

New Mexico's *NEW* Prescribed Burning Act



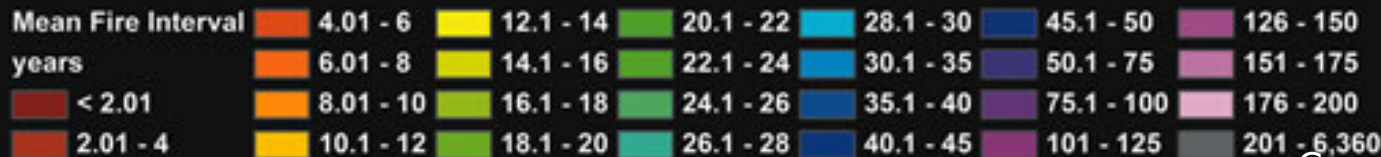
Doug Cram
Extension Forest and Fire Specialist
Cooperative Extension Service
New Mexico State University



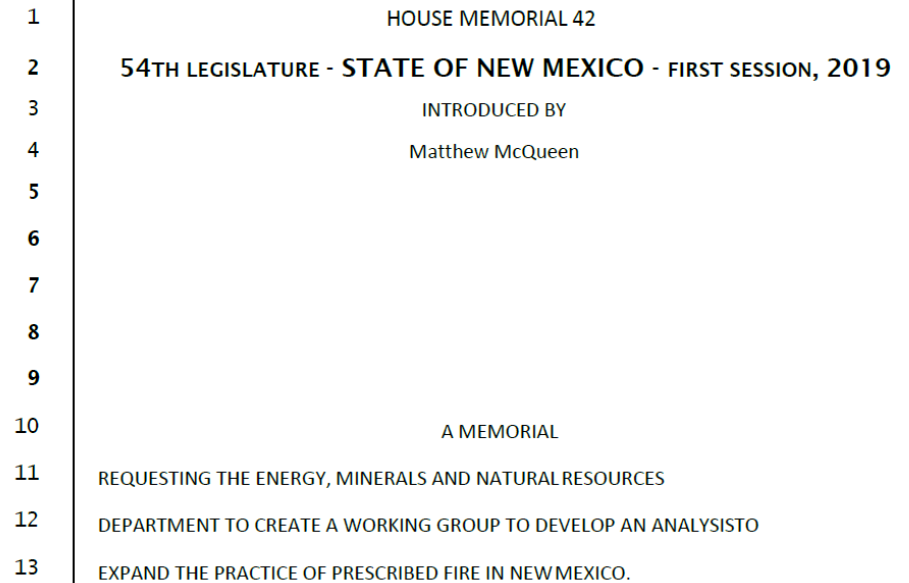
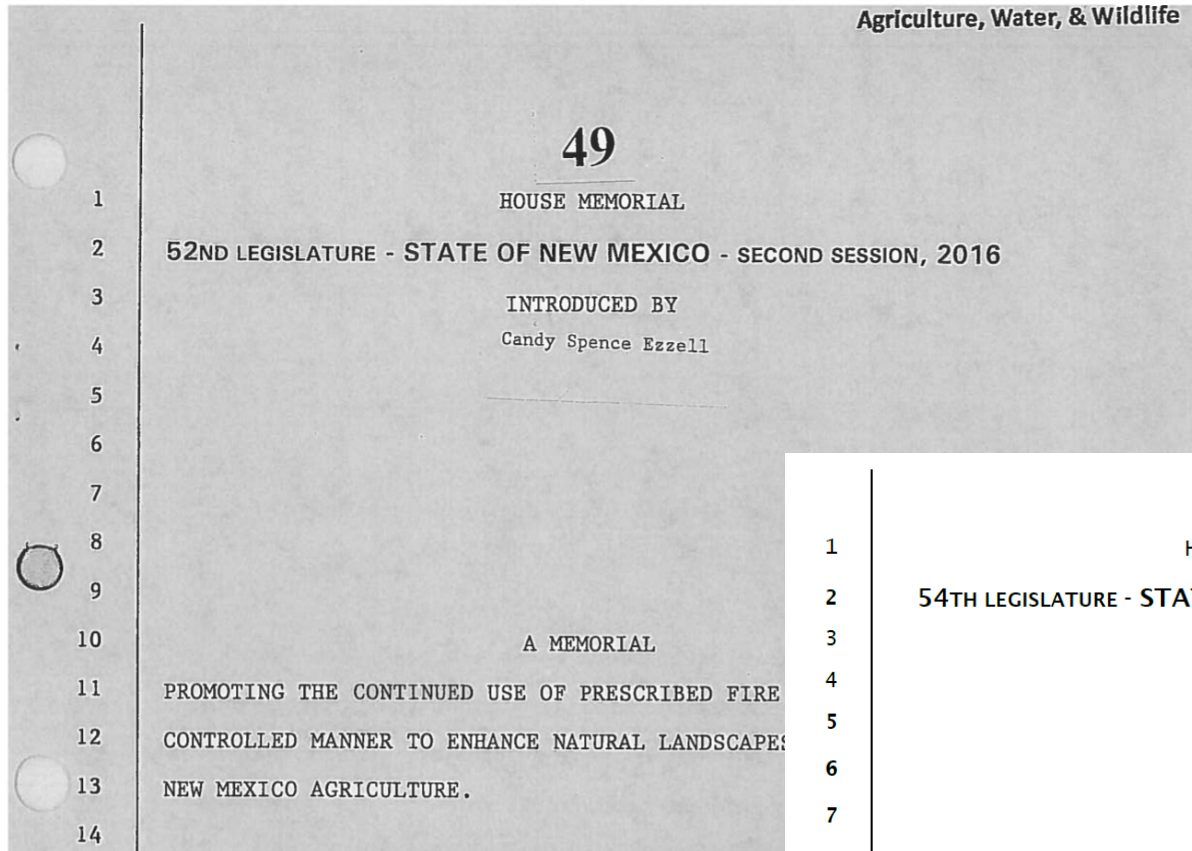
How Did We Get Here?



