

COURSE: Prescribed Fire Planning and Implementation

TOPIC: Civil and Criminal Liability (UNIT 10)

HANDOUT 1: Hypothetical Problems

Hypo #1: Scope of Duty. Jane, a recreation specialist with no training in the use of prescribed fire, is looking for a site to locate a day picnic area. She chooses a flat area covered with low-lying brush. Feeling that prescribed fire is the fastest and cheapest method of clearing the site, Jane, without authorization from anyone else, negligently conducts a broadcast burn. The fire escapes, causing damage to adjacent private property. Is Jane personally liable for the damage to the private property? What should Jane do to avoid liability?

In this hypothetical Jane conducted the prescribed burn without proper training or authorization. If any question exists as to whether something is within the scope of employment, get permission from the proper supervisor to conduct the activity, or get someone else whose duty it is to conduct the activity.

Hypo. #2: Negligent Acts. Frank, an FMO, is directed to conduct a prescribed burn for the purpose of bald eagle habitat enhancement. The burn site is adjacent to private property owned by Tom, a rancher. Frank and Tom have recently had several run-ins. In fact, Tom has made several complaints to Frank's supervisor, resulting in threatened disciplinary action. In preparing for the burn, Frank orders the construction of fireline (containment line?) next to Tom's property. However, Frank knows the ordered fireline is inadequate to prevent damage to Tom's fence. The burn is conducted, causing damage to Tom's fence. Is Frank personally liable? The lesson is 1) Do not make management decisions vindictively; and 2) if there is a chance a decision might be viewed as vindictive or made with the intent to harm, withdraw from the project and allow a neutral and objective manager to carry it out.

Hypo. #3: Deep Pocket. Jane's negligence in locating the picnic area causes \$50,000 in damages to Tom's property. Jane is a GS-7, lives in government housing (a single-wide trailer), and drives a 1979 Toyota pick-up. Jane has no other significant assets. Will Tom sue Jane, the government, or both?

Hypo. #4: Policy Judgment. Laura, a FWS Refuge Manager, together with her staff, drafted a Refuge Fire Management Plan. The plan calls for limited fire

suppression on lightning caused fires located in certain areas remaining within specified environmental parameters. In drafting the plan, Laura and her staff were guided by particular management objectives. That summer, lightning starts a fire within a limited suppression zone. No all-out suppression efforts are made because the fire remained within prescription. Nevertheless, the fire burns out of the limited suppression zone and onto adjacent private land. Can the private landowner sue for damages under FTCA? Why or why not?

Hypo. #5: To bolster the discretionary function argument, what else might Laura and her staff have done?

Hypo. #6: Operational Decision. Marcos, a FWS Refuge Manager, is driving down a winding dirt public access road on his way to a prescribed burn. Marcos is late. Determined to observe the prescribed fire ignition, Marcos decides to drive faster. He comes to a curve. Because of his speed, Marcos takes the turn too wide and hits an oncoming truck driven by Chuck, a local rancher. Can Chuck sue the government under FTCA?

Hypo #7: Negligent Application of Policy. The Cache Valley Wildlife Refuge has developed a detailed Fire Management Plan. The plan calls for extensive use of prescribed fire to enhance elk habitat. This objective is clearly stated in the plan and the prescription is written specifically for that purpose. The plan is the product of interdisciplinary meetings, following public hearings. Sue is the Refuge FMO, charged with conducting burns. Despite the detailed Fire Management Plan, Sue, confident in her abilities, disregards the fire prescriptions. On one occasion the burn escapes, damaging adjacent private land. Can the government be sued under FTCA? Why or why not?

Hypo. #8: Negligent Application of Policy. Careless picnickers start a fire on FWS land. The fire burns in heavy fuels, but is finally contained at 1600 acres on August 11. Fire danger remains very high. Recognizing the potential for rekindling, the Refuge FMO orders daily patrols and mop-up as needed. As time goes on, the patrols become sporadic and mop-up infrequent despite continued rekindle risk. On September 20, following several days of high winds and lowering humidities, the fire spreads to nearby logging slash. The fire runs as far as 20 miles in one direction, causing extensive damage to private property. In determining if the government can be sued, consider: 1) Does the discretionary function exception apply to the FMO's decision?; and, 2) Was the execution of that decision negligent?

Hypo. #9: A lightning caused wildfire is burning through heavy timber and brush on Lotta Trees National Wildlife Refuge. Bob, on detail to Lotta Trees, has

been assigned as Division Supervisor on the fire. Bob does have training as a Division Supervisor, but his actual fire experience is limited to the flat, grassy plains of his home refuge in Texas. Bob orders a burnout operation on the division to commence at 1300 hours. Excited by the prospect of conducting the burnout, Bob failed to listen during morning briefing when hot, dry, easterly winds were predicted for the afternoon. The burnout operation failed when the predicted afternoon winds rose, blowing fire across the line. As the fire ran up the hill towards a group of private ranches, Bob was heard to say, "Well, this ain't the way it burns back home!" Three of the four ranches were saved. However, one home was severely damaged. Fire reached the damaged home through brush the homeowner had failed to clear away.

- 1) What standard of care applies to Bob?
- 2) Did Bob conform to that standard? Why or why not?
- 3) Did the fact that houses were nearby make the standard greater?
- 4) Do any contributory or comparative negligence arguments exist? If so, what?

FINAL PROBLEM

On August 2, dry thunderstorms started numerous fires on the Salt Wells National Wildlife Refuge. The large number of fires and extreme fire conditions immediately created competition for fire suppression resources. Ross, the Refuge FMO, and his crew of seven firefighters were sent to the Huckleberry Fire. Ross had extensive fire training and experience. A line was quickly constructed around the two-acre fire, and burning trees felled and mopped up. When Ross and his crew left, they notified dispatch that a patrol crew should return in the morning and continue mop-up as needed. The Huckleberry Fire was three miles from private property.

During the night, the fire situation worsened. Another fire broke containment, threatening a communication complex and private homes. The Incident Commander accordingly vetoed Ross' patrol order. The Huckleberry Fire was given a lower priority. Available fire resources were shipped to the active fires.

On August 3, erratic afternoon winds rekindled the Huckleberry Fire, causing crowning and spotting $\frac{1}{4}$ mile ahead of the fire. Because of continued problems with other escaped fires, insufficient resources were available to properly staff the Huckleberry Fire.

By August 4, the Huckleberry Fire was approaching private property owned by Lyla.

Lyla contacted the refuge dispatcher, requesting additional resources. Some personnel and equipment were sent, but they were still insufficient. In an effort to save her property, Lyla and her family started their own burnout operation. The effort was unsuccessful. Eventually fire consumed several structures on Lyla's property.

- 1) Is Ross personally liable for the damage to Lyla's property for failing to initially suppress the Huckleberry Fire? Why or why not?
- 2) Can Lyla sue the government under the FTCA: Does the discretionary function exception apply to the decision not to send patrol crews back to the Huckleberry Fire, and to not send additional resources when the Huckleberry Fire blew-up? Why or why not?
- 3) Assuming the discretionary function exception does not apply, is the government liable under the FTCA? Assume further the IC was a government employee, and was functioning within the scope of her employment. In developing your argument, consider the following:
 - a) What is the applicable standard of care for the IC?
 - b) Did the IC conform to that standard? Why or why not?
 - c) Did the fact that private property was threatened increase the required standard of care? Why or why not?
 - d) Are there any arguments of contributory or comparative negligence? If so, what are they?
- 4) Can Lyla prosecute Ross or the IC criminally? Are Ross or the IC criminally liable?