

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 310 (Dodd)
Version: April 12, 2023
Hearing Date: April 25, 2023
Fiscal: Yes
Urgency: No
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SUBJECT

Prescribed fire: civil liability: cultural burns

DIGEST

This bill, in relevant part, expands the definition of burn boss and revises the definition of “cultural burn” and “cultural fire practitioner” for purposes of the qualified immunity provided prescribed burning in California. The bill provides for agreements that waive regulatory requirements for cultural burns, as specified.

EXECUTIVE SUMMARY

According to the United States Forest Service, prescribed fires, or prescribed burns or controlled burns, “refer to the controlled application of fire by a team of fire experts under specified weather conditions to restore health to ecosystems that depend on fire.”¹ However, for many years, the predominant fire management policy in California was to suppress all fire. The crucial role of prescribed fires, while predating the colonization of California, has gained renewed attention in recent times after an era of focusing primarily on fire exclusion. The practice creates habitat and assists in the regeneration of certain species of plants and trees. Methodical prescribed burning also reduces surface fuel, decreasing the intensity of future wildfires. The folly of the state’s historical approach to fire prevention is now apparent and prescribed fires are accepted as a necessary part of California’s current strategy.

To encourage increased prescribed burning, the state has provided for clear certification standards of “burn bosses” and presumptions of due diligence in such burns when properly permitted. Recent legislation provides that a burn boss and a private landowner upon whose property a burn boss carries out a prescribed burn are immune from liability for any fire suppression or other costs as the result of a prescribed burn, unless the burn was conducted in a grossly negligent manner.

¹ *Prescribed Fire*, United States Forest Service, <https://www.fs.usda.gov/managing-land/prescribed-fire>.

This bill is sponsored by the Karuk Tribe. It is supported by a coalition of groups, including the Pacific Forest Trust. It is opposed by the California Air Pollution Control Officers Association. This bill passed out of the Senate Natural Resources and Water Committee on a vote of 11 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Requires the State Fire Marshal to develop a curriculum for a certification program for burn bosses, who possess authority to engage in a prescribed burning operation and to enter into the necessary contracts related to a prescribed burning operation. The curriculum shall provide for the initial certification as well as the continuing education of burn bosses. (Pub. Resources Code § 4477(a).)
- 2) Requires the California Department of Forestry and Fire Protection (CAL-FIRE) to develop a training program for prescribed fire users to certify professionals in any agency or organization as burn bosses. CAL-FIRE shall certify these individuals to a common standard. It states the intent of the Legislature that the department use its discretion to ensure that burn bosses are thoroughly qualified to engage in prescribed burning operations prior to issuing certifications. (Pub. Resources Code § 4477(b).)
- 3) Provides for the creation of prescribed burn agreements and the provisions to be included in such agreements. The law also provides for the contractual apportionment of liability and the purchase of liability insurance. (Pub. Resources Code § 4475 et seq.)
- 4) Provides that no person shall be liable for any fire suppression or other costs otherwise recoverable, as specified, resulting from a prescribed burn if all of the following conditions are met:
 - a) the purpose of the burn is for wildland fire hazard reduction, ecological maintenance and restoration, cultural burning, silviculture, or agriculture;
 - b) a person certified as a burn boss pursuant to Section 4477 of the Public Resources Code reviewed and approved a written prescription for the burn that includes adequate risk mitigation measures;
 - c) the burn is conducted in compliance with the written prescription;
 - d) the burn is authorized pursuant to applicable law;
 - e) the burner has a landowner's written permission or the approval of the governing body of a Native American Tribe to burn;
 - f) the burn is conducted in compliance with any air quality permit required;and

