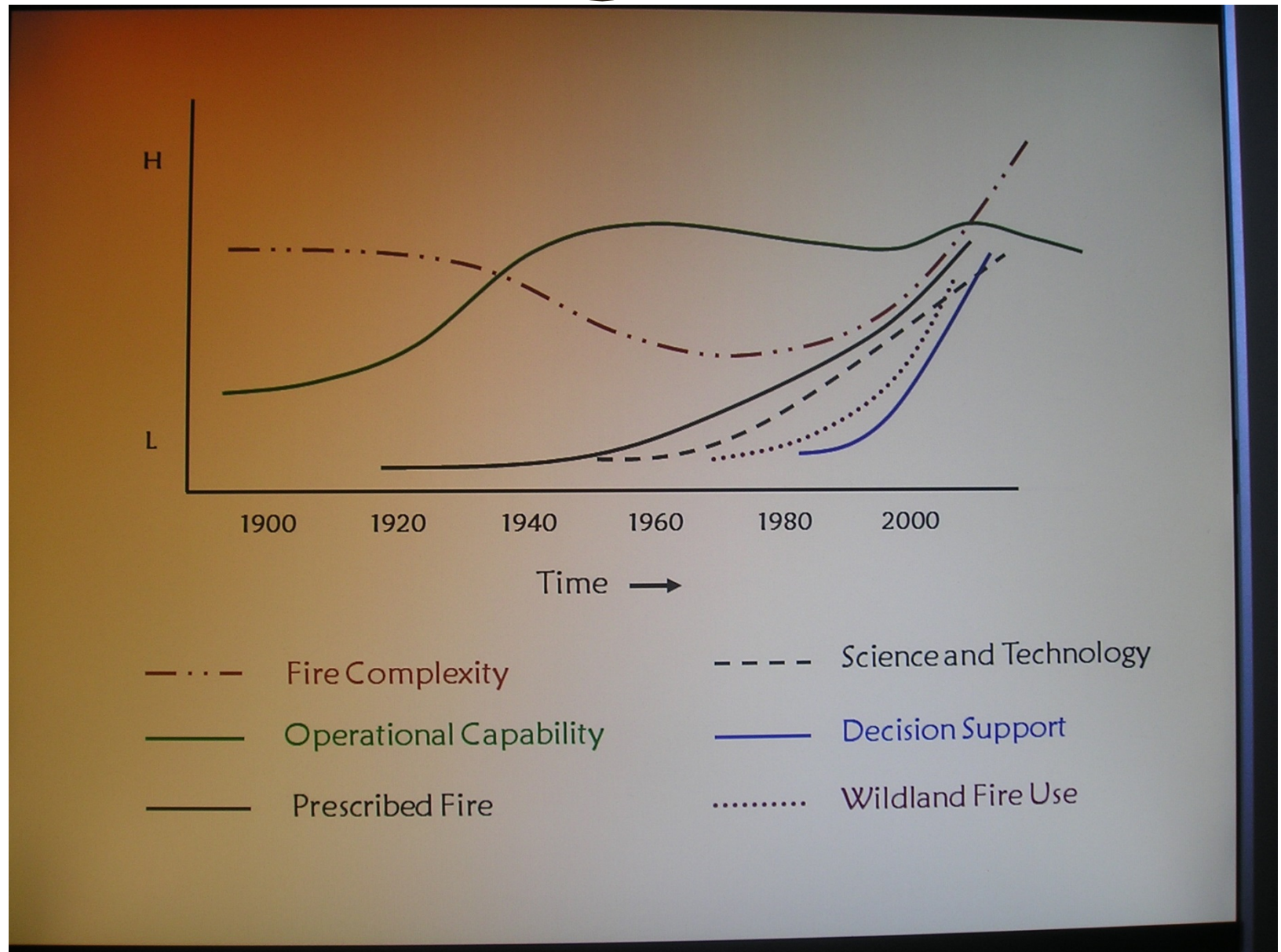
PRESCRIBED FIRE

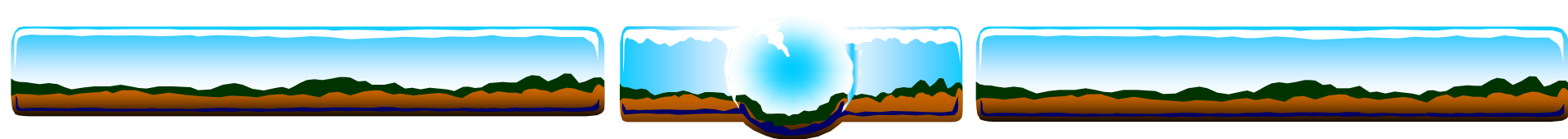
A prescribed fire is a wildland fire deliberately set by man under a pre-planned set of environmental conditions (ie. Favorable Fuels, weather and/or topography) to achieve a stated set of goals and objectives of the landowner, natural resource manager or agency.



Current NM State law:

State law allows prescribed fire but there is little language specific to the practice. 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 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.

(While Rangelands are not specifically addressed in this statute, by default we must include them as they are intermixed in many areas of the state.)

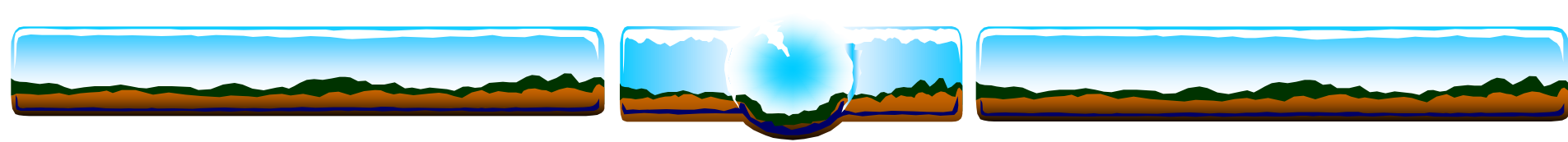


Such practices includes “ silviculture planning, fire prevention, *and controlled burning* to remove trees and ensure regeneration of commercial tree species.”



State Forestry's Current Role

