Prescribed Burning Legal Issues

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Overview

The calendar indicates that the time for conducting open burns of agricultural land is approaching. In the Great Plains (and also some areas of eastern Washington and Oregon), prescribed burning of pasture grass is a critical component of rangeland management. It is an effective and affordable means of reversing and controlling the negative impacts of woody plant growth and its expansion that damages native grasslands. It can also play a role in limiting wildfire risk. But some landowners are reluctant to engage in prescribed (controlled) burns out of a concern for liability and casualty risks associated with escaped fire and smoke. While some states in the Great Plains have "burn bans," agricultural-related burns are typically not prohibited during such bans.

The legal rules, regulations and liability risks associated with prescribed burning of agricultural lands – it's the topic of today's post.

Regulations – The Kansas Approach

The states that comprise the Great Plains have regulations governing the conduct of prescribed burns. The regulations among the states have commonalities, but there are distinctions from state-to-state. In addition, in some states, open burning bans can be imposed in the interest of public safety but exempt agricultural-related burns. For purposes of this article, I will look at the Kansas regulations.

Kansas administrative regulations set forth the rules for conducting prescribed burns. *K.A.R. §28-19-645 et seq.* In general, open burning is prohibited unless an exception applies. *K.A.R. §645.* One of those exceptions is for open burning of agricultural lands that is done in accordance with the regulations. *K.A.R. §28-19-647(a)(3).* Under that exception, open burning of vegetation such as grass, woody species, crop residue, and other dry plant growth for the purpose of crop, range, pasture, wildlife or watershed management is exempt from the general prohibition on open burning. *K.A.R. §28-19-648(a).* However, a prescribed burn of agricultural land must be conducted within certain guidelines. For instance, before a burn is started the local fire control authority with jurisdiction in the area must be notified unless local government has specified that notification is not required. *K.A.R. §28-19-648(a)(1).* Also, the burn cannot create a traffic hazard. If wind conditions might result in smoke blowing toward a public roadway, notice must be given to the highway patrol, county sheriff or local traffic officials before the burn is started. *K.A.R. §28-19-648(a)(2).* Likewise, a burn cannot create a visibility safety hazard for airplanes that utilize a nearby airport. *K.A.R. §28-19-648(a)(3).* If such a problem could potentially result, notice must be given to the airport officials before the burn begins. *Id.* In all situations, the burn must be supervised until the fire is extinguished. *K.A.R. §28-19-648(a)(4).* Also, the Kansas burn regulations allow local jurisdictions to adopt more restrictive ordinance or resolutions governing prescribed burns of agricultural land. *K.A.R. §28-19-648(b).*

Kansas regulations also specify that the open burning of vegetation and wood waste, structures, or any other materials on any premises during the month of April is prohibited in the counties of Butler, Chase, Chautauqua, Cowley, Elk, Geary, Greenwood, Johnson, Lyon, Marion, Morris, Pottawatomie, Riley,

Sedgwick, Wabaunsee, and Wyandotte counties. *K.A.R. §28-19-645a(a).* This is the Flint Hills region of Kansas – some of the most abundant pasture ground in the United States. However, certain activities are allowed in these counties during April. For instance, the prescribed burning of agricultural land for the purposes of range or pasture management is allowed, as is the burning of Conservation Reserve Program (CRP) land that is conducted in accordance with the requirements for a prescribed burn of agricultural land. *K.A.R. §28-19-645a(b)(1).* Open burning during April is also allowed in these counties if it is carried out on a residential premise containing five or less dwelling units and incidental to the normal habitation of the dwelling units, unless prohibited by any local authority with jurisdiction over the premises. *K.A.R. §28-19-645a(b)(2).* Also, open burning is allowed for cooking or ceremonial purposes, on public or private lands regularly used for recreational purposes. *Id.*

Non-agricultural open burning activities must meet certain other requirements including a showing that the open burning is necessary, in the public interest and not otherwise prohibit by any local government or fire authority. *K.A.R. §28-19-647(b).* These types of open burning activities must also be conducted pursuant to an approved written request to the Kansas Department of Health and Environment that details how the burn will be conducted, the parameters of the activity, and the location of public roadways within 1,000 feet as well as occupied dwelling within that same distance. *K.A.R. §§28-19-647(d)(2)(E-F).* The open burning of heavy oils, tires and tarpaper and other heavy smoke-producing material is not permitted. *K.A.R. §28-19-647(e)(2).* A burn is not to be started at night (two hours before sunset until one hour after sunrise) and material is not to be added to a fire after two hours before sunset. A burn is not to be conducted during foggy conditions or when wind speed is less than five miles-per-hour or greater than 15 miles-per-hour. *K.A.R. §§28-19-647(e)(3-5).*

Legal Liability Principles

As noted above, Kansas regulations require that an agricultural prescribed burn is to be supervised until the fire is extinguished. But sometimes a fire will get out of control even after it is believed to be extinguished and burn an adjacent property resulting in property damage. How does the law sort out liability in such a situation?