- g) the person's conduct did not constitute gross negligence. (Civ Code § 3333.8.)
- 5) Provides that cultural burns conducted by a cultural fire practitioner are exempt from paragraphs (b) and (c) above. It also provides that this statute does not affect the ability of an entity to bring a civil action against any defendant. (Civ Code § 3333.8.)
- 6) Defines "cultural burn" for purposes of Section 3333.8 to mean the intentional application of fire to land by Native American tribes, tribal organizations, or cultural fire practitioners to achieve cultural goals or objectives, including subsistence, ceremonial activities, biodiversity, or other benefits. (Pub. Resources Code § 3333.8)
- 7) Defines "cultural fire practitioner" to mean a person associated with a Native American tribe or tribal organization with experience in burning to meet cultural goals or objectives, including subsistence, ceremonial activities, biodiversity, or other benefits. (Pub. Resources Code § 3333.8)
- 8) Defines "cultural burn" or "cultural burning" to mean the intentional application of fire to land by California Native American tribes, tribal organizations, or cultural fire practitioners to achieve cultural goals or objectives, including for subsistence, ceremonial activities, biodiversity, or other benefits. (Pub. Resources Code § 4002.4)
- 9) Defines "cultural fire practitioner" to mean a person associated with a California Native American tribe or tribal organization with experience in burning to meet cultural goals or objectives, including for subsistence, ceremonial activities, biodiversity, or other benefits. (Pub. Resources Code § 4002.6)
- 10) Defines a "burn boss" as either of the following:
 - a) a person certified pursuant to Section 4477 to conduct prescribed burning operations and to enter into contracts related to prescribed burning operations; or
 - b) a person qualified for the National Wildfire Coordinating Group position title of "Prescribed Fire Burn Boss Type 1" or "Prescribed Fire Burn Boss Type 2." (Pub. Resources Code § 4500(a)(1).)
- 11) Establishes the Prescribed Fire Liability Pilot Program to be administered by CAL-FIRE, to increase the pace and scale of the use of prescribed fire and cultural burning and to reduce barriers for conducting prescribed fires and cultural burning. (Pub. Resources Code § 4500(b).)

- 12) Authorizes a person, firm, or corporation, or a group or combination of persons, firms, corporations, or groups, that owns or controls brush-covered land, forest lands, woodland, grassland, shrubland, or any combination thereof within a state responsibility area to apply to CAL-FIRE for permission to utilize prescribed burning for specified public purposes. (Pub. Resources Code § 4492.)
- 13) Requires CAL-FIRE, upon receipt of an application, to inspect the land in company with a permit applicant to determine whether a permit shall be granted, to prescribe the manner in which the site for the prescribed burning shall be prepared, and to require any precautions to be taken by the applicant as may be considered reasonable to prevent damage to the property of others by reason of the burning. The precautions shall, if deemed necessary, include the advance preparation of firebreaks and the firefighting equipment and personnel desirable to conduct the prescribed burning. (Pub. Resources Code § 4493.)
- 14) Permits CAL-FIRE to issue to an applicant a burning permit that shall specify the site preparation requirements and required precautions to be exercised prior to and during the burning. The issuance of a permit by the department does not relieve the permit holder from the duty of exercising due diligence to avoid damage to property of others in conducting the burning of vegetation as authorized by the permit. However, compliance with a permit issued pursuant to this article shall constitute prima facie evidence of due diligence. (Pub. Resources Code § 4494.)
- 15) Requires the director to appoint a cultural burning liaison to engage with California Native American tribes, tribal organizations, and cultural fire practitioners; advise CAL FIRE on developing increased cultural burning activity; and make recommendations on reducing barriers to cultural burning; among other requirements. (Pub. Resources Code § 703)
- 16) Provides that any person who personally or through another willfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by that person to escape to, the property of another, whether privately or publicly owned, is liable to the owner of such property for any damages to the property caused by the fire. (Health & Saf. Code § 13007.)
- 17) Provides that any person who allows any fire burning upon their property to escape to the property of another, whether privately or publicly owned, without exercising due diligence to control such fire, is liable to the owner of such property for the damages to the property caused by the fire. (Health & Saf. Code § 13008.)
- 18) Provides that any person who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by that person to

escape onto any public or private property, is liable for the cost of investigating and making any reports with respect to the fire and other administrative costs. (Health & Saf. Code § 13009.1.)

- 19) Provides that every person is responsible, not only for the result of their willful acts, but also for an injury occasioned to another by the person's want of ordinary care or skill in the management of their property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon themselves. (Civ. Code § 1714(a).)