- ❖ The Forestry Division supports the application of prescribed fire as an integral tool in the management of New Mexico's forest resources and the protection of life and property in the wildland/urban interface. To support wise resource management of forested lands throughout the state, the division will provide technical forest management assistance to state and private landowners in the development of land management plans, which may include recommendations for prescribed fire as an integral element of the plan.



The division may lend support, assistance and training to individual landowners and other agencies in prescribed fire as budget and personnel availability allow.



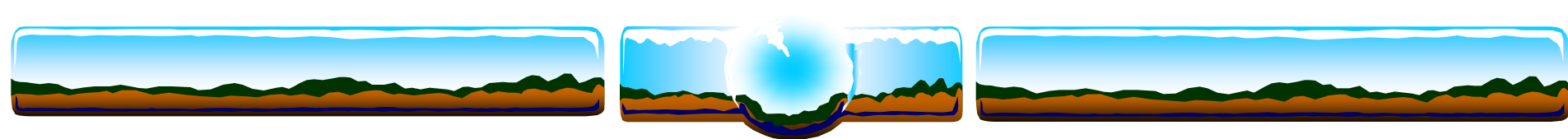
But the landowner is still the responsible party for the Prescribed burn.





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.
- ❖ Smoke released from prescribed fires may also cause health and safety issues to adjacent landowners.



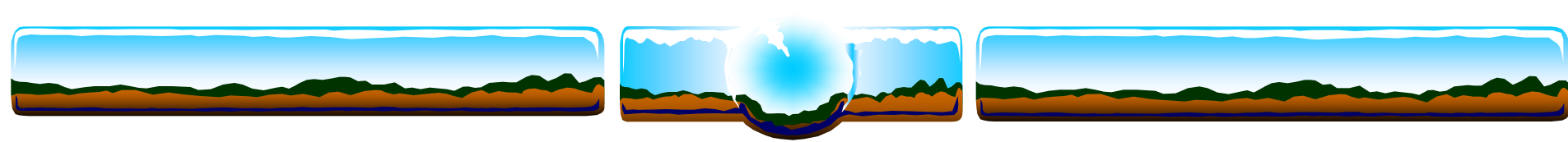
From a lawyer's perspective, legal liability is
“backward
looking” in the sense that the facts of an accident are
examined and blame is assigned based on an existing
legal framework.

