HB

198

TO: Alaska Land Use Council
THROUGH: Staff Committee
FROM: Trespass Work Group
SUBJECT: Recommendations on Trespass
DATE: September 11, 1985

In January 1985, the Council adopted a work item addressing unauthorized use and trespass on both public and private lands. A work group including the following agencies was established:

Alaska Federation of Natives (Lead Agency)
State of Alaska, Department of Natural Resources
State of Alaska, Department of Fish and Game
State of Alaska, Department of Law, District Attorney's Office (ad hoc)
State of Alaska, Department of Public Safety (ad hoc)
U.S. Dept. of Interior, Bureau of Land Management
U.S. Dept. of Agriculture, Forest Service
U.S. Dept. of Interior, Fish and Wildlife Service
U.S. Dept. of Interior, National Park Service
U.S. Dept. of Interior, Bureau of Indian Affairs (ad hoc)

Under the leadership of the Alaska Federation of Natives, the group has developed a comprehensive set of recommendations on the subject. The primary focus of attention has been to identify ways to foster cooperation among landowners and recommend actions which may be taken by public agencies and private landowners to prevent and alleviate the growing problems of trespass and unauthorized use especially inadvertent use which constitutes the majority of the problems now occurring.

The Work Group spent several months identifying ways to foster cooperation among landowners in terms of preventing and abating trespass and unauthorized use on public and private land.

The underlying direction of the work group's recommendations is a good neighbor approach which encourages public and private land owners to cooperate to prevent trespass on adjoining land. The recommendations of the group are not intended to conflict with or contradict the responsibility of each landowner to enforce applicable laws and regulations on his own land to prevent trespass or unauthorized use.

The work group paid considerable attention to the question of who should be responsible for implementing each recommendation. In a number of cases the entity that would be most appropriate to implement the recommendation is identified in the report. It must be recognized, however, that the affected owner, public or private, has the primary responsibility for initiating actions to prevent trespass and working with neighboring landowners to develop a solution.

Some of these recommendations will require additional funding. These recommendations should be referred to by agencies as they prepare their respective budgets so that they may requisition funds needed to fulfill their responsibilities associated with trespass enforcement and abatement.

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RECOMMENDATIONS

WORK ITEM #1 - Recommend specific activities that offer public education intended to prevent unauthorized use of private and public lands.

A. User Information Maps[1] and Brochures Illustrating Land Ownership

Through better knowledge of the state's land ownership pattern, a significant amount of the inadvertent trespass activity could be prevented. In order to remedy this problem, easy to understand maps and brochures depicting land ownership should be prepared and made readily available to users of state, federal and other public land. These maps or brochures should be prepared for those areas which receive high public use and should show, in as much detail as possible, the land status for the area. Once completed, these maps should be made available to the public through public agencies, public information facilities, appropriate retail outlets and Native corporation offices. It is recommended that agencies preparing maps and brochures follow the steps outlined below.

1. Identification of areas subject to high use and trespass - Sites and easements which are subject to high public use should be identified by the landowner. It is recommended that agencies notify and solicit this information from regional corporations and other major landowners[2] prior to preparing user information maps. Such priority areas would most likely include the railbelt and roadbelt, the Bristol Bay area, specific parts of southeast Alaska, well used river corridors, major recreation areas, and transportation corridors. By identifying areas subject to trespass in these priority areas, it is possible to determine where land ownership maps are most needed. Due to funding priorities it will be necessary to focus first on those areas subject to high use and frequent trespass problems.

2. Preparation of maps - It is recommended that public agencies and Native corporations give due consideration to trespass abatement by establishing priorities for preparation of user information maps. It is recommended, prior to an agency's completion of these maps that major landowners review the map, when practical or reasonably necessary, to ensure that the land ownership information is accurately depicted.

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[1]General User Information Maps - These maps are of a general nature and should show land ownership boundaries and land status information. These maps are generally available for distribution to the public and are meant to inform the user about general topics concerning Alaska including land use, sources for additional information, or availability of areas for recreational use.

[2]Major landowners-Since the passage of ANCSA, large tracts of both state and federal land have been transferred to private landowners. These landowners include the Alaska Native regional corporations, village corporations, or other parties receiving tracts of land. Other major landowners include state and federal agencies such as the Bureau of Land Management and the State of Alaska, Department of Natural Resources.

a. Easement Atlas - The existing easement atlas project being carried out by the State of Alaska, Department of Natural Resources (DNR) is an example of a mapping program which meets the need of providing accurate land ownership maps. Under this project, DNR is preparing map atlases for the Bristol Bay and Copper River Basin areas. These atlases are made up of maps at 1:63,360 scale. They show the location of all valid public easments and rights-of-way, as well as the land status for those areas. If these atlases prove to be beneficial, they should be prepared for other areas of the state subject to high public use.

b. Native Corporation Maps - It is recommended that Native corporations also prepare maps of their land status which could be posted in regional centers, agency offices, Native corporation offices, hunting and fishing lodges, etc.

3. Distribution of Maps - It is recommended that the distribution of user information maps, whether free or at a nominal cost, be expanded. Whenever practical, appropriate land ownership maps should be made available and distributed to the following: aircharter businesses, guides, hunters, fishermen, campers and others who use public land. As they are completed, the DNR easement atlases should be distributed through state and federal agency offices.

B. Language for Public Documents Regarding Trespass and Unauthorized Use

It is recommended that appropriate language regarding the use of private land appear on all public documents (i.e., brochures, maps or informational leaflets) on land use, recreation, hunting and fishing, as well as any other documents which are appropriate. An example of wording that might be useful for this purpose is set forth below:

"Both small and large tracts of privately owned land are located within and adjacent to the boundaries of publicly owned land throughout the state. This private land is not open to public use or travel without permission from the landowner, unless public easements have been reserved or there is a valid existing public right-of-way. Navigable rivers passing through private land are available for use up to the ordinary high water mark. Tidelands are also available for public use up to the mean high tide mark.

Invasion of community and camp privacy is a concern of many rural residents. Be sensitive to local concerns. Trapping cabins and tent camps are essential to the livelihood of many rural residents. They should not be used except in case of real emergency. They may appear abandoned, especially in late summer when the brush is tall. The owners will return though and will need everything they left for the coming winter. The early trappers and wilderness travelers established an honorable tradition of respecting camps and cabins - a tradition that continues today.

Users should check with the _____ (insert appropriate land management agency) to determine the location of public land and public easements across private land. For information regarding the use of private land contact the landowner. Use or travel across private land or an unauthorized use of a public easment could be considered criminal trespass."

C. General Public Education Program on Trespass

A general public education program focusing on trespass is recommended and necessary. It should emphasize Alaska land ownership patterns, the need to prevent trespass and unauthorized use and respect private and public land. This public education program should be directed at both local residents and visitors. Outlined below are several suggestions for educating the public about trespass and unauthorized use.

1. Public Service Announcements - Public service announcements for radio and television should be developed and presented to the Alaska public by concerned parties. These announcements should inform the public about land ownership patterns and land use policies within Alaska. Such announcements could be developed on a state-wide basis or for particular use areas, such as wildlife refuges, parks or regional geographic areas. The Alaska Land Use Council will encourage interagency efforts to develop general statewide public service announcements. It is expected that both public agencies and Native organizations will participate in preparing and presenting public service announcements for specific areas or uses.

   Whenever possible, these announcements should be aired on programs dealing with hunting, fishing, recreation, etc. The announcements should emphasize that it is an individual's responsibility to become familiar with the land ownership patterns and trespass policies and laws for specific areas in Alaska. To the extent possible, an announcement should include an explanation of the allowable activities and uses for the different categories of public and private land in a particular area. It should also describe the means by which the public may become familar with land ownership patterns, trespass laws and policies.

2. Visitor Centers and Other Public Information Centers - When appropriate, available information on land ownership and land use and trespass policies should be integrated into visitor center materials, as well as other public information outlets or programs. It is recommended that the visitor centers have maps, easement atlases, Native land policies and land ownership brochures available. This information should be provided to the visitor centers by the appropriate entity and it should include a list of contacts for additional information concerning the use of public and private land. Visitor center and public information personnel should be able to inform the public about the location of large tracts of private land near or adjacent to public land.

3. Native Corporation Brochures and Actions - It is recommended that the Alaska Federation of Natives prepare an informational brochure describing Native land ownership in the state and the need to respect this privately owned land. Those Native corporations and public agencies which have serious trespass problems should consider setting up booths at sports fairs and other public events to explain their land management policies and practices.

4. Publications - Whenever possible, descriptions of existing land management policies and appropriate maps showing land ownership patterns should be included in magazines, tourist brochures, publications such as the Alaska Milepost, etc. Recently, Northwest Publishing has offered to include this information in their Milepost publications. Public and private landowners are encouraged to provide this information to these periodicals.

5. Central Depository For Land Use Policies and DNR Easement Atlases - A central depository should be established for information on land use policies and copies of the DNR easement atlases. Land owners are responsible for ensuring that the information on file is current. It is recommended that this information be updated on a regular basis. Possible locations for this purpose include visitor centers or the Department of Interior Resource Library. Such a depository will provide both landowners and the general public with a central location to acquire information about land use policies and public easement information. Official land status information will continue to be available at existing land records offices.

6. School Education Program - It is recommended that a land information program be developed for use in public schools throughout the state. This program could include audio - visual aids and other educational materials on the history of the various land acts and programs which have affected land ownership and land use in Alaska; specifically this should include the Alaska Native Claims Settlement Act, the Alaska National Interest Lands Conservation Act, and the Alaska Statehood Act. The program could also include information on current land management policies, including trespass, throughout Alaska. It is recommended that the University of Alaska and Department of Education be requested to produce the program.