This bill:

- 1) Expands the definition of "burn boss" for purposes of Section 3333.8 to match the definition in the Prescribed Fire Liability Pilot Program.
- 2) Clarifies that relevant references are to *California* Native American tribes for purposes of Section 3333.8.
- 3) Redefines "cultural fire practitioner" to mean a person recognized by a California Native American tribe or tribal organization with substantial experience in burning to meet cultural goals or objectives.
- 4) Authorizes the Secretary of the Natural Resources Agency ("the secretary") to enter into agreements with federally recognized California Native American tribes in support of tribal sovereignty with respect to cultural burning. The secretary may agree, with regard to cultural burning, that compliance with specified state permitting or regulatory requirements is not required. Authorizes the secretary to enter into an agreement with a federally recognized California Native American tribe only with the concurrence of the Secretary of the California Environmental Protection Agency.
- 5) Requires the secretary, in order to support the above agreements, to convene a cultural burn working group consisting of, but not limited to, the secretary, the Secretary of the California Environmental Protection Agency, the State Air Resources Board, the State Water Resources Control Board, the Department of Fish and Wildlife, the Department of Forestry and Fire Protection, the Department of Parks and Recreation, the California Coastal Commission, California Native American tribes, and local governments, with the goal of determining a framework to enable conditions conducive to cultural burning. On or before January 1, 2025, the cultural burn working group shall report to the Legislature on the findings of the workgroup.
- 6) Clarifies that it does not provide authorization to enter or burn property without the permission of the landowner.

7) Sunsets this latter provision on January 1, 2029.

COMMENTS

1. Prescribed burning

The Public Resources Code defines “prescribed burning” as the planned application and confinement of fire to wild land fuels on lands selected in advance of that application to achieve any of the following objectives:

- prevention of high-intensity wild land fires through reduction of the volume and continuity of wild land fuels;
- watershed management;
- range improvement;
- vegetation management;
- forest improvement;
- wildlife habitat improvement; and
- air quality maintenance. (Pub. Resources Code § 4464.)

These burns are low-intensity fires that are either intentionally lit or allowed to burn in specified weather conditions according to a preapproved plan, known as a burn plan. The ultimate goal is to reduce the occurrence and intensity of future wildfires. It is widely accepted that prescribed burns are a crucial and underutilized component to addressing the dramatic increase in massive wildfires in California. The Legislature has made clear that prescribed burning and wildland resources management planning serve an important public purpose and “benefit all the [people] of the state.” (Pub. Resources Code § 4462.)

California provides the guidelines for lawful prescribed burns. It also outlines contractual partnerships CAL-FIRE can enter into to carry them out and provides for the permitting, by CAL-FIRE, of certain prescribed burns. SB 1260 (Jackson, Ch. 624, Stats. 2018) sought to increase the use of prescribed burns, in part by encouraging partnerships with “cooperators”:

[H]istorically, the department conducted prescribed burns only utilizing its own personnel and therefore was liable for any damages resulting from the burn. However, to reach the statewide prescribed burn goals identified in the “California Forest Carbon Plan: Managing our Forest Landscapes in a Changing Climate,” to limit the threat of catastrophic wildfire, and to improve forest health, the department may have a smaller role on individual prescribed burns with a cooperator taking more control as authorized This cooperator control may range from creating the burn plan to being the burn boss and conducting the burn. (Pub. Resources Code § 4475.)

SB 1260 also required the State Fire Marshal to establish a certification program for burn bosses who “possess authority to engage in a prescribed burning operation and to enter into the necessary contracts related to a prescribed burning operation.” The established curriculum must provide for not only the initial certification, but the continuing education of burn bosses. SB 1260 also requires CAL-FIRE to develop a training program for prescribed fire users to certify professionals in any agency or organization as burn bosses. CAL-FIRE is required to certify these individuals to a common standard and to use “its discretion to ensure that burn bosses are thoroughly qualified to engage in prescribed burning operations prior to issuing certifications.”

Various barriers have been cited that limit the utilization of prescribed burning, either privately or through cooperative burns with CAL-FIRE, including a lack of experienced practitioners, the ability to get permits, limited periods during which appropriate conditions exist, air quality concerns, and liability concerns. Recent legislation has sought to address these issues.

2. Efforts to expand the use of prescribed fires

AB 642 (Friedman, Ch. 375, Stats. 2021) made multiple changes to state law to enhance wildland fire prevention efforts, including, among other things, incorporating and facilitating cultural burning practices, and requiring the identification of moderate and high fire hazard severity zones in local responsibility areas, as provided.

SB 926 (Dodd, Ch. 606, Stats. 2022) established the Prescribed Fire Liability Pilot Program (pilot program) to increase the pace and scale of prescribed fire and cultural burning, created the Prescribed Fire Claims Fund to support coverage for losses from prescribed fires and cultural burning of up to \$2 million per claim, and requires the CAL-FIRE to establish guidelines governing the pilot program, among other things, as provided.

