

May 22, 2024  
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UTILITY WILDFIRE  
LIABILITY  
STATUTORY  
CONSIDERATIONS

# UTILITY WILDFIRE LIABILITY STATUTORY CONSIDERATIONS

## INTRODUCTION

In recent years, utilities and states in the western United States are increasingly considering solutions for utility liability in the event of catastrophic wildfire events. The most notable example, California's SB 901, passed in 2018 as the result of the Camp Fire, which killed 86 people, destroyed 13,600 homes, and created an estimated liability of more than \$12 billion. Since that time several states are taking a closer look at wildfire liability.

Currently in Montana, a few peripheral statutes potentially apply; however, there is no specific statute relating to electrical utilities and wildfires.

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## GENERAL NEGLIGENCE

On the most basic level, a utility that caused a wildfire is potentially subject to a common law lawsuit alleging negligence. Generally, a person harmed by a fire that was caused by a utility must prove four elements:

1. the utility owed a duty of care;
2. the utility breached that duty;
3. the utility's breach of the duty caused the damages; and
4. the harmed party can prove the damages sustained. This is typically known as the four elements of a negligence lawsuit.

Although negligence is generally based in common law, the Montana legislature has codified the negligence standard in sections 27-1-701 and 28-1-201, MCA. These provide that all persons, including legal entities, are responsible for their "want of ordinary care" and that all persons are required "to abstain from injuring" other persons:

**27-1-701. Liability for negligence as well as willful acts.** Except as otherwise provided by law, each person is responsible not only for the results of the person's willful acts but also for an injury occasioned to another by the person's want of ordinary care or skill in the management of the person's property or person except so far as the person has willfully or by want of ordinary care brought the injury upon the person.

**28-1-201. General duty of care.** Every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon any of another person's rights.

Put simply, a utility that negligently caused a wildfire could potentially be subject to a lawsuit by a party harmed by the wildfire. This party would have to essentially establish that the utility failed to exercise its duty of ordinary care or skill and that this failure caused harm to the party, i.e. causing the wildfire.

At present, a utility is liable for wildfire damages that are caused by the negligent conduct of the utility – determined under common law principles of negligence. Whether a utility negligently caused a wildfire would involve complex and esoteric engineering principles and standards relating to the operation and maintenance of the utility. All of these issues would be carefully considered to determine whether the utility breached its standard of care.

In determining the standard of care, common law generally applies. That notwithstanding, only a handful of statutes in Title 69 concern wildfire liability and negligence standards. For example, section 69-4-201, MCA, generally provides a standard of care in the construction involving wires for power, heat, light, telephone, telegraph, or signal transmission or reception. Essentially, the statute provides that the national electrical safety code provides construction standards and proof of compliance with the requirements establish “due care” in the defense of a negligence claim:

**69-4-201. Application of national electrical safety code.** (1) The national electrical safety code standards govern all construction involving wires for power, heat, light, telephone, telegraph, or signal transmission or reception. Except as provided in 69-4-203, electrical construction of overhead and underground electrical supply and communication lines in the state must be in conformity with the rules set forth in the national electrical safety code approved by the American national standards institute as published by the institute of electrical and electronic engineers. The national electrical safety code provides construction standards and must be enforced by the commission. Proof of compliance with the requirements of an applicable national electrical safety code standard establishes due care in the defense of a negligence claim alleging a violation of that standard.

(2) The commission shall adopt rules to implement and enforce this part. The commission shall adopt by rule standards for electrical safety. The standards must be based on standards published in the most recent edition of the national electrical safety code.

Thus, a negligence lawsuit involving a utility-caused wildfire relating to electrical wires could potentially implicate this statute. In Ogden v. Mont. Power Co., 229 Mont. 387, 747 P2d 201, 44 St. Rep. 2068 (1987), the plaintiffs alleged that their house burned because the defendant electrical utility negligently maintained and operated a floating power line. The Montana Supreme Court ruled in favor of the plaintiffs, holding that the defendant electrical utility failed to adhere to the negligence standards of section 69-4-201, MCA. The court noted that when the defendant utility has a high standard of care and the plaintiff provides clear evidence of negligence, it becomes incumbent upon the defendant to provide evidence to show due care was exercised.