Mean Fire Return Interval



How Did We Get Here?



How Did We Get Here?

“Expanding the Use of Prescribed Fire in New Mexico”

House Memorial 42 Working Group Report To New Mexico Legislature

Final Report June 15, 2020

EXPANDING THE USE OF PRESCRIBED FIRE IN NEW MEXICO

WORKING GROUP REPORT TO THE NEW MEXICO LEGISLATURE AS REQUESTED THROUGH HOUSE MEMORIAL 42

EXECUTIVE SUMMARY

The New Mexico House of Representatives passed House Memorial (HM) 42 in the 2019 session requesting the Energy, Minerals and Natural Resources Department (EMNRD) explore ways to expand the practice of prescribed fire on private lands in New Mexico. The memorial created a broad working group of experts and stakeholders from across the state to conduct research and analysis of expansion strategies and to develop a report to the legislature.

Fire is fundamentally necessary for healthy ecosystems in New Mexico; however, the central challenge is when and how to use prescribed fire to promote and manage healthy ecosystems and reduce the negative impacts of uncharacteristically large or intense wildfires, such as those the state has experienced in recent decades. Research from across the globe has conclusively shown that frequent forest and rangeland burning reduces wildfire severity and extent, and provides a host of other beneficial outcomes, including reducing costs of hazardous fuels management. However, significant barriers exist in New Mexico that make implementation of prescribed fire on private lands at the required pace and scale challenging or impossible. They include:

1. undefined statutory liability for prescribed burning;
2. lack of available and affordable insurance (directly corresponding to undefined liability);
3. private practitioners expressed a need for additional expertise through training; and
4. variability across local governments in process for obtaining permission to burn.