In addition, SB 332 (Dodd, Ch. 600, Stats. 2021) dealt with the historic underutilization of this fire prevention method by addressing liability concerns. Section 3333.8, created by SB 332, provides immunity in connection with prescribed fires when certain conditions were met. The burn must be for specified purposes following applicable law, conducted in compliance with any air quality permits required, and the burner had to have the written permission of the landowner or the approval of the governing body of a Native American Tribe. After concerns about the initial scope of the immunity, the law was limited to covering liability for fire suppression or other costs otherwise recoverable, as specified, resulting from a prescribed burn and did not extend to conduct that constitutes gross negligence.

Two other preconditions of immunity are that a person certified as a burn boss pursuant to Section 4477 of the Public Resources Code had to have reviewed and approved a written prescription for the burn that includes adequate risk mitigation

measures and that the burn is conducted in compliance with the written prescription. However, the bill exempted cultural burns conducted by a cultural fire practitioner from these latter requirements. “Cultural burn” is defined to mean the intentional application of fire to land by Native American tribes, tribal organizations, or cultural fire practitioners to achieve cultural goals or objectives, including subsistence, ceremonial activities, biodiversity, or other benefits. “Cultural fire practitioner” means a person associated with a Native American tribe or tribal organization with experience in burning to meet cultural goals or objectives, including subsistence, ceremonial activities, biodiversity, or other benefits.

This bill expands the definition of burn boss for the purposes of Section 3333.8 to align with the definition in the Pilot Program discussed above. The bill also redefines the definition of “cultural fire practitioner” to mean a person recognized by a California Native American tribe or tribal organization with substantial experience in burning to meet cultural goals or objectives, including sustenance, ceremonial activities, biodiversity, or other benefits, and harmonizes the competing definitions of the term in the Public Resources Code.

In order to expand cultural burning even further, the bill also authorizes the Secretary of the Natural Resources Agency to enter into agreements with federally recognized California Native American tribes with respect to cultural burning. The secretary is permitted to agree, with regard to cultural burning, that compliance with state permitting or regulatory requirements involving private prescribed burning and agricultural burning is not required. Dispensing with the latter requirements requires the concurrence of the Secretary of the California Environmental Protection Agency.

To support these agreements, a cultural burn working group will be convened and must include the Secretary of the Natural Resources Agency, the Secretary of the California Environmental Protection Agency, the State Air Resources Board, the State Water Resources Control Board, the Department of Fish and Wildlife, CAL-FIRE, the Department of Parks and Recreation, the California Coastal Commission, California Native American tribes, and local governments. The goal is to create a framework to enable conditions conducive to cultural burning; a report is due to the Legislature by 2025. This section of the bill providing for these agreements and the working group are repealed as of January 1, 2029.

According to the author:

California Native American Tribes and Tribal people have used fire since time immemorial. Cultural burning enables growth of plants used for food, fiber and medicine, creates habitat for animal species relied on for sustenance, promotes biodiversity, and results in resilient ecosystems. While cultural burning shares some limited similarities with prescribed

fire, it is a wholly separate practice governed by Tribal and natural laws. It is an integral part of the cultural practices of Tribes across California.

SB 310 would acknowledge the tribal sovereignty of federally recognized California Native American Tribes with respect to cultural burning. In furtherance of that sovereignty, the Secretary of the Natural Resources Agency is authorized to enter into agreements with federally recognized Tribes to coordinate cultural burning activities on their ancestral territories. The Secretary would be permitted to find that CAL FIRE or local Air Districts permits would not be required. This Bill also expands the application of the gross liability standard established in Civil Code 3333.8 for fire suppression costs to cultural burns subject to a Tribal-Natural Resources Agency Agreement, and to prescribed fires with burn plans reviewed by federally qualified burn bosses.

3. Stakeholder positions

The California Farm Bureau writes in support:

SB 310 would recognize Tribal sovereignty with respect to cultural burning practices, defined as the intentional application of fire by cultural fire practitioners and Tribes to achieve cultural goals and objectives. Farm Bureau members have been significantly impacted by the devastating wildfires ravaging rural California. Moreover, Farm Bureau members in rural areas often find their homeowners and business insurance policies non-renewed due to wildfire risks. The Governor's Wildfire and Forest Resilience Task Force (the Taskforce) is working to reduce that risk, statewide. Together with the interagency Safer from Wildfires program, these risk reduction efforts are vital to trying to stabilize California's admitted insurance market, as it relates to wildfire risk.