Although not related to an electrical utility and by way of illustration, section 69-14-721, MCA, would potentially provide a legal standard to fires caused by a railroad. This statute requires a railroad corporation to keep the track free from combustible material:

**69-14-721. Control of fire hazard along right-of-way.** A railroad corporation or railroad company operating a railroad within this state shall keep its railroad track and either side of the track for a reasonable distance within its right-of-way, free from dead grass, weeds, or any dangerous or combustible material. A railroad corporation or company failing to keep its railroad track and each side of the track free of combustible material as specified in this section is liable for any damages on account of fire emanating from trains, track maintenance, or other railroad operations. A railroad corporation or company may not be

required to keep free of combustible material, as specified in this section, land that is not a part of its right-of-way.

This is one of the few statutes specifically relating to wildfires and entities regulated under Title 69. Although not applying to electrical utilities, it serves as an example of when the legislature establishes a duty and standard of care through statute.

## STATUTES SPECIFICALLY RELATED TO WILDFIRE

While there aren't any specific statutes applying to electrical utilities and wildfires, one general statute may be applicable. Section 50-63-104, MCA, subjects any legal entity to liability for wildfires if it was caused by a negligent or unintentional act. Additionally, this statute limits the damages that may be claimed by a harmed party:

**50-63-104. Liability for forest or range fires.** (1) In a civil action against any person or legal entity that is not a state government entity or a political subdivision of state government, for a forest or range fire caused by a negligent or unintentional act or omission that is not willful or wanton, the real and personal property damage is limited to:

- (a) the reasonable costs for controlling or extinguishing the forest or range fire;
- (b) economic damages; and
- (c) either:
  - (i) the diminution of fair market value of the real and personal property resulting from the fire; or
  - (ii) the actual and tangible restoration costs associated with restoring the damaged real and personal property to its undamaged state to the extent that those actual and tangible costs are reasonable and practical. The costs of restoring the unimproved property may not be greater than the fair market value of the property immediately before the fire.

(2) As used in this section:

- (a) "economic damages" means objectively verifiable monetary loss, including but not limited to out-of-pocket expenses, loss of earnings, loss of use of property, and loss of business or employment opportunities;
- (b) "fair market value" means the amount a willing buyer would pay a willing seller in an arm's-length transaction when both parties are fully informed about all of the advantages and disadvantages of the property and neither is acting under any compulsion to buy or sell, as determined by a certified appraiser who is qualified to appraise the property;
- (c) "forest or range fire" means a fire that burns any unimproved real property located outside of an incorporated municipality, regardless of whether there are improvements also affected by the fire and regardless of whether the fire also burns property within an incorporated municipality.

This statute limits damages that may be claimed to costs for controlling the fire, economic damages, and general property loss. Importantly, however, this statute only applies to a "forest or range fire." This is defined as any fire

that is on “unimproved real property located outside of an incorporated municipality.” It would not apply to a wildfire that damages a city.

Finally, it should be noted that Montana’s state fire policy, codified in section 76-13-115, MCA, establishes that all private property owners have a responsibility to mitigate fire hazards:

**76-13-115. State fire policy.** The legislature finds and declares that:

- (1) the safety of the public and of firefighters is paramount in all wildfire suppression activities;
- (2) it is a priority to minimize property and resource loss resulting from wildfire and to minimize expense to Montana taxpayers, which is generally accomplished through an aggressive and rapid initial attack effort;
- (3) interagency cooperation and coordination among local, state, and federal agencies are intended and encouraged, including cooperation when restricting activity or closing areas to access becomes necessary;
- (4) fire prevention, hazard reduction, and loss mitigation are fundamental components of this policy;
- (5) all property in Montana has wildfire protection from a recognized fire protection entity;
- (6) all private property owners and federal and state public land management agencies have a responsibility to manage resources, mitigate fire hazards, and otherwise prevent fires on their property;
- (7) sound forest management activities to reduce fire risk, such as thinning, prescribed burning, and insect and disease treatments, improve the overall diversity and vigor of forested landscapes and improve the condition of related water, wildlife, recreation, and aesthetic resources;
- (8) development of fire protection guidelines for the wildland-urban interface is critical to improving public safety and for reducing risk and loss; and
- (9) catastrophic wildland fire in wildland-urban interface areas resulting from inadequate federal land management activities to reduce fire risk has the potential to jeopardize Montanans' inalienable right to a clean and healthful environment guaranteed in Article II, section 3, of the Montana constitution.