EXPANDING THE USE OF PRESCRIBED FIRE IN NEW MEXICO

WORKING GROUP REPORT
TO THE NEW MEXICO LEGISLATURE
AS REQUESTED THROUGH
HOUSE MEMORIAL 42

EXECUTIVE SUMMARY

The New Mexico House of Representatives passed House Memorial (HM) 42 in the 2019 session requesting the Energy, Minerals and Natural Resources Department (EMNRD) explore ways to expand the practice of prescribed fire on private lands in New Mexico. The memorial created a broad working group of experts and stakeholders from across the state to conduct research and analysis of expansion strategies and to develop a report to the legislature.

Fire is fundamentally necessary for healthy ecosystems in New Mexico; however, the central challenge is when and how to use prescribed fire to promote and manage healthy ecosystems and reduce the negative impacts of uncharacteristically large or intense wildfires, such as those the state has experienced in recent decades. Research from across the globe has conclusively shown that frequent forest and rangeland burning reduces wildfire severity and extent, and provides a host of other beneficial outcomes, including reducing costs of hazardous fuels management. However, significant barriers exist in New Mexico that make implementation of prescribed fire on private lands at the required pace and scale challenging or impossible. They include:

1. undefined statutory liability for prescribed burning;
2. lack of available and affordable insurance (directly corresponding to undefined liability);
3. private practitioners expressed a need for additional expertise through training; and
4. variability across local governments in process for obtaining permission to burn.

Core Team

Laura McCarthy, State Forester, Chair
Anne Bradley, The Nature Conservancy, Co-Vice Chair
Doug Boykin, New Mexico Prescribed Fire Council, Co-Vice Chair
Eytan Krasilovsky, Forest Stewards Guild, Liability Team Lead
Emily Hohman, The Nature Conservancy, Training Team Lead
Vernon Muller, Forestry Division, Permitting Team Lead
Doug Cram, New Mexico State University Extension, Core Team
Don Kearny, New Mexico Prescribed Fire Council, Core Team
Donald Griego, Forestry Division, Core Team
Eugene Pino, Forestry Division, Core Team
Rich Naden, National Park Service, Core Team

Contributing Agencies

Anna Krylova, Office of the Superintendent of Insurance
Todd Baran, Office of the Superintendent of Insurance
Alfred Walker, Office of the Superintendent of Insurance
Elizabeth Kuehn, New Mexico Environment Department
Kerwin Singleton, New Mexico Environment Department

How Did We Get Here?

“Expanding the Use of Prescribed Fire in New Mexico”

Full Working Group Participants

Lesli Allison, Western Landowners Alliance
Cheryl Bada, Deputy General Counsel, Energy, Minerals and Natural Resources Department
Caren Cowan, Consultant
Jacob Davidson, New Mexico Department of Game and Fish
John Franchini, Superintendent of Insurance
Dave Laskey, Forest Stewards Guild
Kent Reid, Director, New Mexico Forest and Watershed Restoration Institute
Alfred Walker, Attorney, Office of the Superintendent of Insurance
Lisa Bye, Prescribed Fire and Fire Specialist, Bureau of Land Management
Ryan Suazo-Hinds, Pueblo of Tesuque
Jacob Davidson, Habitat Manager, New Mexico Department of Game and Fish
Kristin Graham-Chavez, State Conservationist, Natural Resource Conservation Service
Enos Herkshan, Regional Fuels Specialist, Southwest Region, Bureau of Indian Affairs
Teresa Seamster, Rio Grande Chapter, Sierra Club
Jim Wanstall, New Mexico Department of Agriculture
Tony Delfin, Program Manager, New Mexico Association of Conservation Districts
Mark Meyers, Forester, New Mexico State Land Office
Joy Esparsen, Deputy Director, New Mexico Counties
Nick Cardenas, Fire Marshal, Colfax County
Randy Villa, Fire Management Officer, Grant County
David Vega, Captain, San Juan County Fire Department
Joe Kenmore, Emergency Services Director, Lincoln County

Where Are We Now??