D. Land Use Policies

It is recommended that Native corporations establish policies for the use of their land. These policies should be made available for reference at the central depository and visitor information centers.

E. Cooperation

It is recommended that neighboring public and private landowners work together to provide the general public with land use policies and permit information concerning public and private land. Private landowners should provide information of this nature to public agencies managing adjacent land. Once this information has been provided, public agencies should make the information available to the general public through their offices. Agency personnel will not be expected to interpret the Native land policy information or to issue permits. It is recommended that public agencies make similar information available to the Native corporations in order that they may distribute the information to the public.

F. Landowner Education Program

It is recommended that guidelines and/or educational programs be developed to provide private landowners with information regarding management and protection of privately owned land from trespass and unauthorized use. The education program should focus on landowner rights, duties and liabilities with regard to detaining trespassers, methods for pursuing criminal and civil action, reporting procedures for trespass activities, land management options, and permitting systems for commercial and non-commercial uses. This program may include the use of: videos, public service announcements, brochures, etc. It should be a cooperative effort between private landowners and public agencies. It is recommended that the Alaska Federation of Natives, Alaska Native Foundation and other regional profit and non-profit Native corporations explore and implement this program.

WORK ITEM #2 - Discuss known and suspected problems of unauthorized use and explore ways land and resource managers may be able to assist each other, as permitted by applicable laws, in implementing their respective responsibilities for enforcement and management to prevent unauthorized use. Among other things the group should identify problems and solutions associated with unauthorized access and travel across public land, permitting systems and other trespass prevention measures.

A. Cooperation & Trespass Prevention Measures

Agencies and private land owners are encouraged to cooperate and develop informal, and where appropriate formal agreements, which will encourage landowners to report to the appropriate landowner instances of unauthorized use and trespass on adjacent land. In the limited instances where formal agreements are advisable, the agreements should not be burdened with liability clauses regarding failure to report trespass incidents. The agreement should generally specify the types of activities which will constitute unauthorized use or trespass for the purpose of reporting such actions. It is recommended that landowners be responsible for informing their neighbors about their land management policies and priorities. It will be necessary for private landowners to provide such policies to agencies so they will know when to inform a land owner of a possible incident of trespass or unauthorized use. Generally, it is recommended that land managers concentrate on reporting trespass actions which cause resource damage, could lead to lasting resource damage, are a taking of timber or a mineral resource, represent continued unauthorized commercial use, or are activities which might lead to adverse possession.

1. Land Bank Agreements - Land Bank agreements may be used as a vehicle between public and Native land owners to report suspected trespass incidents. Unless otherwise specified, such agreements should not impose a liability upon the reporting agency.

2. Land Exchanges/Boundary Adjustments - In some high use areas, land exchanges or minor boundary adjustments may remedy trespass problems. It is recommended that a program be implemented whereby Native corporations could request public land management agencies to make land exchanges, boundary adjustments and/or acquire public easements to remedy or ameliorate chronic trespass problems.

B. Program Development

Agency heads, Native corporation officers and other appropriate policy representatives should provide direction on the development of programs and policies to prevent and deal with trespass problems.

1. Indentification and on-site management of site and trail easements - It is recommended that land owners and public agencies cooperatively identify easements subject to high public use. Programs should be implemented by the appropriate manager which ensure that these sites and trails receive priority in terms of posting and management. Providing appropriate facilities such as outhouses and litter barrels, as well as providing trail maintenance and clean-up programs, should be considered in those areas receiving high use. The Dillingham effort could be used as a model for this program. In this case, the BLM provided signs regarding public use of an ANCSA §17(b) easement, and in turn, the village corporation posted the signs along the easements on their land.

Public agencies and Native corporations should investigate the use of funding sources, such as DOT/PF's local roads and trails program monies, to help finance the identification and placement of signs along high use areas and public easements. The agency with primary management responsibility should develop standardized signs to identify authorized uses of easements and high use public areas.

2. Land Use Planning - Land use planning efforts for public and private land should take into consideration the impact of various activities which might cause trespass problems. Land use plans should identify heavily used areas which are open to public use.

3. Native Owned Land - It is suggested that Native corporations consider identifying areas on Native owned lands which may be open to public use for specific purposes. If opened, this land could be made available on a permit basis or non-permit basis. The Native corporations should also identify those areas which require the greatest protection against trespass and unauthorized use. They should then establish priorities for trespass abatement and for protecting specific areas against trespass and unauthorized use.

C. Law Enforcement

It is the perception of the Native community that trespass laws are not being adequately enforced, nor are trespass complaints being investigated in a timely manner. It is recommended that the Department of Public Safety investigate various mechanisms to improve upon the enforcement of trespass laws.

WORK ITEM #3 - Identify activities that may lead to trespass and unauthorized use on adjacent land and recommend possible ameliorating actions.

A. Coordination of Planning and Development Efforts

It is recommended that adjacent landowners coordinate with one another when developing activities that would attract the public since certain facilities or activities tend to have a magnetic quality which attracts or encourages the public use. Landowners should strive to implement their programs in a way to minimize activities or development which create unwanted trespass problems for adjacent landowners.

B. Uses Along Public Waters, Tidelands and Submerged Lands

It is recommended that agencies and private landowners work together to minimize trespass and unauthorized use problems which might occur on private uplands because of activities which are permitted along public waters, tidelands and submerged lands.

Legislative Action

After considerable discussion, the work group felt that recommending specific changes in state law was inappropriate as part of its recommended actions for trespass abatement. The work group, however, recognized that existing laws may not provide for effective control of trespass on public and private land; therefore legislative action may be needed.

Although land use activities have largely remained unchanged in Alaska since the passage of ANCSA and ANILCA, land ownership and management patterns have changed dramatically. Areas previously open for virtually unregulated public use are no longer available for that same purpose.

Existing state trespass laws evolved when private land ownership was generally confined to small blocks of land, usually 160 acres or less in size. The reality now is that in addition to the usual small blocks of private land, Native village and regional corporations own large blocks of land, thousands and even millions of acres in size. Boundaries between public and privately owned land are usually poorly defined, difficult to distinguish on the ground, and may extend for literally hundreds of miles.

Changing land ownership patterns require, at the minimum, a thorough review of current laws with respect to posting requirements and penalties currently applicable to trespass violations, as well as a review of state law authorizing adverse possession to determine whether it still serves a useful purpose in Alaska property law. Additional attention should be directed to the unauthorized taking of resources, such as sand, gravel and timber, from private land since current civil and/or criminal laws and penalties for such unathorized use may be inadequate.

The work group also agreed that liability laws should be examined and amended, if necessary, to limit the liability on the part of the land owner or manager for public use of their land. Limitations on liability might encourage private landowners to permit public use of their land.

The work group recognizes the importance of the legislative recommendations set forth by Jim Messick in the Department of Public Safety report, Trespass and Unauthorized Use of Native Lands in Alaska. The report may well serve as a starting point for a thorough review of all state laws which currently apply to trespass on private land.

In light of the massive changes in land ownership patterns, AFN and private landowners should undertake a critical review of all state laws dealing with trespass, unauthorized use of privately owned land and resources, and private landowner liabilities. The goal of such a review should be to recommend legislative action, if deemed necessary, to achieve two objectives: 1) require practical and reasonable measures for protecting private land and associated resources from trespass; and 2) reduce, as much as possible, the risk that land owners take if they allow recreational use of their land by the general public.

Re: Sponsor Substitute for HB 660 "An Act regulating the use of land."

Section by Section Analysis

This legislation is designed to provide landowners with better regulations regarding the use and management of privately owned lands.

Section 1

Section 1 adds a new chapter to Title 5 which addresses recreational use of private land. The purpose of this amendment is to encourage private landowners to open their lands to recreational use by the public. In exchange for opening private lands to public use, landowners would be protected from liability claims by recreational users.

Under the proposed statute, except as otherwise provided in the Act, a landowner will owe no duty of care to keep the land safe for entry or use by others for recreational purposes.[1] Nor will a landowner be required to warn persons using the land of a dangerous condition, use, structure or activity on the land, so long as the use is recreational in character. Furthermore, under the Act, an owner who directly or indirectly invites a person to use his property for recreational purposes doesn't extend any assurance of safety, confer legal status as a licensee or invitee, or assume responsibility for any injury to users caused by other recreational users. The Act, thereby, places invitees, licensees, and trespassers on the same footing if they are recreational users. Should an individual file suit against a landowner, it eliminates the need for an inquiry into the owner's consent or lack thereof.

The Act does, however, limit a landowner's liability in two specific cases. First of all, it does not limit a landowner's liability for a willful or malicious failure to guard against a dangerous condition, structure, or activity. This duty is analogous to the minimal standard of care owed to trespassers at common law.[2] In addition, the immunity of the statute does not apply to the landowner who charges for the recreational use of his land, excluding from this exception lease fees paid by the state and a municipal government or business. This exception preserves the common-law duty of the landowner when he has an economic interest in the presence of another.[3]

However, the Act does not relieve an individual using the land for recreation from an obligation to exercise care in relation to his use of the land and activities on the land. Recreational users will be liable for any damage to the property they cause during use of the property. The Act applies to an owner of land leased to the state, unless otherwise provided in writing.

The over-all effect of the Act, in summary, is to relieve an owner of land of any duty of care to persons using it for recreational purposes, unless he charges for use of the land, or his acts are willful or malicious. The implementation of the Act should encourage private landowners to open their land to the public for recreational use.