Negligence. In general, as applied to agricultural burning activities, the law applies one of three possible principles. One principle is that of negligence and the other is that of strict liability. The negligence system is a fault system. For a person to be deemed legally negligent, certain conditions must exist. These conditions can be thought of as links in a chain. Each condition must be present before a finding of negligence can be obtained. The first condition is that of a legal duty giving rise to a standard of care. How is duty measured? To be liable for a negligent tort, the defendant's conduct must have fallen below that of a "reasonable and prudent person" under the circumstances. A reasonable and prudent person is what a jury has in mind when they measure an individual's conduct in retrospect - after the fact, when the case is in court. The conduct of a particular tortfeasor (the one causing the tort) who is not held out as a professional is compared with the mythical standard of conduct of the reasonable and prudent person in terms of judgment, knowledge, perception, experience, skill, physical, mental and emotional characteristics as well as age and sanity. For those held out as having the knowledge, skill, experience or education of a professional, the standard of care reflects those factors. For example, the standard applicable to a professional veterinarian in diagnosing or treating animals is what a reasonable and prudent veterinarian would have done under the circumstances, not what a reasonable and prudent *person* would do.

If a legal duty exists, it is necessary to determine whether the defendant's conduct fell short of the conduct of a "reasonable and prudent person (or professional) under the circumstances." This is called a breach, and is the second element of a negligent tort case.

Once a legal duty and breach of that duty are shown to exist, a causal connection (the third element) must be established between the defendant's act and (the fourth element) the plaintiff's injuries (whether to

person or property). In other words, the resulting harm to the plaintiff must have been a reasonably foreseeable result of the defendant's conduct at the time the conduct occurred. Reasonable foreseeability is the essence of causality (also known as proximate cause). For example, assume that a Kansas rancher has followed all of the rules to prepare for and conduct a prescribed pasture burn. After conducting the burn, the rancher banks the fire up and leaves it in what he thinks is a fairly safe condition before heading to the house for lunch. Over lunch, the wind picks up and spreads the fire to an adjoining tract of real estate. If the burning of the neighbor's property was not reasonably foreseeable, an action for negligence will likely not be successful. However, if the wind was at a high velocity before lunch and all adjoining property was extremely dry, it probably was foreseeable that the fire would escape and burn a neighboring landowner's tract.

Note: For a plaintiff to prevail in a negligence-type tort case, the plaintiff bears the burden of proof to *all* of the elements by a preponderance of the evidence (just over 50 percent).

Intentional interference with real property. Another legal principle that can apply in to open burning activities, is intentional interference with real property. This principle is closely related to trespass. Trespass is the unlawful or unauthorized entry upon another person's land that interferes with that person's exclusive possession or ownership of the land. At its most basic level, an intentional trespass is the intrusion on to another person's land without the owner's consent. However, many other types of physical invasions that cause injury to an owner's possessory rights abound in agriculture. These types of trespass include dynamite blasting, flooding with water or residue from oil and gas drilling operations, erection of an encroaching fence, unauthorized grazing of cattle, raising of crops and cutting timber on another's land without authorization, and prescribed agricultural burning activities, among other things.

In general, the privilege of an owner or possessor of land to utilize the land and exploit its potential natural resources is only a qualified privilege. The owner or possessor must exercise reasonable care in conducting operations on the land so as to avoid injury to the possessory rights of neighboring landowners. The owner or possessor must exercise reasonable care in conducting operations on the land so as to avoid injury to the possessory rights of neighboring landowners. For example, if a prescribed burn of a pasture results in heavy smoke passing onto an adjoining property accompanied with a long-term residual smoke odor, the party conducting the burn could be held legally responsible for damages under the theory of intentional interference with real property even if the burn was conducted in accordance with applicable state regulations. *See, e.g., Ream v. Keen, 112 Ore. App. 197, 828 P.2d 1038 (1992), aff'd, 314 Ore. 370, 838 P.2d 1073 (Ore. 1992).*

Strict liability. Some activities are deemed to be so dangerous that a showing of negligence is not required to obtain a recovery. Under a strict liability approach, the defendant is liable for injuries caused by the defendant's actions, even if the defendant was not negligent in any way or did not intend to injure the plaintiff. In general, those situations reserved for resolution under a strict liability approach involve those activities that are highly dangerous. When these activities are engaged in, the defendant must be prepared to pay for all resulting consequences, regardless of the legal fault.

Kansas liability rule for prescribed burning. A strict liability rule could apply to a prescribed burn of agricultural land if the activity were to be construed as an inherently (e.g., extremely) dangerous activity. In Kansas, however, farmers and ranchers have a right to set controlled fires on their property for agricultural purposes and will not be liable for damages resulting if the fire is set and managed with ordinary care and prudence, depending on the conditions present. *See, e.g., Koger v. Ferrin, 23 Kan. App. 2d 47, 926 P.2d 680 (Kan. Ct. App. 1996)*. In Kansas, at least at the present time, the courts have determined that there is no compelling argument for imposing strict liability on a property owner for damages resulting from a prescribed burn of agricultural land. *Id.*

Note: The liability rule applied in Texas and Oklahoma is also negligence and not strict liability. In these states, carefully following applicable prescribed burning regulations goes along way to defeating a lawsuit claiming that damages from a prescribed burn were the result of negligence.

Certainly, for prescribed burns of agricultural land in Kansas, the regulations applicable to non-agricultural burns establish a good roadmap for establishing that a burn was conducted in a non-negligent manner. Following those requirements could prove valuable in protecting against a damage liability claim if the fire gets out of control and damages adjacent property.

Conclusion

Prescribed burning of agricultural land in Kansas and elsewhere in the Great Plains is an excellent range management tool. Practiced properly the ecological and economic benefits to the landowner can be substantial. But a burn must be conducted within the framework of existing regulations with an eye toward the legal rule governing any potential liability.