## OTHER STATE'S WILDFIRE LIABILITY EFFORTS

### California

In 2018, California passed Senate Bill 901. SB 901 allowed the California Public Utilities Commission (PUC) to approve the utilities' sale of recovery bonds to finance costs incurred in excess of insurance proceeds, incurred, or that are expected to be incurred, by an electrical corporation, excluding fines and penalties, related to wildfires. It also allowed the PUC to approve related rate increases.

Put simply, the California Assembly attempted to, as much as possible, moderate the impact on ratepayers in the event of liability, balancing the costs of wildfire liability in ratepayers' bills by financing excess costs with the sale of private bonds.

The bill required any recovery charges or recovery bond sales meet the following standards per the rules of the commission:

- I. They are just and reasonable.
- II. They are consistent with the public interest.
- III. The recovery of recovery costs through the designation of the fixed recovery charges and any associated fixed recovery tax amounts, and the issuance of recovery bonds in connection with the fixed recovery charges, would reduce, to the maximum extent possible, the rates on a present value basis that consumers within the electrical corporation's service territory would pay as compared to the use of traditional utility financing mechanisms, which shall be calculated using the electrical corporation's corporate debt and equity in the ratio approved by the commission at the time of the financing order.

The bill also required electric utilities to submit a Wildfire Mitigation Plan under California Public Utilities Code Section 8387. This section generally requires every publicly owned utility to construct, maintain, and operate its electrical facilities to minimize the risk of wildfire posed by those facilities. California then passed Assembly Bill 1054 in 2019. This bill required the wildfire mitigation plans to be submitted to the California Wildfire Safety Advisory Board for review at least once every three years. The purpose of the plans are to reduce the risk of wildfires that could be ignited by an electrical utility in high fire threat locations. The plans describe the activities being taken to mitigate the threat of wildfires caused by electrical equipment, including power lines:

**CA Pub Util Code Section 8387.**

(a) Each local publicly owned electric utility and electrical cooperative shall construct, maintain, and operate its electrical lines and equipment in a manner that will minimize the risk of wildfire posed by those electrical lines and equipment.

(b) (1) The local publicly owned electric utility or electrical cooperative shall, before January 1, 2020, prepare a wildfire mitigation plan. After January 1, 2020, a local publicly owned electric utility or electrical cooperative shall prepare a wildfire mitigation plan annually and shall submit the plan to the California Wildfire Safety Advisory Board on or before July 1 of that calendar year. Each local publicly owned electric utility and electrical cooperative shall update its plan annually and submit the update to the California Wildfire Safety Advisory Board by July 1 of each year. At least once every three years, the submission shall be a comprehensive revision of the plan.

(2) The wildfire mitigation plan shall consider as necessary, at minimum, all of the following:

(a) An accounting of the responsibilities of persons responsible for executing the plan.

(b) The objectives of the wildfire mitigation plan.

(c) A description of the preventive strategies and programs to be adopted by the local publicly owned electric utility or electrical cooperative to minimize the risk of its electrical lines and equipment causing catastrophic wildfires, including consideration of dynamic climate change risks.