Policy Perspective & Functionality Perspective

AN ACT

RELATING TO PRESCRIBED BURNING; ENACTING THE PRESCRIBED
BURNING ACT; ALLOWING PRIVATE LANDOWNERS TO CONDUCT
PRESCRIBED BURNS; PROVIDING FOR PRESCRIBED BURN PERMITS;
LIMITING CIVIL LIABILITY; INSTITUTING A PRESCRIBED BURN
MANAGER CERTIFICATION PROGRAM; PROVIDING FOR PRESCRIBED BURN
TRAINING; PROVIDING FOR THE ESTABLISHMENT AND DISTRIBUTION OF
FEES; EXPANDING USES OF THE FOREST LAND PROTECTION REVOLVING
FUND.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NE

SECTION 1. SHORT TITLE.--Sections 1 through 8
act may be cited as the "Prescribed Burning Act".

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 20 FORESTRY
PART 5 PRESCRIBED BURN MANAGER CERTIFICATION PROGRAM

19.20.5.1 ISSUING AGENCY: Energy, Minerals and Natural Resources Department, Forestry Division.
[19.20.5.1 NMAC – N,]

19.20.5.2 SCOPE: 19.20.5 NMAC applies to applicants for prescribed burn manager certification and
individuals who are certified as prescribed burn managers pursuant to the Prescribed Burning Act, Sections 68-5-1
to 68-5-8 NMSA 1978.
[19.20.5.2 NMAC – N,]

19.20.5.3 STATUTORY AUTHORITY: 19.20.5 NMAC is adopted pursuant to the Prescribed Burning
Act, Section 68-5-7 NMSA 1978 and Section 9-1-5(E) NMSA 1978.
[19.20.5.3 – N,]

19.20.5.4 DURATION: Permanent.
[19.20.5.4 NMAC - N,]

19.20.5.5 EFFECTIVE DATE: Month XX, YEAR, unless a later date is cited at the end of a section.
[19.20.5.5 NMAC – N,]

19.20.5.6 OBJECTIVE: To create a prescribed burn manager certification program for private lands in
New Mexico.
[19.20.5.6 NMAC – N,]



Where Are We Now??

Policy Perspective

Draft Rule Shortcomings

NM Stakeholders, Landowners, Conservationists, and Lawmakers were told in writing (HM42), in public meetings, and in testimony:

“A new training requirement must function as a tool to reduce barriers to implementation, not create new requirements that do not specifically address the liability, insurance, and training access challenges discussed above. **A new training requirement could itself become a barrier if not thoughtfully designed, implemented, funded, and established specifically for the purpose of reducing other existing barriers to implementation.**” (HM42 p. 17 & 18)



Where Are We Now??

Policy Perspective

Draft Rule Shortcomings

NM Stakeholders, Landowners, Conservationists, and Lawmakers were NOT told in writing (HM42), in public meetings, and in testimony:

Proficiency standards for pile and broadcast burning.



Where Are We Now??

Policy Perspective

Draft Rule Shortcomings

NM Stakeholders, Landowners, Conservationists, and Lawmakers were told in writing (HM42), in public meetings, and in testimony:

“Recommendations for Training in New Mexico: An appropriately rigorous state-specific curriculum that is independent of NWCG courses is recommended to expand the use of prescribed fire on private lands.” (HM42 p.20)
(Underline added for emphasis.)



Where Are We Now??

Policy Perspective

Draft Rule Shortcomings

NM Stakeholders, Landowners, Conservationists, and Lawmakers were NOT told in writing (HM42), in public meetings, and in testimony:

40 hours of NWCG coursework

(Course see 8 more hours if S-130 is required to get a red card)



Where Are We Now??

Policy Perspective

Draft Rule Shortcomings

NM Stakeholders, Landowners, Conservationists, and Lawmakers were told in writing (HM42), in public meetings, and in testimony:

“New Mexico State University Extension is recommended to lead curriculum delivery...” (HM42 p. 21)

“The extension service shall provide the training for ... certification.” (Prescribed Burning Act, Section 8)



Where Are We Now??