Presently, forty-three states, excluding Alaska, Nevada, Arizona, Rhode Island, Missouri and Mississippi have adopted laws which limit the liability of landowners whose lands are used by the public for recreational purposes such as hunting, fishing and sightseeing.[4] States have adopted these statutes to encourage landowners to open their lands to the public for recreational use. In exchange for opening their land, the private landowner's liability is then limited. These recreational use statutes represent a reverse in the trend toward extending land owner liability. These laws are based upon a special public policy directed toward a limited classification of users.[5] These statutes usually represent a tradeoff whereby the landowner is relieved of certain tort liabilities when he gratuitously allows the public to use his land for recreational purposes.[6] Statutes of this kind, including those not based on

the Model Act, have been held constitutional against equal protection challenges as rationally related to the valid state purpose of opening private lands for use by the public.[7]

Until the adoption of recreational use statutes, the tort liability of owners and occupiers of land has traditionally been based on common law doctrines. The courts have typically adhered to common law rules which recognize that a landowner owes a certain duty of care towards those entering upon his property as an entrant or invitee.[8] However, in most instances, it has been recognized that a landowner owes trespassers or licensees the duty to merely refrain from willfully or wantonly injuring them, with the least duty of care being owed to a trespasser.[9]

The model recreational use act and subsequent recreational use acts have dramatically altered the common law principles regarding liability. Under these acts, except when there is consideration, owners may remain silent and allow even known hazards to persist without incurring liability for resultant injuries to recreational users, regardless of the users' classification under common law. The law shifts the burden of liability for injuries from the landowner to the recreational user.[10] Although this principle may seem contrary to common law, the courts have upheld the various recreational use laws because the public benefit of encouraging free use of the land far outweighs the increased cost of injuries to negligent recreationalists.[11]

Recreational use statutes have been enacted to increase the amount of land available for public recreation activities. In order to accomplish this, the legislatures created a "quid pro quo," whereby a landowner receives immunity from lawsuits due to his negligence in return for opening his land to the public. Alabama's preamble expresses the intent in creating these statutes by stating:

> "It is hereby declared that there is a need for outdoor recreational areas in this state which are open for public use and enjoyment; that the use and maintenance of these areas will provide beauty and openness for the benefit of the public and also assist in preserving the health, safety and welfare of the population; that it is in the public interest to encourage owners of land to make such areas available to the public by limiting such owner's liability towards persons entering therein for such purposes; (emphasis added) that such limitations in liability would encourage owners of land to allow non-commercial public recreational use of land which would not otherwise be open to the public, thereby reducing state expenditures needed to provide such areas."[12]

Without certain legal protection against liability claims, it is unreasonable to expect a private landowner to open his land to public use. This is especially true in Alaska where much of the land is isolated, in a natural state and so remote it cannot be carefully policed by the landowner.

There is concern that the proposed legislation removes a landowner from total legal responsibility to a person entering onto his land for recreational uses. This, however, is not the case because Section (d) states, "This section does not limit the liability of an owner of land for a wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." (emphasis added). Twenty-two other statutes contain the same exclusion,[13] and most others have similar provisons.[14]

Although AS 09.45.795 provides liability protection against injuries received on unimproved land, the recreational use act amendment takes the law a step further. The liability protection a landowner receives would now extend to any private land so long as it is open to public recreational use and the landowner receives no valuable consideration for use of the land. This language would, therefore, remove some of the burden now placed on a landowner

to warn persons entering upon his land of any hidden dangers of which he is aware, Moloso v. State, 644 P.2d 205 (Alaska 1982), or possibly including the likelihood of being eaten by an unruly bear or other ferocious beast, Carlson v. State, 598 P.2d 969 (Alaska 1979).

The amendment as proposed is not contrary to case law which supports the premise that recreational use statutes should be applicable to rural areas where land is in its natural, undeveloped state[15] or the statutes are only applicable to land not susceptible to policing.[16] A landowner in an urban setting cannot use the Recreational Use Act as a defense should someone be injured in his backyard.

Section 05.40.010(c) is a clarification of what can be considered compensation for the purpose of this act. Although other recreational use acts leave the meaning of compensation ambiguous by using language such as for a "charge" or "consideration"[17] it is important to remove any ambiguities regarding the definition of "compensation" for the purposes of this act. A landowner should not have to be responsible for the actions of a lessee. In this situation, the lessee, not the landowner, will be the party liable for any damages resulting from an injury or wrongful death of a user of the leased premises.

The language in AS 05.40.020 is standard language included in the recreational use acts.[18] It is necessary to protect a landowner's ownership rights in the land. Without such language, it is possible that over a period of time the public would acquire a prescriptive easement to use a particular piece of land for recreational purposes in perpetuity. This language prevents such an action from occurring.

Section 2.

Section 2 amends AS 09.45.730 by adding a new subsection which recognizes the right to go onto another person's land to conduct geophysical exploration is a valuable interest which should be protected by the law. The mineral explorer who goes onto another person's land to gather geotechnical data or take mineral resources without permission from the landowner is a geophysical trespasser.[19] This type of trespass activity is becoming more common in Alaska. It is believed that a law such as this will help deter any illegal resource exploration or taking of mineral resources.

The courts have recognized a landowner's right of recovery against a geophysical explorer who enters upon land without authority and conducts a geophysical survey.[20] Damages have been awarded to a landowner for geophysical trespass based on actual surface damages,[21] on loss of the exploration right, [22] and on loss of the leasing value.[23]

An adequate remedy is required to compensate the landowner for the loss of prospective advantage suffered in a particular case. When the interference results in a pecuniary loss, the landowner should be allowed legal redress if (1) the explorer intentionally proceeds with a geophysical survey of the plaintiff's land without authorization, and (2) an actual exploration of the property is conducted.

In the case of a geophysical trespass, physical harm to the property is only of minor consequence. Physical damages can be avoided by the use of modern surveying methods that cause little or no physical damage to the land. The greatest concern of landowners is not damage to land, but their loss of prospective economic advantages. A landowner's major losses are those resulting from the misappropriation of information regarding the mineral estate. A landowner is deprived of a valuable exploration right, and if the survey tends to demonstrate that the land is valueless for mineral development, a landowner may be denied the opportunity to lease or sell his rights to the mineral estate.[24]

Usually when the public knows a surreptitious survey has taken place, speculative value of the land is affected whether or not information concerning the results is made public. For example, if the explorer takes no action after the survey has been conducted, unfavorable data will be presumed, causing the same effect as drilling a dry hole.[25] In Humble Oil & Refining Co. v Kishi, the landmark case on destruction of speculative value,[26] the court held that a trespasser who entered and drilled a dry hole was liable to the property owner for the destruction of the speculative value of the land. Whether the destruction of speculative value is caused by the drilling of a dry hole or by a geophysical survey, the landowner has been harmed.[27] Conversely, should the survey yield positive results which tend to demonstrate that certain land has a high propensity to produce a mineral resource, nondisclosure problems may arise in future negotiations between the explorer and landowner.

The following types of damages[28] have been suggested, dependent upon the particular facts and circumstances and the bona fide intent of the defendant: (1) the value of the right to enter on the land for the survey; (2) the loss of speculative value by reason of unfavorable publicity resulting from the survey; (3) the value to the trespasser of the information the operator obtained by the geophysical trespass; and (4) a form of punitive damages when the trespass is in bad faith. It has been held that a landowner may be awarded at least nominal damages for unauthorized geophysical exploration; however he is not limited to such a small remedy.[29] Other cases have conclusively established that compensatory damages are available to redress any injuries that were proximately caused by unauthorized geophysical exploration.[30] In addition, one Court has stipulated that punitive damages are available for flagrant disregard of the rights of the mineral owner.[31]

Given the sensitive nature of mineral rights, the landowner should also be protected against a negligently conducted survey.[32] For example, a negligent survey would encompass misappropriation of information occurring as a result of boundary errors or operational negligence. In situations where unauthorized exploration has occurred, a landowner loses a valuable exploration right.[33] If the existence of the survey becomes known, or if unfavorable contents of the survey are released, the landowner is harmed since he may suffer the loss of all prospective advantage arising from the mineral estate.

A landowner can also be harmed should an unauthorized survey yield information that suggests that a property has high mineral potential. Although mineral estate information is confidential and of a propriatary nature, it may be used to the detriment of the landowner and the benefit of the misappropriator. When an exploration company and landowner go to negotiate exploration/development contracts, the exploration company is under no duty to disclose the findings of its illegal survey or the fact that a survey has been conducted. In this situation, the exploration company has an unfair advantage in the negotiation process because of information gathered surreptitiously. Based on the data gathered, a company may or may not decide to enter into an exploration/development contract.[34]

Adverse economic consequences invariably flow from unauthorized exploratory activities. When the geophysical explorer proceeds with a survey, the landowner receives no compensation for the surveys conducted. Meanwhile, the explorer has acquired valuable private information without being required to compensate the landowner. If favorable for mineral production, and if secrecy of the survey is maintained, the information will lead to an unequal bargaining position since the exploration company is under no duty to disclose the existence of the survey or its contents. Furthermore, information that is compiled from a geophysical survey is often inaccessible to the landowner because the survey cost is prohibitive. Conversely, if the information released is unfavorable and tends to show the land is worthless for mineral development, a landowner could suffer the loss of speculative or lease value.

The surreptitious geophysical survey is the type of improper conduct to be guarded against by the "interference"[35] tort. Intentionally proceeding with a geophysical survey without proper

authorization from the landowner is the type of improper, unfair, and unethical trade practice against which the interference tort should protect. E.I. DuPont de Nemours & Co. v. Christopher, 431 F.2-d, 1012 (1970) stated that "extraction of confidential information concerning the mineral estate by use of air reconnaissance devices would be an improper method of appropriation."

The landowner's right to contract for the sale of the opportunity to explore the land is a prospective advantage, as is the landowner's right to enter into subsequent oil and gas leases. When an operator chooses to act without proper authorization, the landowner is injured. The surreptitious survey interferes with the landowner's ability to contract for the sale or lease of the exploration rights. Once the survey has been conducted, the landowner will have lost the value of those exploration rights.[36] Moreover, that loss may be compounded by publication or business disclosures that may deprive a land owner of the speculative or lease value of the land, or result in an unequal bargaining position and lost profits for the landowner.