- (d) A description of the metrics the local publicly owned electric utility or electrical cooperative plans to use to evaluate the wildfire mitigation plan's performance and the assumptions that underlie the use of those metrics.
- (e) A discussion of how the application of previously identified metrics to previous wildfire mitigation plan performances has informed the wildfire mitigation plan.
- (f) Protocols for disabling reclosers and deenergizing portions of the electrical distribution system that consider the associated impacts on public safety, as well as protocols related to mitigating the public safety impacts of those protocols, including impacts on critical first responders and on health and communication infrastructure.
- (g) Appropriate and feasible procedures for notifying a customer who may be impacted by the deenergizing of electrical lines. The procedures shall direct notification to all public safety offices, critical first responders, health care facilities, and operators of telecommunications infrastructure with premises within the footprint of potential deenergization for a given event.
- (h) Plans for vegetation management.
- (i) Plans for inspections of the local publicly owned electric utility's or electrical cooperative's electrical infrastructure.
- (j) A list that identifies, describes, and prioritizes all wildfire risks, and drivers for those risks, throughout the local publicly owned electric utility's or electrical cooperative's service territory. The list shall include, but not be limited to, both of the following:
- i. Risks and risk drivers associated with design, construction, operation, and maintenance of the local publicly owned electric utility's or electrical cooperative's equipment and facilities.
  - ii. Particular risks and risk drivers associated with topographic and climatological risk factors throughout the different parts of the local publicly owned electric utility's or electrical cooperative's service territory.
- (k) Identification of any geographic area in the local publicly owned electric utility's or electrical cooperative's service territory that is a higher wildfire threat than is identified in a commission fire threat map, and identification of where the commission should expand a high fire-threat district based on new information or changes to the environment.
- (l) A methodology for identifying and presenting enterprise wide safety risk and wildfire-related risk.
- (m) A statement of how the local publicly owned electric utility or electrical cooperative will restore service after a wildfire.
- (n) A description of the processes and procedures the local publicly owned electric utility or electrical cooperative shall use to do all of the following:
- i. Monitor and audit the implementation of the wildfire mitigation plan.
  - ii. Identify any deficiencies in the wildfire mitigation plan or its implementation, and correct those deficiencies.

iii. Monitor and audit the effectiveness of electrical line and equipment inspections, including inspections performed by contractors, that are carried out under the plan, other applicable statutes, or commission rules.

(3) The local publicly owned electric utility or electrical cooperative shall, on or before January 1, 2020, and not less than annually thereafter, present its wildfire mitigation plan in an appropriately noticed public meeting. The local publicly owned electric utility or electrical cooperative shall accept comments on its wildfire mitigation plan from the public, other local and state agencies, and interested parties, and shall verify that the wildfire mitigation plan complies with all applicable rules, regulations, and standards, as appropriate.

(c) The local publicly owned electric utility or electrical cooperative shall contract with a qualified independent evaluator with experience in assessing the safe operation of electrical infrastructure to review and assess the comprehensiveness of its wildfire mitigation plan. The independent evaluator shall issue a report that shall be made available on the internet website of the local publicly owned electric utility or electrical cooperative, and shall present the report at a public meeting of the local publicly owned electric utility's or electrical cooperative's governing board.

SB 901 also allowed the California Public Utilities commission to approve the utilities' sale of recovery bonds to finance costs incurred in excess of insurance proceeds, incurred, or that are expected to be incurred, by an electrical corporation, excluding fines and penalties, related to wildfires.

Put simply, the California Assembly restricted the utilities from recovering the costs of wildfire liability in ratepayer's bills, but allows the utilities to finance the added costs by selling private bonds.

## **Utah**

Utah passed House Bill 66 in 2020, which generally made sweeping changes to its wildland fire planning and cost recovery laws, including:

- Granting the Public Service Commission rulemaking authority to enact rules establishing procedures for the review and approval of a wildland fire protection plan;
- Requiring a qualified utility and an electric cooperative to prepare and submit for approval a wildland fire protection plan;
- Specifying information that is required to be included in a wildland fire protection plan;
- Requiring the Public Service Commission to review and approve a wildland fire protection plan submitted by a qualified utility;
- Providing that a qualified utility may recover, through rates, the capital investments and expenses incurred to implement a wildland fire protection plan;
- Requiring a qualified utility to annually report certain capital investments and public expenses incurred for the implementation of a wildland fire protection plan to the Public Service Commission;
- Requiring a governing authority of an electric cooperative to review and approve a wildland wildland fire protection plan submitted by an electric cooperative;
- Providing that a qualified utility or an electric cooperative with an electrical transmission fore protection plan are not considered to have negligently caused a wildland fire under certain circumstances;



- Modifying the standard of care for a right of action for injuries to trees; and
- Specifying the liability provisions that apply for damages arising from a wildland fire.