From an economist's perspective, liability law
is “forward looking” in that it affects the way people
behave while undertaking risky activities

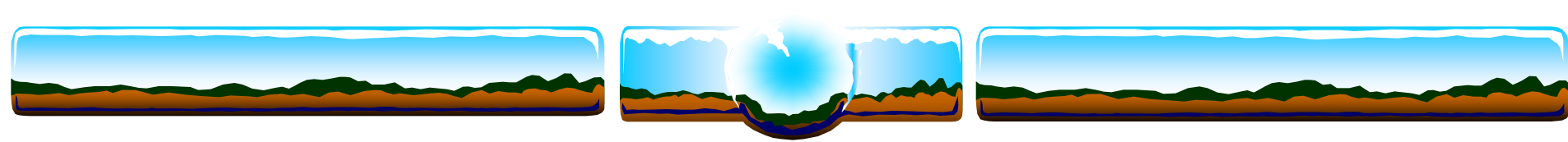


Tort Laws

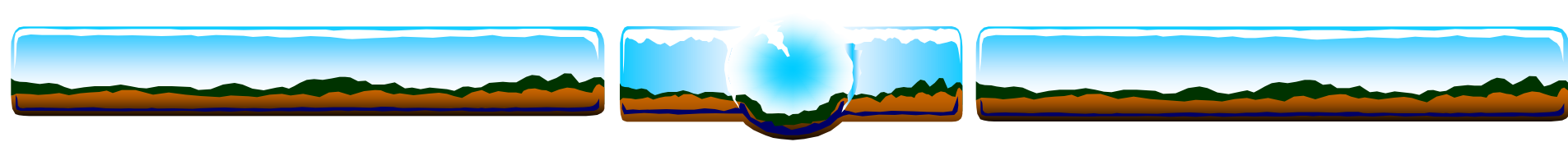
- ❖ For many private landowners, the possibility of getting sued and potential litigation costs have been the main worry in considering prescribed fire.
- ❖ The liability issue related to prescribe fires falls into the category of tort law.
- ❖ A tort is a civil wrong which is the result of some types of socially unreasonable and unacceptable behavior.



New Mexico does not have specific statutes about prescribed fires and it's 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.

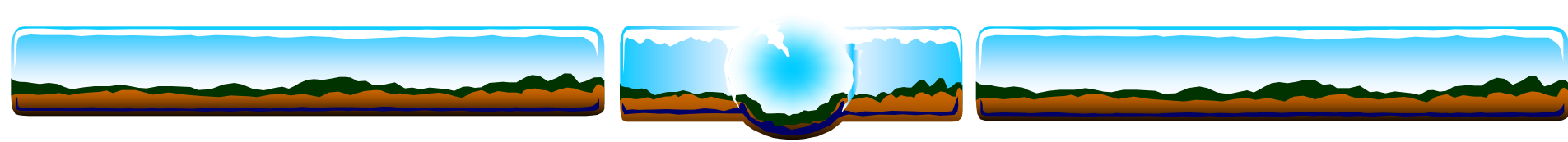


The Simple negligence rule permits the prescribed burner the defense that the damage occurred in spite of the fact that the he took all the applicable measures to prevent the escape or damaging consequences.

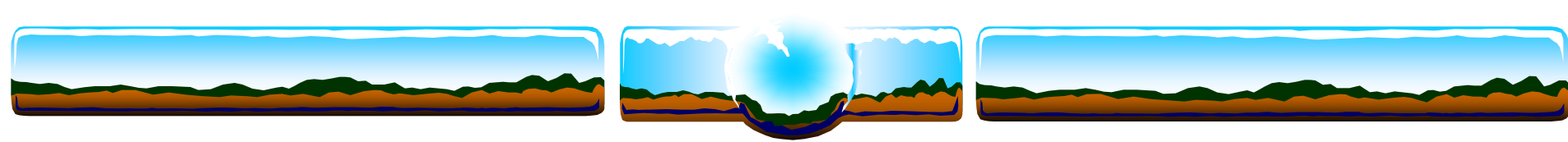


A rule of negligence requires the victim to prove harm and fault.