When an exploration company conducts a survey of a landowner's property, the existence of the survey should amount to prima facie evidence of a prospective advantage since the operator was sufficiently interested in the property to expend the time, effort, and money to conduct the survey. The landowner's lost profits might be measured by any of the following methods: (1) the value of the right to enter on land for the survey. (2) the loss of speculative or lease value, or (3) the difference between the price paid and the actual fair market value. The ultimate goal is to make the landowner whole for the deprivation occasioned by the actions of the exploration company.[37] If the exploration company's conduct is sufficiently culpable, punitive damages should be awarded.

When the interference results from negligently conducted exploration activites, the landowner can be afforded legal redress under the negligence aspect of the tort. Negligent interference with prospective advantage is recognized in California[38] and like the intentional counterpart, provides legal redress to make the landowner whole for the injuries inflicted by a surreptitious geophysical survey.

Section 3

Section 3 amends AS 09.45.795 so that the landowners are protected against liability suits resulting from injuries caused by isolated and unknown improvements which may be on an individual's land. The proposed change in the law will provide landowners with reasonable protection against an "attractive nuisance" or "negligence" lawsuit involving an improvement for which a landowner had no actual knowledge and could not reasonably be expected to have had knowledge of its existence.

Due to the vast amount of private land in Alaska and the remote location of much of the land, it is quite possible that there are improvements on the land for which the landowners have no actual knowledge. Although the AS 09.45.795 provides liability protection against injuries received on unimproved and apparently unused land, no protection is provided for those situations involving unknown improvements, such as mine shafts, out-of-way gravel pits, old military facilities, abandoned cabins or old roads, trails and airstrips.

The duty of care owed by an owner or possessor of land to those on the land has traditionally depended upon a rather rigid scheme of classification of the persons on the land as trespassers, licensees or invitees, with the greatest duty of care owed to invitees. The Restatement of Torts, Second outlines the following duties of care a landowner owes to an entrant on the land:

§ 342. Dangerous Conditions Known to Possessor

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
(c) the licensees do not know or have reason to know of the condition and the risk involved.

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused by his invitees by a condition on the land if, but only if, he
(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
(c) fails to exercise reasonable care to protect them against the danger.

In these situations, the court typically examine the nature of the improvement,[39] the cost of removing the improvement,[40] the landowner's likeliness and actual knowledge of its existence and the extent to which the improvement can be considered an attractive nuisance.[41]

Section 4

Section 4 adds a new section to AS 09.45.795 which states that a landowner is not liable to a trespasser in violation of AS 11.46.320 for damages for an injury received or wrongful death which occurs on a landowner's land whether it is improved or unimproved.

Under the present law, it is possible for a trespasser to sue a landowner for injuries received while trespassing on the other person's land. However, under the law of torts, the lowest duty is owed to a trespasser, who is defined by §329 of the Restatement of Torts, Second, as "...a person who enters or remains upon land in possession of another without a privilege to do so created by the possessor's consent or otherwise."

In the past, other courts have held that a landowner owes a minimum care to a trespasser.[42] Since there is almost no case law in Alaska dealing with trespass and injury to the trespasser, it is important that Alaska's statutes be revised to protect landowners from liability suits involving trespassers.

Section 5

Section 5 amends AS 11.46.320 by adding a new section which outlines several forms of trespass which shall be considered criminal in nature, and therefore, subject to criminal prosecution. The penalty for the trespass actions will continue to be a Class A misdemeanor as stated in AS 11.46.320.

Presently, the revised Criminal Code provides that "a person, who without intent to commit a crime on the land, enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is privileged to do so, (emphasis added) unless; 1) notice against trespass is personally communicated to that person by the owner of the land or some authorized person; or 2) notice against trespass is given by posting in a reasonably conspicuous manner under the circumstances."

As the statute is now written, it encourages and permits casual trespass, rather than preventing it. The existing statute is worded in such a manner that it does not discourage casual trespass on private land. Rather, it sanctions this type of activity so long as an individual is not intending to commit a crime and the lands are unused and unfenced, or the individual using the land has not been advised by the land owner that the land is indeed private land.

It is difficult for private landowners to get state officials to aggressively prosecute those cases involving various types of trespass on private lands. The Criminal Code is ineffective when dealing with trespass predominantly because the State Troopers, by and large, do not view trespass as a major crime. This attitude is in significant contrast to the Lower 48 where states have made it a crime to hunt or fish on private land if an individual does not have permission from the landowner beforehand.[43] In its present form, the statute is very vague as to what constitutes criminal trespass, and therefore, does not provide landowners with adequate protection against trespassers. The Alaska Statutes are subject to interpretation and place the burden of proof that a trespass has occurred on the landowner. The proposed changes in the statute removes the ambiguity now found in AS 11.46.320(a) and (b). This language leaves no doubt as to what actions shall be considered criminal trespass, and therefore subject to prosecution as such.

As it now stands, the statute may be interpreted in a manner which will permit a person to enter on private land to go hunting, fishing, camping, prospecting, etc., so long as the person is not intending to commit a crime and the lands are unused, unfenced, and no one advises the user to the contrary. The statute reflects the philosophy that if a landowner wants to exclude intruders, the land owner should be solely responsible for taking steps to do so. The entire burden of protecting one's land is thereby placed on the landowner. The philosophy is very contrary to the laws of other states.[44] Comparatively, Alaska's trespass laws are much more lenient and do very little to protect a landowner against trespass.

Closely associated with the problem of the leniency of the state's laws is an attitude which is common to law enforcement agencies and the District Attorney's office wherein trspass is regarded as a low priority issue. Trespass activities are not viewed as major crimes which require immediate legal action, consequently little is done to enforce the state's trespass laws, even when requested to do so by a landowner experiencing trespass problems. As long as this attitude prevails, landowners will continue to have to carry the responsibility themselves of deterring trespassers and enforcing trespass laws. To ease the burden on the landowner more stringent trespass laws are needed.

The amendment to AS 11.46.320 clearly differentiates between acts which are fundamentally civil in nature and those which are more criminal in character. Furthermore, it recognizes that criminal prosecution is not necessary for all trespass offenses. In some situations, such as cases involving geophysical or timber trespass, the civil courts and/or privately negotiated agreements may could be used in lieu of criminal prosecution to resolve the trespass problem when the situation warrants such action. It is important to note, however, that a civil action is usually not a very satisfactory remedy to a trespass problem because it is expensive for an individual to prosecute a civil case. A landowner would be required to hire attorneys to file the action and there is no certainty of recovering more than nominal amounts for damages done during the trespass. Unless the enormous evidentiary burden now placed on the landowner is removed, the majority of the trespass actions now occurring will remain unabated and difficult to prosecute.

The intent of this amendment to AS 11.46.320 is to deal with severe instances of trespass. The amendment recognizes that not every trespass action is criminal in nature. The amendment recognizes that the inadvertency of a typical trespass by an individual who, who without consent from the landowner, mistakenly crosses or camps on unfenced and unposted

private land in an area dominated by wilderness and interspersed with public land is usually such a minimal intrusion upon the land of another that it should not be considered a criminal act. However, the amendment does recognize that landowners have certain rights must be protected, especially if an individual knowingly enters private land, and reasonable notice has been given not to enter or remain on the property.[45] This type of action will now be considered a criminal trespass. The proposed statutory language for revising the Criminal Code holds a trespasser accountable for his trespass actions. A trespasser who ignores the rights of a landowner to limit the use of his land should be subject to prosecution because he blatantly and patently ignored the landowner's request not to use or enter onto the land. Such willfullness shows a total disregard for the rights of others and should not be tolerated by the law.[46]

Section 6

Section 6 amends AS 11.46.350(b) by allowing that "notice" be given through the use of alternative forms of posting.[47] Furthermore, by deleting the language "and apparently unused" the statute recognizes that there are vast tracts of unimproved land that may be used by the landowner which should also be protected against trespass.

Section 7

Section 7 adds a new section to AS 11.46.350 which provides specific requirements for posting private land. The purpose of this language is to remove the ambiguity associated with the present statutory requirement that land be posted "in a reasonably conspecuous manner." The law as it is now written leaves everything to interpretation. A landowner's interpretation of the minimum posting requirement may result in the landowner not posting his lands sufficiently to satisfy law enforcement officers or prosecutors. For example, under a strict interpretation of the law, if a float plane lands on a lake or river inside a private landowner's property boundaries, the land would not be considered to be posted "in a reasonably conspicuous manner," if signs were posted only on the property's exterior boundaries. To be considered adequately posted, signs would have to be posted along the shores of all interior lakes and rivers. This interpretation of the law is extremely burdensome for owners of large tracts of land because of the vastness, remoteness and inaccessibility of many of these lands.

The statute has been modified so that it is reasonable and will permit the private landowner to comply with the posting requirement with reasonable facility. Under the present law, those private landowners who have not adequately posted their lands against trespass are unable to prosecute trespassers even if there is a flagrant and purposeful instance of trespass and unauthorized use. The addition of alternative posting options reflect the uniqueness of Alaska's land ownership patterns (vast tracts of undeveloped private land) and makes the posting of private land much less burdensome for the landowner. This amendment will provide protection to the private landowner against casual trespass and will also allow for prosecution of severe cases of trespass. Since state law requires that land be posted before there can be enforcement of the trespass laws, it is essential that the statutes stipulate in no uncertain terms what constitutes the posting of land.[48] The proposed language of Section 7 recognizes the unique character of land ownership patterns in Alaska. Specifically Section 11.46.350(d)(2) provides guidelines for posting land that is isolated and inaccessible by road.[49] Under the current law, it is possible that a court would interpret the law to mean that a landowner has to post signs along all outer property boundaries, river banks and lake shores. For land owners with large tracts of land, this would mean posting literally hundreds and thousands of signs. This is a very expensive and burdensome requirement for landowners. In fact, in many areas of the state, it would be difficult for landowners to post signs simply because there are no trees on which to attach "no trespassing" signs. As it is now written, the state's posting requirement is unrealistic when applied to large tracts of land, and in many instances cannot be implemented economically or

practically by the landowner. The new language provides for an alternative form of posting which can be used more readily by landowners.