Policy Perspective

Draft Rule Shortcomings

NM Stakeholders, Landowners, Conservationists, and Lawmakers were NOT told in writing (HM42), in public meetings, and in testimony:

13% of the 64 hours of required coursework would be delivered by Extension.



Where Are We Now??

Policy Perspective

Draft Rule Shortcomings

NM Stakeholders, Landowners, Conservationists, and Lawmakers were told in writing (HM42), in public meetings, and in testimony:

“The curriculum would also engage private landowners and indigenous and traditional communities to recognize the state’s unique social and cultural history, including centuries of fire use in agriculture and land management.” (HM42 p. 20)
(Underline added for emphasis.)



Where Are We Now??

Policy Perspective

Draft Rule Shortcomings

NM Stakeholders, Landowners, Conservationists, and Lawmakers were NOT told in writing (HM42), in public meetings, and in testimony:

There were no private landowners within subject matter experts (SME)

There were no Hispanic or Native American members that represented private landowners within SME



Where Are We Now??

Policy Perspective

Draft Rule Shortcomings

IF NM Stakeholders, Landowners, Conservationists, and Lawmakers were told in writing (HM42), in public meetings, and in testimony...to get certified:

- 1) Rigorous proficiency standards for pile & broadcast burning (2-5 years)
- 2) 40 - 48 hours of NWCG coursework
- 3) Plus 24 more hours of coursework
- 4) No significant engagement with NM landowners as SME

Otherwise, subject to Double Damages



Where Are We Now??

Policy Perspective

Draft Rule Shortcomings

**IF NM Stakeholders, Regulators, Scientists, and
Lawmakers are not writing (and
meeting) with the community...to get certain**

- 1) Rigorous efficiency standards, pile & broadcast burn (1,4,6 years)
- 2) 40 - 45% of NWCG could
- 3) Plus 20 hours of coursework
- 4) No significant engagement with NM as a

Otherwise, subject to



Where Are We Now??

Functionality Perspective

Draft Rule Shortcomings

- 1) Overarching Goal:** “Expanding the Use of Prescribed Fire in New Mexico”
 - By design, proficiency standards are meant to be a barrier
- 2) Act specifically states certification program should be “accessible” to private landowners.**
 - Rigorous proficiency standards, completed workbook, burn boss signature, 64 hours of coursework, cost/expense, opportunity cost
 - What will proficiency workbook require for pile and broadcast burns?



Where Are We Now??

Functionality Perspective

Draft Rule Shortcomings

- 3) Who is going to come to my ranch in Harding County on 48 hours' notice (due to a narrow burn weather forecast), serve as the certified burn boss (thereby accepting liability for the burn), and sign off on my proficiency workbook?**
- 4) If a landowner cannot reasonably and in a timely manner burn their own property because of a lack of certification and exposure to double damages, where can they receive burn experience?**
- Federal, state, NGO burn opportunities necessitate red card
✓ NWCG S-130, S-190, pass arduous pack test, in hand?**



Where Are We Now??

Functionality Perspective

Draft Rule Shortcomings

5) Collectively, it stands to reason, we'll get less burning than before – leading to less resilient forests, rangelands, and watersheds, and less hazardous fuel reduction leading to increased fire exposure to people and property;

AND those that do burn without certification (for whatever reason) will be putting themselves in financial straits in the event of an escaped burn and lawsuit.



Where Are We Now??

Functionality Perspective

Draft Rule Shortcomings

Argument: We're better off now than before.