Negligence, is defined as
“carelessness or the lack of the exercise of due care toward others or their property.”

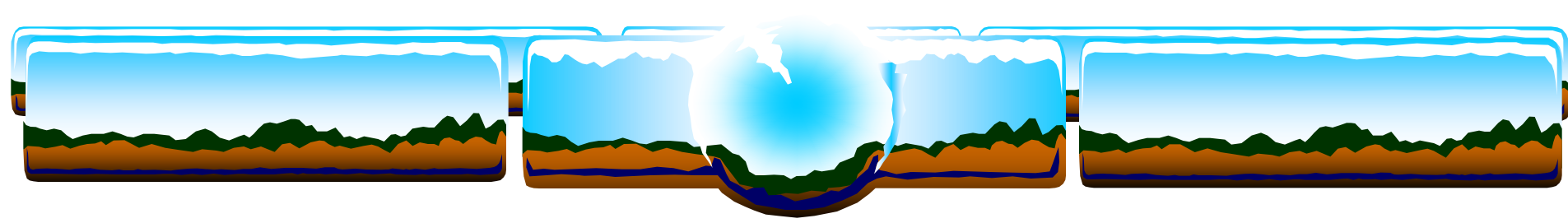


The standard for measuring whether or not a person is simply negligent is the *reasonable prudent person*. Under the simple negligence rule there is the possibility to reduce or even avoid the liability

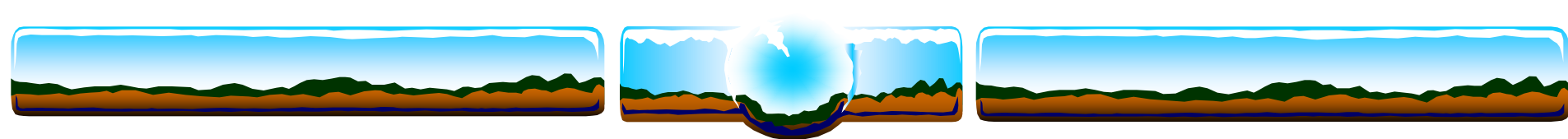


As a comparison, Gross negligence is generally defined as the failure to use even the slightest amount of care, thereby showing recklessness or willful disregard for the safety of others.

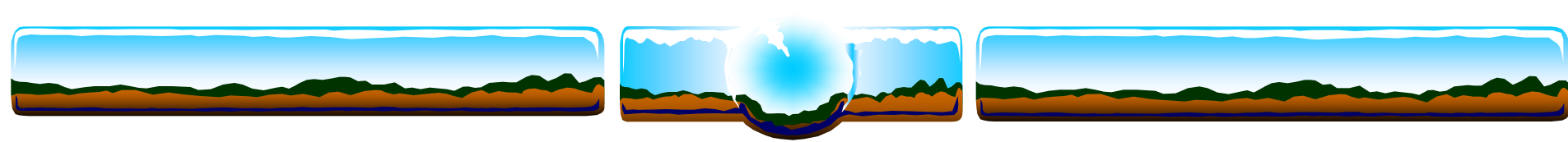
This is not in the best interest of most landowners and is simply not an option.