Finally the new language in AS 11.46.350(e) provides for criminal penalties for the removal or destruction of trespassing signs and fences enclosing private land. "No trespassing" signs are constant targets for vandalism. Although landowners still have a continual obligation to police their lands to ensure that his lands remain posted, this provision will at least provide landowners with some recourse against individuals who intentionally remove and destroy "No Trespassing" signs or fences surrounding their property.[50]

Footnotes

1 See e.g. Texas O. & E. Ry v. McCarroll, 80 Okla. 282, 284-45, 195P. 139, 141 (1920) trespassers); Foster, 426 P.2d at 360 (licensees). Once a trespasser is discovered, however, the owner must exercise ordinary care to avoid injuring him. Texas O. & E. Ry, 80 Okla. at 285, 195 P. at 141-42. Further, a landowner must warn licensees and discovered trespassers of concealed, dangerous conditions of which the owner has knowledge. W. Prosser, Law of Torts, §§ 58, 60, at 357-85 (4th ed. 1971).

2 In Oklahoma, the invitor must use ordinary care to maintain his premises in reasonably safe condition. Wise v. Roger Givens, Inc. 618 P.2d 951, 952 (Okla 1980); Rogers v. Hennessee. 602 P.2d. 1033, 1034 (Okla. 1979). This duty is applicable only to defects or conditions not readily observable by the invitee. Sutherland, 595 P.2d at 783.

3 An invitee is a person expressly or impliedly invited on the land for a business purpose; the owner and the invitee have a mutual interest in the invitee's presence. W. Prosser; supra. note 1 §60, at 385.

4 ALA. Code §35-15-20 (Supp. 1982); ARK STAT, ANN. §§50-1101 to -1107 (1971); CAL. CIV. CODE §846 (West 1982); COLO. REV. STAT. §§33-41-101 to -105 (1973); CONN. GEN. STAT. ANN §§52-557f to -557k (West Supp. 1982); DEL. CODE ANN, tit. 7. §§5901-5907 (Supp. 1970); FLA. STAT. ANN. §375.251 (West 1974 & Supp. 1982); GA. CODE ANN. §§105-403 to -409 (1968 & Supp. 1982); HAWAII REV. STAT. §§520-1 to -8(1976); IDAHO CODE §36-1604 (Supp. 1982); ILL. ANN. STAT. ch. 70, §§31-37 (Smith-Hurd Supp. 1982-1983); IND. CODE ANN. § 14-2-6-3 (Burns 1982); IOWA CODE ANN. §§IIIC.1-7 (West Supp. 1982-1983); KAN. STAT. ANN. §§58-3201 to -3207 (1976); KY. REV. STAT. ANN. §150.645 (Baldwin 1981); LA. REV. STAT. ANN. §9:2791 (West 1965); ME. REV. STAT. ANN, tit. 14, §159-A (1980 & Supp. 1982-1983); MD. NAT. RES. CODE ANN. §§5-1101 to -1108 (1974 & Supp. 1982); MASS. GEN. LAWS ANN. ch. 21, §17C (West 1981); MICH. COMP. LAWS ANN. §300.201 (West Supp. 1982-1983); MINN. STAT. ANN §§87.01 -.03 (West 1977); MONT. CODE ANN. §§70-16-301 to -302 (1981); NEB. REV. STAT. §§37-1001 to -1008 (1978); N.H. REV. STAT. ANN. §212:34 (Supp. 1979), N.J. STAT. ANN. §§2A:42 A-2 to -5 (West Supp. 1982-1983); N.M. STAT. ANN §17-4-7 (1978); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 1978 & Supp.) 1981-1982); N.D. CENT. CODE §§53-08-01 to -06 (1982); OHIO REV. CODE ANN. §§ 1533.18-181 (Page 1978 & Supp. 1982); OKLA. STAT. ANN, tit 76, §10-16 (West 1976); OR. REV. STAT. §§ 105.655-680 (1981); PA. STAT. ANN. tit, 68, §§ 477.1-8 (Purdon Supp. 1982-1983); S.C. CODE ANN. §§27-3-10 to -70 (Law Co-op, 1976); S.D. (CODIFIED LAWS ANN. §20-9-5 (1979); TENN. CODE ANN. §§51-801 to -805 (1977); TEX. REV. CIV. STAT. ANN, art 1b (Vernon Supp. 1982); VT. STAT. ANN. tit, 10, §5212 (1973); VA. CODE §29-1302 (Supp. 1982) WASH. REV. CODE ANN. §§4 24.200 -210 (Supp. 1982); W. VA CODE §§ 19-25-1 to -5 (1977); WIS. STAT. §29.68 (1979): WYO. STAT. §§34-389.1-6 (Supp. 1975). Two states enacted recreational use statutes but later repealed them. See N.C. Secs. Laws 830.§1 (repealed 1980); 1965 Utah Laws 115 (repealed 1971).

5 COMMITTEE OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION, XXIV SUGGESTED STATE LEGISLATION 150-152 (1975). The policy preamble states - Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public. The acquisition and operation of outdoor recreational facilities by governmental units is on the increase. However, large acreages of private land could add to the outdoor recreational resources available...in those instances where private

owners are willing to make their land available to members of the general public without charge, it is possible to argue that every reasonable encouragement should be given to them.

6 "The Legislative Assembly hereby declares it is the public policy of the State of Oregon to encourage owners of land to make their land available to the public for recreational purposes by limiting their liability towards persons entering therein for such purposes, and in the case of permissive use, by protecting their interests in their land from the extinguishment of any such interest or the acquisition by the public of any right to use or continue the use of such land for recreational purposes." §105.660 Oregon Statutes-Property Rights and Transactions.

7 Parish v. Lloyd, 82 Cal. App.3d 785, 147 Cal. Rptr. 431, 432 (1978) and Lostritto v. Southern Pac. Transp. Co., 73 Cal. App.3d 737, 140 Cal. Rptr. 905, 910-911 (1977), upholding Cal., Civ. Code §846 (West Supp. 1979); and Estate of Thomas v. Consumers Power Co., 58 Mich. App. 486, 228 N.W.2d 786, 792 (1975), upholding Mich. Comp. Laws Ann. §300.201 (Supp. 1979). Limiting the liability of landowners opening their property to the public for recreation does not violate equal protection. Simpon v. U.S. (C.A. 1981) 652 f.2d 831.

8 Restatement of Torts, Second §341A, 343 (1965). See also Morton v. Lee, 75 Wn.2d 393, 400 S n.2, 450 P.2d 957, 961-67 S n.2 (1969). Buthnick v. J & M, Inc., 186 Wash. 658, 661, 59 p.2d 750, 751 (1936).

9 W. Prosser, Law of Torts, §58, 60 (4th ed. 1971).

10 State of Oregon. §105.665 Duties and liabilities of owner of land used by public for recreation.

Except as otherwise provided in ORS 105.675: (1) an owner of land owes no duty of care to keep land safe for entry or use by others for any recreational purpose or to give warning of a dangerous condition, use, structure of activity on the land to persons entering thereon for any such purpose. (2) an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

(a) Extend any assurance that the premises are safe for any purpose;
(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed; or
(c) Assume responsibility for or incur liability for any injury to person or persons or property caused by an act of omission of that person.

11 See Note 7.

12 Alabama Code §35-15-20 (Supp. 1982) (emphasis added)

13 See Cal. Civ. Code §846 (West 1982); Conn. Gen. Stat. Ann. §52-557h(1) (West Supp. 1983); Del. Code Ann. tit. 7, §5906(1) (1984); Ga. Code Ann. §105-408(a)(Supp. 1982); Hawaii Rev. Stat. §520-5(J) (1976) (slightly dissimilar); Act of Aug. 2, 1965, §6(a), Ill. Ann. Stat. ch 70, §36(a) (Smith-Hurd Supp. 1983-1984); Iowa Code Ann. §11C.6(1) (West Supp. 1983-1984); Kan. Stat. Ann. § 58-3206(a)(1983); Ky. Rev. Stat. Ann. §150.645 (Bobbs-Merrill 1980) ("willful and malicious"); Me. Rev. Stat. Ann, tit, 14 § 159-A(4)(A) (1980); Md. Nat. Res. Code Ann. § 5-1106 (1983); Neb. Rev. Stat. §37-1005(1) (1978); Nev. Rev. Stat. §42.510(3)(a) (1981); N.W. Rev. Stat. Ann. §212.34 III(a) (Supp. 1983); N.J. Stat. Ann. § 2A.42A-4(a) (West Supp. 1983-1984); N.Y. Gen. Oblig. Law

§9-103(2)(a) (McKinney Supp. 1983-1984); N...D. Cent. Code §53-08-05(1)(1982); 68 PA. Cons. Stat. Ann. §477-6(1)(Purdon Supp. 1983-1984); Tenn. Code Ann. §§ 11-10-103(1)(Supp. 1983)("dangerous or hazardous"). 70-7-104(1)(1983); Va. Code §29-130.2(d) (Supp. 1983); W.Va. Code § 19-25-4(1984) ("dangerous or hazardous"), Wis. Stat. Ann. §29.68(3) (West Supp. 1983-1984).