Farm Bureau supports the identified actions from the Taskforce to reduce statewide wildfire risk. Cultural burning practices, with the extension of liability protection to these burns created in SB 310, helps the state reach its goals to reduce wildfire fuels.

A coalition of groups, including the California Native Plant Society, write in measured support of the bill:

Recognizing tribal sovereignty with regard to cultural fire raises many complex issues. There is substantial variation in capacity between the fire programs of different tribes and cultural fire practitioners, and the risk associated with practicing fire on different landscapes varies greatly around the state. But it is a moral imperative that the State try to improve

the current situation and support tribal efforts to restore their cultural practices and role as fire keepers.

The Karuk Tribe, the sponsor of the bill, explain the impetus for it:

Throughout the late 19th Century . . . California and the United States explicitly criminalized Indigenous practices, in an effort to force Native people to assimilate into settler culture and to “protect” the timber supply on lands stolen from Native people. Native people were shot for burning as late as the 1930s. To this day, cultural burning conducted in a manner respectful of cultural practices and Tribal sovereignty is unjustly criminalized, and may still be classified as arson under state law, potentially a felony offense.

To right this wrong, SB 310 would formally recognize Tribal sovereignty with respect to cultural burning practices.

The California Air Pollution Control Officers Association writes in opposition:

While prescribed fire is a beneficial activity, it must be implemented carefully and judiciously so that its use does not cause adverse impacts on public health or safety. The air districts, in partnership with the California Air Resources Board, CalFire, Federal Land Managers, tribes, and others work closely to ensure that emissions from prescribed fires do not significantly impact downwind communities. The permitting process considers factors provided by tribal, federal and state land managers which include meteorological conditions, type of vegetation to be treated, estimated emissions, topography, fire suppression techniques and location to the nearest population centers. The permits also include public notification and smoke modeling requirements to help inform potentially affected areas. Should a prescribed burn be implemented without regard to these parameters and proper safeguards, downwind communities may be adversely affected. This may result in immediate health impacts and cause panic and unnecessary calls to fire agencies from community members that may believe a wildfire has started in their vicinity.

Regardless, out of respect for tribal sovereignty and in compliance with the United States Constitution regarding tribal sovereignty, the air districts do not require Native American tribes to obtain permits when practicing cultural burns on federally recognized trust lands as defined in 25 USC 2201. Unfortunately, SB 310 would allow cultural burns to be carried out anywhere in the state without regard to the above outlined safety measures if the permission of the landowner has been procured. Additionally, there is no standardized system to document tribal

membership. Each tribe has its own standards and maintains its own list which is not available for access by state and local governments. As a result, there is no existing system to document who is a “tribal member” for purposes of this legislation. Further, SB 310 would override local government’s ability to protect public health and safety by shifting authority for making burn decisions to the state. Burn decisions are made using highly localized data often in real time, and it is our concern that without this data, prescribed burn decisions will be based on incomplete knowledge of local conditions which will either slow our ability to implement prescribed fire, or risk jeopardizing public health and safety.

SUPPORT

Karuk Tribe (sponsor)
California Farm Bureau Federation
California Native Plant Society
Defenders of Wildlife
Humboldt Redwood Company
Mendocino Redwood Company
Midpeninsula Regional Open Space District
Pacific Forest Trust
Salmon River Restoration Council
Sierra Forest Legacy
The Watershed Research and Training Center

OPPOSITION

California Air Pollution Control Officers Association

RELATED LEGISLATION

Pending Legislation: SB 675 (Limón, 2023) expands the definition of fire prevention activities to include prescribed grazing, defined as the lawful application of grazing by a specific kind of livestock at a determined season, duration, and intensity. SB 675 is currently in the Senate Appropriations Committee.

Prior Legislation:

SB 926 (Dodd, Ch. 606, Stats. 2022) *See Comment 2.*

SB 332 (Dodd, Ch. 600, Stats. 2021) *See Comment 2.*

AB 642 (Friedman, Ch. 375, Stats. 2021) *See Comment 2.*

SB 1260 (Jackson, Ch. 624, Stats. 2018) *See* Comment 1.

SB 2585 (Patterson, 2018) would have provided that a property owner and their agent conducting a prescribed burn shall not be liable for damage or injury caused by fire or smoke, unless negligence is proven, when the prescribed burn meets specified conditions. This bill died in the Assembly Natural Resources Committee.

PRIOR VOTES:

Senate Natural Resources and Water Committee (Ayes 11, Noes 0)