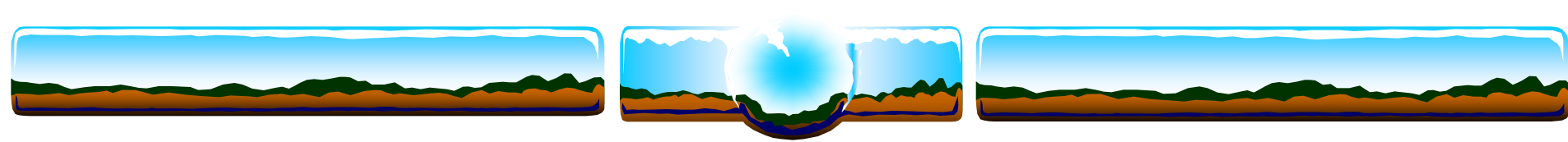
A recent example of a negligence decision is *Schmierer et al. v Weishaar et al.* (2000). A field-clearing burn, started in Washington State in 1996, escaped and burned neighboring property, apparently because calm winds unexpectedly intensified and rekindled the fire after it was thought to be extinguished. In a pretrial summary judgment, the court decided that the increase in wind was unforeseeable and found the defendant not negligent and not liable for damages. On appeal, the appellate court found, to the contrary, that the defendant should have foreseen the possibility of increased winds. The case was sent back to the lower court for trial, but was ultimately settled prior to that trial.



A strict liability case is that of *Koos v Roth*, in Oregon (1982). Oregon statutes do not explicitly impose strict liability for escaped prescribed fire, so the common-law approach would usually be to apply a negligence rule. However, based on testimony from a local fire chief that as many as one out of eight field-burning fires escape in the country, the court found field burning to be an “ultra-hazardous activity”, and therefore subject to strict liability, because even reasonable and prudent precautions cannot reduce the risk of escape to acceptable levels

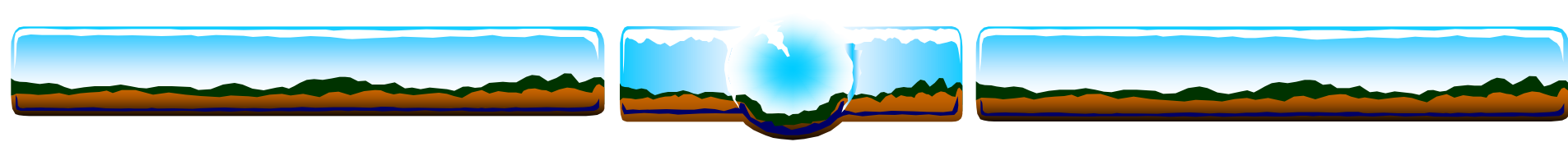


A New Mexico state statute that places prescribed fire under the simple negligence rule would benefit the use of prescribed burning within the state but would need broad legislative and executive office support to pass the Legislature.

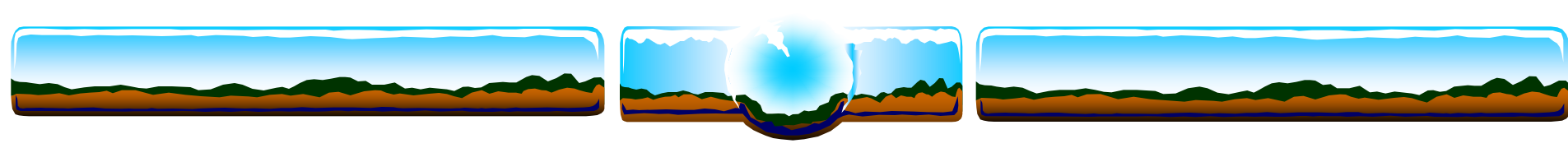


If prescribed fire provides public goods such as wildfire risk mitigation, wildlife habitat management benefits, and ecosystem restoration, liability law should

rely on negligence rules – perhaps even weaker negligence rules such as gross negligence standards rather than strict liability rules, because these rules provide less of a disincentive to use prescribed fire as a fuels management tool.



Under the Florida 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”.