14 See Ala. Code §35-15-24(a) (Supp. 1982)(quoted infra note 134); Ark. Stat. Ann. §50-1106(a)(Supp. 1983)("malicious but not mere negligent failure to guard or warn against an ultra-hazardous condition, structure, personal property, use or activity usually known to...be dangerous"); Colo. Rev. Stat. §33-41-104(a)(1973)("willful or malicious failure to guard or warn against a known dangerous condition, use, structure, or activity likely to cause harm"), Fla. Stat. Ann. §375.251(4)(West 1974)("deliberate, willful or malicious injury to persons or property"); Ind. Code Ann. §14-2-6-3)(Burns Supp. 1983)("malicious or illegal acts") La. Rev. Stat. Ann. §9.279(B)(West 1965)("deliberate and willful or malicious injury to persons or property"); Mass. Gen. Laws. Ann. ch 21, §17C(West 1981)("willful, wanton or reckless conduct") Mich. Comp. Laws Ann. §300-201 (West 1984) ("gross negligence or willful and wanton misconduct") Minn. Stat. Ann. §87.025(a)(West 1983)("conduct which...entitles a trespasser to maintain an action"); Miss. Code Ann. §89-2-5 (Supp. 1983) ("deliberate, willful or malicious injury"); Mont. Code Ann. §70-16-302(1983)("willful or wanton misconduct), Or. Rev. Stat. §105.655(1981)("reckless failure to guard"); S.C. Code Ann. §27-3-60(a)(Law Coop 1976)("grossly negligent, willful or malicious failure to guard or warn") S.D. Codified Laws Ann. §20-9-5 (1979) ("gross negligence or willful and wanton misconduct"); Tex. Rev. Civ. Stat. Ann, art 1b(2)(Vernon 1969)("willful or malicious injury to persons or property"); Vt. Stat. Ann. tit 10 §5212(b)(1973)("no greater duty except as to acts of active negligence than is owed a trespasser); Wash. Rev. Code Ann. §4.24.210 (Supp. 1983-1984)("injuries... by reason of a known dangerous artifical latent condition for which warning signs have not been conspicuously posted").

Only two recreational use statutes contain no such exception. See Idaho Code §35-1604 (Supp. 1983); Ohio Rev. Code Ann. §1533.18-.181 (Baldwin 1980).

15 Quesenberry v. Milwaukee County, 106 Wis. 2d 685 317 N.W.2d 468, 472 (1982) (activities expressed in statute are usually "done on land in its natural undeveloped state."

16 Kucher v. Pierce County, 24 Wash. App. 281, 600 P.2d at 688, 1979. The court discussed three factors for determining the scope of applicability of the immunity statute; these include: "(1) the amount of land owned by the defendant; (2) the arrangement of this land and its improvements and (3) the relative proximity of the land to a population center.

17 Ark. Stat. Ann. §50-1106(b)(1971); Tex. Rev. Civ. Stat. Ann. art. 1b §4(2) (Vernon 1969 & Supp. 1982)

18 Ore. Stat. §105.677(1) "An owner of land who either directly or indirectly invites or permits any person to use his land for any recreational purpose without charge shall not thereby give to such person or to other persons any right to continued use of his land for any recreational purpose without his consent. (2) The fact that an owner of land allows the public to recreationally use his land without posting or fencing or otherwise restricting use of his land shall not raise a presumption that the landowner intended to dedicate or otherwise give over to said public to continued use of the land.

19 8 H. Williams and C. Meyers, Manual of Oil and Gas Terms, 319 (5th ed. 1982), defines the term "geophysical trespass as "the wrongful entry on land for the purposes of making a geophysical survey on the land."

20 See Phillips Petroleum Co. v. Cowden, 241 F.2d 586 (5th Cir. 1957)(the right to explore is a valuable property right that can be legally protected); Franklin v. Arkansas Fuel Oil Co., 218 La 987, 51 So. 2d 600 (1951) (the right to explore is a valuable property right which belongs exclusively to the owner of the land and if it is wrongfully exercised, it is a proper element to be considered in awarding damages); Layne Louisiana Co. v. Superior Oil Co., 209 La, 1014, 26 So. 2d 20 (1946) (the right to conduct geophysical exploration is a valuable property right and disregard of that right entitles the landowner to recover compensatory damages); Angelloz v. Humble Oil & Ref. Co., 196 La. 604, 199 So. 656 (1940) (the right to permit entry upon land to conduct physical exploration is a valuable property right and belongs exclusively to the owner); Wilson & Texas Co., 237 S.W.2d 649 (Tex. Civ. App. 1951) (the right to enter upon lands for the purpose of making geophysical surveys is a valuable property right which belongs exclusively to the landowner, and an unauthorized invasion renders the invader liable for damages to the owner).

21 See Shell Petroleum Corp. v. Scully, 71 F.2d 772 (5th Cir. 1934) (plaintiff entitled to recover full indemnity for his loss in quasi-contract); Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014, 26 So. 2d 20 (1946)(actual damages awarded for loss of cattle, drilling of seventeen shot holes and damages to fences, trees, private road, crops and the surface terrain of the land); General Geophysical Co. v. Brock, 205 Miss. 189, 38 So. 2d 703 (1949)(actual damages awarded for destruction of a water well); Wilson v. Texas Co., 237 S.W.2d 649 (Tex. Civ. App. 1951)(good faith trespasser is liable only for actual damages).

22 See Franklin v. Arkansas Fuel Oil Co. 218 La. 987, 51 So. 2d 600 (1951) (exploration right is a proper element to be considered in the award of damages): Holcombe v. Superior Oil Co., 213 La. 684, 35 So. 2d 457 (1948)(compensatory damages available for appropriation of the exploration right), Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014, 26 So. 2d 20 (1946) (exclusive right to explore for minerals entitles landowner to recover compensatory damages for disregard of the right); Angelloz v. Humble Oil & Ref. Co. 196 La. 604, 199 So. 656 (1940) the right to explore is a valuable property right and may be considered in assessing damages).

23 See Williams & Meyers, Adverse Possession and Trespass in the Law of Oil and Gas, 29 Rocky Mt. L. Rev. 1, 48-50 (1956). Williams and Meyers cite Angelloz v. Humble Oil & Ref. Co. 196 La. 604, 199 So. 656 (1940)(dissemination of unfavorable information by geophysical trespasser entitled landowner to damages for resulting depreciation of lease value) as authority for recovery of damages for loss of speculative value. The rationale advanced for allowing recovery for loss of leasing rights due to a decrease in speculative value is that if the general public is aware that a survey has been made with no subsequent attempt to execute a lease on the land, the speculative lease value of the land is affected even in the absence of a publication of the survey rights. The wrongful geophysical survey and subsequent failure to lease has the same effect on speculative value as drilling a dry hold. See e.g. Humble Oil & Refining Co. v. Kishi, 276 S.W. 190 (Tex. Comm'n App. 1925)(damages awarded for loss of lease value caused by drilling a dry hole).

24 R. Hemingway, Oil and Gas §4.1(1971) (discussion of progress of deprivations occassioned by use of modern geophysical methods). See also Kennedy v. General Geophysical Co., 213 S.W.2d 707, 710 (Tex. 1948).

25 H.Williams and Meyers. Oil and Gas. §130 (1981).

26 Humble Oil & Refinery Co. v. Kishi, Tex. Comm. App. 276 W.S. 190 and 191.

27 "So far as the speculative value of the land is concerned, the combination of events has virtually the same effect as the drilling of a dry hole in the Kishi case, Williams and Meyers. Oil & Gas Laws, §230 (1981).

28 Williams & Meyers, supra note 18, at §230.

29 See Shell Petroleum Corp. v. Scully, 71 F.2d 772 (5th Cir. 1934) where it was held that general damages are available to mineral owners for unauthorized geophysical exploration.

30 See generally Shell Petroleum Corp. v. Scully, 71 F.2d 772 (5th Cir. 1934); Franklin v. Arkansas Fuel Oil Co. 218 La. 987, 51 So. 2d 600 (1951); Geophysical Serv. Inc. v. Thigpen, 233 Miss. 454, 102 So. 2d 423 (1958); Kennedy v. General Geophysical Co. 213 S.W.2d 707 (Tex. Civ. App. 1948).

31 See Geophysical Serv. Inc. v. Thigpen, 233 Miss. 454, 102 So. 2d 423 (1958).

32 "Large sums of money are annually paid landowners for the mere right to go onto their land and make geophysical and seismographic tests." Layne Louisiana Co. v. Superior Oil Co., 216 So. 2d 20, 22 (La. 1946). Rice, "Wrongful Geophysical Exploration," 44 Montana Law Review 53, 66 (1983).

33 See Phillips Petroleum Co. v. Cowden, 241 F.2d 586 (5th Cir. 1957) where the Fifth Circuit held that the right to conduct geophysical operations is either held by the lessee or mineral owner exclusively and one who geophysically explores with the consent of the surface owner is liable to the owner of mineral rights for trespass of his interest.

The Court noted:
This conclusion appears reasonable if it is considered that in many instances an unexplored mineral right has only a speculative value upon which investigation may prove to be either far in excess of or considerably less than the real value of the deposits it represents. It is both public knowledge in general and it appears from this record in particular that the right to explore for minerals has a considerable monetary value and it thus follows that it must generally be vested exclusively in either the mineral or the surface owner (or at most jointly in both) since if each had the independent right to explore or to permit exploration the right of neither would in fact be protected. Since mineral rights are in the first instance almost always purchased as speculations and are often resold as such a number of times it would be a peculiar rule that would permit the owner of an entirely different estate, the surface, to reduce or sell the right to reduce a certainty, and thereby change the whole basis of the valuation of information about property belonging to another that can only be obtained by investigations carried out at the site of the mineral estate. (emphasis added)

34 430 So. 2d 301 n2. "The right to geophysically explore land for oil and gas and other minerals is a valuable right of the landowner since the average landowner lacks the means or funds to gather geophysical or seismographical information, and such information, if disseminated can impair the landowner's ability to deal advantageously with his valuable mineral rights."