Chief among the changes made in House Bill 66 was clarifying when an electric utility may be considered to have negligently caused a wildland fire, now located in section 65A-3-4(3) of the Utah Code:

**Utah Code 65A-3-4. Liability for causing wildland fires.**

(1) As used in this section:

(a) "Electric cooperative" means the same as that term is defined in Section 54-24-102.

(b) "Electrical transmission wildland fire protection plan" means a wildland fire protection plan, as defined in Section 54-24-102, that is:

(i) prepared and submitted by a qualified utility and approved as provided in Section 54-24-201; or

(ii) prepared and submitted by an electric cooperative and approved as provided in Section 54-2-203.

(c) "Qualified utility" means the same as that term is defined in Section 54-17-801.

(2) (a) Except as provided in Subsection (3), a person who negligently, recklessly, or intentionally causes or spreads a wildland fire shall be liable for the cost of suppressing that wildland fire, regardless of whether the fire begins on:

(i) private land;

(ii) land owned by the state;

(iii) federal land; or

(iv) tribal land.

(b) The conduct described in Subsection (2)(a) includes any negligent, reckless, or intentional conduct, and is not limited to conduct described in Section 65A-3-2.

(3) In an action under this section to recover for property damage resulting from a wildland fire or to recover the cost of fire suppression resulting from a wildland fire, a qualified utility or electric cooperative may not be considered to have negligently caused a wildland fire if:

(a) (i) the electrical transmission wildland fire protection plan of the qualified utility or electric cooperative identifies and addresses the cause of the wildland fire for fire mitigation purposes; and

(ii) at the origin of the wildland fire, the qualified utility or electric cooperative has completed the fire mitigation work identified in the electrical transmission wildland fire protection plan, including:

(a) inspection, maintenance, and repair activities;

(b) modifications or upgrades to facilities or construction of new facilities;

(c) vegetation management work; and

(d) preventative programs; or

(b) (i) the qualified utility or electric cooperative is denied or delayed access to a right-of-way on land owned by the state, a federal agency, or a tribal government after the qualified utility or electric cooperative requests access to the right-of-way to perform vegetation management or fire mitigation work in accordance with an electrical transmission wildland fire protection plan; and

(ii) the electrical transmission wildland fire protection plan identifies and addresses the cause of the wildland fire for fire mitigation purposes.

(4) A person who incurs costs to suppress a wildland fire may bring an action under this section to recover those costs.

(5) (a) A property owner who suffers damages resulting from a wildland fire may bring an action under this section to recover those damages.

(b) An award for damages to real property resulting from a wildland fire, including the loss of vegetation, shall be the lesser of:

(i) the cost to restore the real property to its pre-wildland fire condition; or

(ii) the difference between:

(A) the fair market value of the real property before the wildland fire; and

(B) the fair market value of the real property after the wildland fire.

(6) A person who suffers damage from a wildland fire may pursue all other legal remedies in addition to seeking damages under Subsection (4) or (5).

Thus, House Bill 66 specifically prohibits causes of actions against electric utilities or cooperatives if certain conditions are met.

## CONCLUSION

Recently, an Oregon Jury in a class action lawsuit found that PacifiCorp negligently failed to cut power to its 600,000 customers despite warnings from fire officials. The jury awarded more than \$42 million to 10 victims relating to 2020 wildfires. The jury found that PacifiCorp breached its standard of care by keeping its power lines energized during fires. This finding was based on evidence submitted during the trial, including expert witness testimony, lay witness testimony, and cross examination by the opposing parties.

Similarly, as western states develop policy related to wildfire liability, the question of when a utility is liable and what costs are included in a liability case is still left largely to the interpretation, on a case-by-case basis, of the courts in Montana.