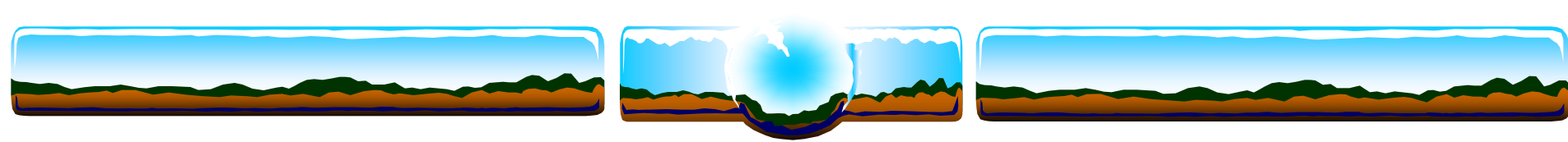


But where does this leave us in New Mexico?

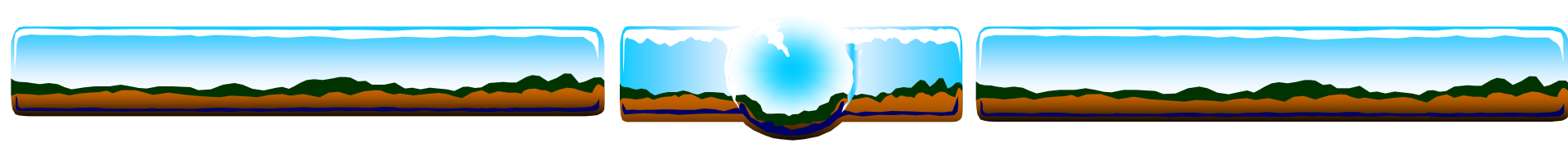


Liability Insurance

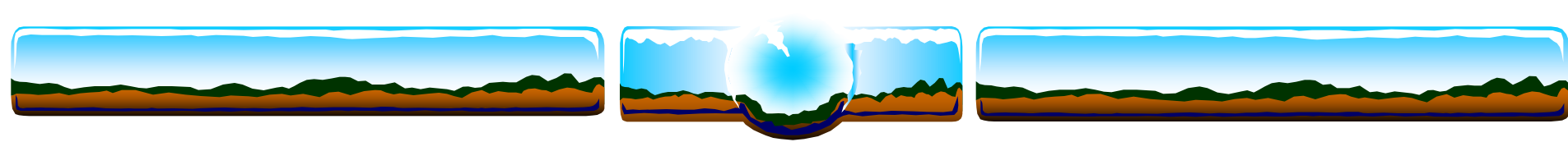




Affordable coverage for the private landowner will only be available if the insurance industry can be put at ease on two critical points.



Is there a large enough premium pool
to be worth the risk?



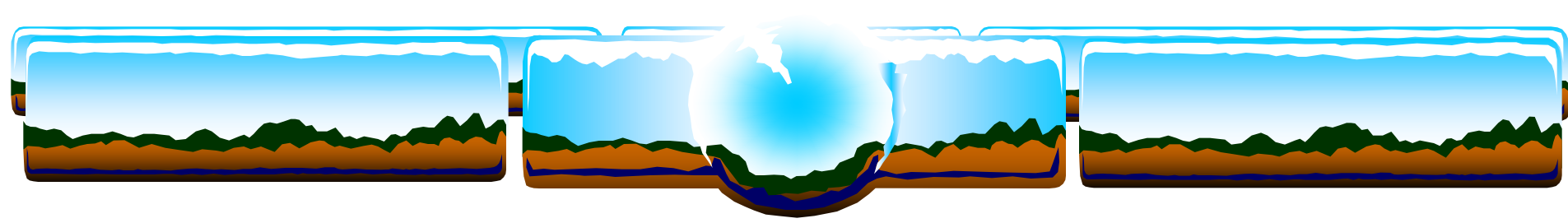
Is there a common and agreed on set of training, burn plan, and general RX operating procedures to be followed by each insured landowner.

Background Information

*Effects of Liability and Regulation on
Prescribed Fire Risk in the United States*
Jonathan Yoder

*Liability, Incentives, and Prescribed Fire for
Ecosystem Management*
Jonathan Yoder, David Engle, and Sam Fuhlendorf

*Response to New Mexico Prescribed Fire Council
Building Rx Capacity (April 2013)*
Don Kearney



Avenues for Liability Insurance

Leslie Kutz- The Bramlet Agency