35 The landowner's right to dispose or lease property is a prospective advantage that the law has protected by the "interference" tort. Cooper v. Steen, 318 S.W.2d, 757 (Tex. Cit. App. 1958); Solberg v. Sunburst Oil and Gas Co., 246 P. 168 (1926).

36 See note 24.

37 It is a fundamental and cardinal principle of the law of damages that the injured party shall have compensation for the injury sustained. The injured party is entitled to recover full indemnity for his loss, and to be placed as nearly as may be in the condition which he would have occupied had he not suffered the injury complained of. No measure of damages which does not afford just compensation for the loss sustained can stand the fundamental test. Shell Petroleum v. Scully, 71 F.2d 772, 775 (5th Cir. 1934).

38 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. (1979).

39 E.g., Garner v. Pacific Coast Coal Co., 3 Wn. 2d 143, 100 P.2d 32 (1940) is an example of the Washington Supreme Court's approach. In that case two girls were traveling a well beaten path across the defendant's property from a nearby creek. The land had a natural appearance, but, as the defendant knew, immediately beneath the topsoil were incendiary remains of a man-made coal slag which had been created many years earlier. The girls were burned when the topsoil gave way and they feel several feet into a bed of hot cinders. The court denied recovery, even though it found that the defendant knew of the inflammable nature of the undersoil and of the public's frequent use of the path. The court reasoned that because there was no specific knowledge of the precise underground location within the clag where coals might be burning or of the presents of these two particular girls, the defendant was not liable for failure to warn. More compelling, however, may have been the fact that the danger of spontaneous conbustion from smoldering coals was one which the court believed could take place up to 50 years after formation of a coal slag. Furthermore, the land in question was an undeveloped tract of several thousand acres; even the slag itself was more than two acres in size. To require repairs or even warning signs over such an area for so many years would have involved a considerable burden.

40 In many circumstances, the costs will not always be easily susceptible to monetary calculation. The expense of adequate warning signs or repairs to the property may not be excessive, but the extent of the loss to the occupier and the general public in recreational, scenic, utilitarian or aesthetic value as a result of such warnings or repairs could be considerable. Cf. Smith v. United States, 383 F. Supp. 1076, 1080 (D. Wyo. 1974) (recreational value of Yellowstone Park would be diminished by posting or repairing all hazards). As Prosser stated in the context of child trespassers."(t)he utility to the possessor of maintaining the condition must be slight as compared with the risk to children involved, "W. Prosser, supra note 2, §59, at 375.

41 In theory, one required element for application of the doctrine is that the alluring condition be such that its dangers could not be appreciated by a child. See Mathis v. Swanson, 68 Wn. 2d 424, 413 P.2d 662 (1966). However, the courts embrace the assumption that hazardous conditions which occur in nature always should be appreciated, even by a child barely out of infancy. See e.g. Meyer v. General Electric Co. 46 Wn, 2d 251, 280, P.2d 257 (1955).

42 Exempting property owner from tort liability to motorcyclists who are trespassers or nonpaying licensees did not violate equal protection. Parish v. Lloyd (1978) 147 Cal. Rptr. 431, 82 C.A.2d 785.

Landowners could not be held liable for injuries sustained by motorcyclist while riding uphill on a path or trail across properties where motorcyuclists admitted that he had entered properties for recreation, that neither landowner had expressly invited him to enter, that he had paid no money or other consideration for his use of properties, and that failure of landowner to take precautionary or warning measures was neither willful nor malicious. English v. Marin Municipal Water Dist. (1977) 136 Ca. Rptr. 224 66 C.A.3d 725.

[43] State of Wisconsin Criminal Code §943.13.
Criminal trespass to land

(1) Whoever does any of the following is guilty of a Class C misdemeanor:

(a) Enters any enclosed or cultivated land of another with intent to catch or kill any birds, animals, or fish on the land or gather any products of the soil without the express or implied consent of the owner or occupant to engage in any of those activities.

(b) Enters or remains on any land of another after having been notified by the owner or occupant not to enter or remain on the premises.

(c) Hunts, shoots, fishes or gathers any product of the soil on the premises of another, or enters said premises with intent to do any of the foregoing after having been notified by the owner or occupant not to do so.

(d) Enters any enclosed or cultivated land of another with a vehicle of any kind without the express or implied consent of the owner or occupant.

[44] State of Idaho. §18-7008. Trespass - Acts

Every person who willfully commits any trespass, by either:

1. Cutting down, destroying or injuring any kind of wood or timber belonging to another, standing or growing upon the lands of another; or

2. Carrying away any kind of wood or timber lying on such lands; or

3. Maliciously injuring or severing from the freehold of another, anything attached thereto, or the produce thereof; or

4. Digging, taking, or carrying away from any lot situated within the limits of any incorporated city, without the license of the owner or legal occupant thereof, any earth, soil, stone; or

5. Digging, taking, or carrying away from any land in any of the cities of the state, laid down on the map or plan of such city, or otherwise recognized or established as a street, alley, avenue, or park, without the license of the proper authorities, any earth, soil or stone; or

6. Willfully opening, tearing down, or otherwise destroying any fence on the inclosed land of another, or opening any gate, bar, or fence of another and willfully leaving it open, or using the corral or corrals of another without the permission of the owner; or

7. Willfully covering up or encumbering in any manner, the land or city lot of another, without written permission from the owner or custodian thereof; or

8. Every person, except under landlord-tenant relationship, who, being first notified in writing, or verbally by the owner or authorized agent of the owner of real property, to immediately depart from the same and who refuses so to depart after being so notified; or

9. Entering without permission of the owner or owner's agent, upon the real property of another person which real property is posted with "No Trespassing" signs or

other notices of like meaning, spaced at intervals of not less than one (1) sign or notice per six hundred sixty (660) feet along such real property; provided that where the geographical configuration of the real property is such that entry can reasonably be made only at certain points of access, such property is posted sufficiently for all purposes of this section if said signs or notices are posted at such points of access(;) is guilty of a misdemeanor.

45 Hubbard v. Commonwealth, 207 Va. 673, 152 S.E.2d 250 (1967). Entering property of Dan River Mills where signs forbidding such entry was a violation of the Code of Virginia §18.2-119 which allows for criminal prosecution of an individual who enters or remains upon land, buildings or premises of another after having been forbidden to do so.

46 State of Virginia, §18.2-119. Trespass
After having been forbidden to do so; penalties

If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons or by the holder of any easement or other right-of-way authorized by the instrument creating such interest to post such signs on such lands, structures, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be guilty of a Class 1 misdemeanor. This section shall not be construed to affect in any way the provisions of §§ 18.2-132 through 18.2-136 and §29-170 of this Code. (Code 1950, §18.1-173; 1960, c. 358; 1975; cc. 14, 15; 1982, c. 169.)

Section is constitutional. - There is nothing in this section when properly applied which infringes upon any privilege or right guaranteed by the federal Constitution Hall v. Commonwealth, 188 Va. 72, 49 S.E.2d 369 (1948).

47 State of California §554.1 Method of posting

Any property described in Section 554 may be posted against trespassing and loitering in the following manner:

(a) If it is not enclosed within a fence and if it is of an area not exceeding one (1) acre and has no lineal dimension exceeding one (1) mile, by posting signs at each corner of the area and at each entrance.
(b) If it is not enclosed within a fence, and if it is of an area exceeding one (1) acre, or contains any lineal dimension exceeding one (1) mile, by posting signs along or near the exterior boundaries of the area at intervals of not more than 600 feet, and also at each corner, and, if such property has a definite entrance or entrances, at each such entrance.
(c) If it is enclosed within a fence and if it is of an area not exceeding one (1) acre, and has no lineal dimension exceeding one (1) mile, by posting signs at each corner of such fence and at each entrance.
(d) If it is enclosed within a fence and if it is of an area exceeding one (1) acre, or has any lineal dimension exceeding one (1) mile, by posting signs on, or along the line of, such fence at intervals of not more than 600 feet, and also at each corner and at each entrance.
(e) If it consists of poles or towers or appurtenant structures for the suspension of wires or other conductors for conveying electricity or telegraphic or telephonic messages or of towers or derricks for the production of oil or gas, by affixing a

sign upon one or more sides of such poles, towers, or derricks, but such posting shall render only the pole, tower, derrick, or appurtenant structure posted property.
(Added by Stats. 1953, c.32, p.638 §10.)

48 State of New Mexico §30-14-6.

A. The owner, lessee or person lawfully in possession of real property in New Mexico, except property owned by the state or federal government, desiring to prevent trespass or entry onto the real property shall post noticed parallel to and along the exterior boundaries of the property to be posted, at each roadway or other way of access in conspicuous places, and if the property is not fenced, such notices shall be posted every five hundred feet along the exterior boundaries of such land.

B. The notices posted shall prohibit all persons from trespasing or entering upon the property, without permission of the owner, lessee, person in lawful possession or his agent. The notices shall:
(1) be printed legibly in English;
(2) be at least one hundred forty-four square inches in size;
(3) contain the name and address of the person under whose authority the property is posted or the name and address of the person who is authorized to grant permission to enter the property;
(4) be placed at each roadway or apparent way of access onto the property, in addition to the posting of the boundaries; and
(5) where applicable, state any specific prohibition that the posting is directed against, such as "no trespassing," "no hunting," or "no fishing," "no digging" or any other specific prohibition.