Response:

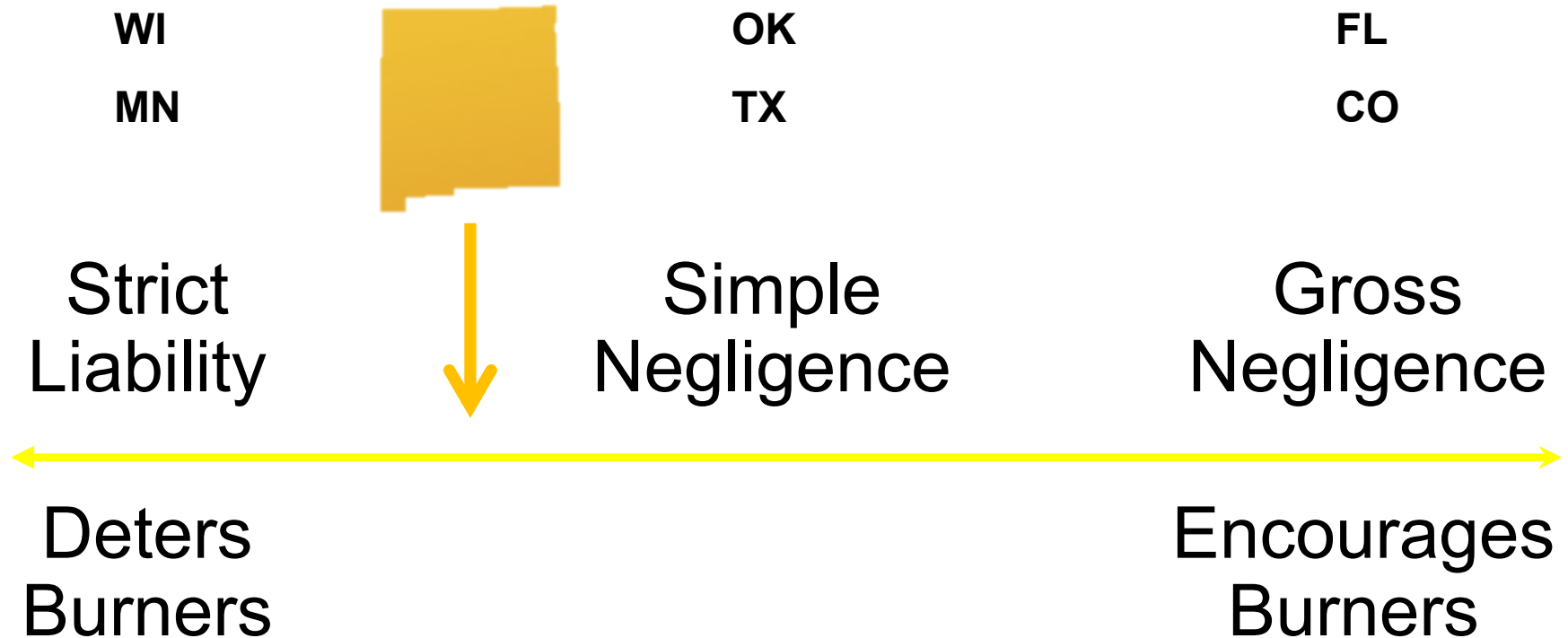
- Prior to Act, no awareness in burn community nor elsewhere in state or local governments of 1882 territorial statute with double damages clause...
- Widely believed and reported in the literature Rx fire liability was undefined in NM. (Sun 2006, Wonka et al. 2015, Matonis 2020)
- However, following passage of Act, it (double damages) is now well known and codified.
- Difference between simple negligence and strict liability in regard to Rx burning is – razor thin.



Where Are We Now??

Functionality Perspective

Draft Rule Shortcomings





Where Are We Now??

Functionality Perspective

Draft Rule Shortcomings



WI
MN

FL
GA

Strict
Liability

Simple
Negligence

Gross
Negligence



Deters
Burners

Encourages
Burners



What's Next...

Public Comment Period

First week of November, Draft Rules published in NM Register.

You can provide written comments...

On Tuesday, December 14, in Santa Fe (?) you can provide in-person (?) and/or Zoom (?) comments at the public hearing. Also, last day to submit written comments.