49 State of Idaho §18-7011. Criminal Trespass - Definition and punishment. -I..... Where the geographical configuration of the real property is such that entry can reasonably be made at only certain points of access, such property is posted sufficiently for all purposes of this section if said signs or notices are posted at such points of access.

50 Code of Virginia §18.2-135.

"Destruction of posted signs; - "Any person who "shall mutilate, destroy or take down any "posted", "no huting" or similar sign or poster on the lands or waters of another...without the consent of the landowner or his agent, shall be deemed guilty of a Class 3 misdemeanor..."

Colorado Criminal Code §18-4-510, Defacing Posted Notice. Any person who knowingly mars, destroys or removes any posted notice authorized by law commits a Class 1 petty offense.

HOUSE COMMITTEE REPORT

(9)

Date referred: 4/17/87 ~~3/30/87~~ FURTHER REFERRALS: Judiciary

DATE: _____

The Resources Committee has considered SSHB 198

"An Act relating to the permissive and nonpermissive use of land."

RECOMMENDS:

[ ] replace with _____ [ ] the same title

[ ] attached amendment(s) [ ] a new title

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

Adelheid Herrmann

SIGNING OTHER RECOMMENDATIONS:

Fleischman No Rec

Dick Shultz No Rec

No Rec

No Rec

Sen Con No Rec

Sen Con

Chairman's signature

Official Business

COMMITTEE: Resources

DATE: April 28, 1987

SIGN-IN

Subject of meeting:

HB 289

HB 198

NAME	ADDRESS	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
Laurence Kimball	411 W. 4th Anne Anc. 99501	274-3611	AFN	Yes HB198
Elizabeth K LeBlanc	516 Denali, Anc 99501	279-5516	Coliste, Corp	Yes HB198
Doug Griffin		4750	DCRA	No
Roland Stanley	ADF&G	0100	ADF&G	HB198
Jen O'Hara	204 N Franklin St. Suite 3 JNU		AK. Environmental Lobby	HB 198
Bert Greist		4750	DCRA	Yes

STATE OF ALASKA

LYMAN F. HOFFMAN
REPRESENTATIVE

P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4530, 465-4453

HOUSE OF REPRESENTATIVES

DISTRICT 25
AKIACHAK
AKIAK
ATMAUTLUAK
BETHEL
CHEFORNAK
EEK
GOODNEWS BAY
KASIGLUK
KIPNUK
KONGIGANAK
KWETHLUK
KWIGILLINGOK
MEKORYUK
NAPAKIAK
NAPASKIAK
NEWTOK
NIGHTMUTE
NUNAPITCHUK
OSCARVILLE
PLATINUM
QUINHAGAK
TOKSOOK BAY
TUNTUTLIAK
TUNUNAK

M E M O R A N D U M

TO: Representative Adelheid Herrmann, Co-Chair
Representative Sam Cotten, Co-Chair
House Resources Committee

FROM: Representative Lyman F. Hoffman

DATE: April 23, 1987

RE: SSHB 198

Please find enclosed for SSHB 198, the following supporting documents.

1) Copy of SSHB 198.

2) Sectional analysis.

3) Alaska Land Use Council Recommendations.

4) Guest opinion by Janie Leask.

Also available upon request,

1) Trespass/Easement Problems on Native Owned Lands
By Elizabeth M. LeBlanc
Calista Corporation - Land & Natural Resources Dept.

2) Trespass/Easement Problems on Native Corporation Lands
by Alaska Federation of Natives Land Committee

Thank you.

P. O. Box 763 Bethel, Alaska 99559 (907) 543-3543

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : SSHB 198
Publish Date :

Revision Date: April 24, 1987
Title : "An Act relating to permissive and nonpermissive use of land."
Sponsor : Repr. Hoffman (by request)
Requestor : Repr. Hoffman

Agency Affected : Department of Law
BRU : Prosecution

Components : Third Judicial District, Fourth Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		72.6	74.8	77.0	79.3	81.7
TRAVEL		14.4	14.8	15.2	15.7	16.2
CONTRACTUAL		8.4	8.7	9.0	9.3	9.6
SUPPLIES		9.0	6.2	6.4	6.6	6.8
EQUIPMENT		3.0				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		107.4	104.5	107.6	110.9	114.3
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		107.4	104.5	107.6	110.9	114.3
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME		2	2	2	2	2
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard L. Pegues

Prepared by : Richard I. Pegues, Director
Phone : 465-3672
Division : Administrative Services
Date : April 24, 1987

Richard L. Pegues /For/

Approved by Commissioner : Grace Berg Schaible, Atty. Gen.
Date : April 24, 1987
Agency : Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SSHB 198

Revisions made by the sponsor substitute changed certain of the bill's definitions, but the substitute did not make any substantive changes to the original version of the bill. Consequently, the fiscal impact on the Department of Law, noted in the department's analysis of April 6, 1987, remains the same. Because the bill would still criminalize a wide range of conduct, which has traditionally been tolerated by Alaska landowners, the bill's potential for causing a substantial increase in trespass prosecutions has not changed. Severe budget reductions, both in FY 87 and FY 88, prevent the department from attempting to assume this additional caseload with its reduced workforce. If the bill becomes law, and fiscal note funds are not approved, the department's ability to enforce the law would be very limited.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SSHB 198

	ATTY III Bethel (PPT)	ATTY III Fairbanks (PPT)	Total
Personal Services	36.9	35.7	72.6
Travel	7.2	7.2	14.4
Contractual	4.2	4.2	8.4
Supplies	4.5	4.5	9.0
Equipment	1.5	1.5	3.0
TOTAL	54.3	53.1	107.4

Costs beyond FY88 include a 3 percent annual inflation factor, less one-time costs.

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months	Location	Election District
PPT	12	Fairbanks	19/20/21

Type of Expenditure		Amount
1	2	3
Salary	28,128	
Benefits	7,597	
Premium Pay		
Other		
Total Personal Services		35,725
Travel		7,200
Contractual		4,200
Commodities		4,500
Equipment		1,500
Other		
Total Cost		53,125

Funding Source for Total Cost		
Federal Receipts	1002	
G. F. Match	1003	
General Fund	1004	53,125
I-A Receipts	1006	
CIP Receipts	1061	
Other		

Justification

This part-time attorney position will be needed to handle the increased number of trespass cases growing out of the adoption of SSHB 198. Non-permissive uses of privately owned land that would be criminalized, and that heretofore have been tolerated by land owners, have the potential for causing a large increase in these cases. Current and projected budget cuts are forcing the department to decline entire classes of misdemeaner cases. Additions at this new class of case require this new position. Allocation to the Attorney III level is appropriate for attorneys who handle first degree misdemeanors.

Request For New Position

Agency: Department of Law

BRU: Prosecution

Component: Fourth Judicial District

Revised Date

FY 88

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months	Location	Election District
PPT	12	Bethel	25

Type of Expenditure		Amount
1	2	3
Salary	29,076	
Benefits	7,800	
Premium Pay		
Other		
Total Personal Services		36,876
Travel		7,200
Contractual		4,200
Commodities		4,500
Equipment		1,500
Other		
Total Cost		54,276

Funding Source for Total Cost		
Federal Receipts	1002	
G. F. Match	1003	
General Fund	1004	54,276
I-A Receipts	1006	
CIP Receipts	1061	
Other		

Justification

This part-time attorney position will be needed to handle the increased number of trespass cases growing out of the adoption of SSHB 198. Non-permissive uses of privately owned land that would be criminalized, and that heretofore have been tolerated by land owners, have the potential for causing a large increase in these cases. Current and projected budget cuts are forcing the department to decline entire classes of misdemeaner cases. Additions at this new class of case require this new position. Allocation to the Attorney III level is appropriate for attorneys who handle first degree misdemeanors.

Request For New Position

Agency: Department of Law

BRU: Prosecution

Component: Third Judicial District

Revised Date

FY 88

TRESPASS AND EASEMENT MANAGEMENT PROBLEMS ON NATIVE OWNED LANDS

Elizabeth M. LeBlanc
Calista Corporation - Land & Natural Resources Dept.
503 East Sixth Avenue
Anchorage, Alaska 99501

ABSTRACT

Ever since Alaska Native corporations began to receive title to their lands, they have been faced with the ever increasing problem of trespass. The types of trespass and frequency of incidents varies from region to region. This paper will familiarize individuals with the trespass problem since it provides an overview of the trespass problem and identifies forms of trespass which affect the ability of government agencies to provide adequate protection against trespass.

INTRODUCTION

December 18, 1971 is a significant date for the Native community in Alaska. This date marks the signing of the historic Alaska Native Claims Settlement Act (ANCSA). When Congress passed ANCSA, it provided for the transfer of 44 million acres of land throughout Alaska to Native owned corporations. ANCSA created several landlords, each of whom was concerned with the disposition of their land and the activities upon it. During the past 15 years the state has been undergoing a complex and often times confusing process of land transfers conveying federal ownership of land to state and private interests. The changing patterns of land ownership, although major, seem pale in the face of the many complex legal issues resulting from the changing land status (e.g. navigability determinations, legal challenges involving grandfather rights, over-selections, trespass enforcement, easements, etc.)

As a result of the various land transfers, there is a great deal of confusion in Alaska as to land status and the rights attached to land ownership. Land that was available for public use one year is not available the next year. The situation has led to an increasing problem of trespass on private land by the general public. The public often fails to realize that the land conveyed to the Native corporations is private land, and does not realize that even though these lands are seemingly unused, undeveloped, and largely unfenced and unmarked, entry onto the land could constitute trespass.

Land conveyed to Native corporations is private property and as such enjoys all the rights and protection due an individual owner. Unfortunately, protecting Native owned land from unauthorized use and entry by the public is becoming a serious problem for the Native corporations and has varying consequences. As with any private landowner, the Native corporations are experiencing an infringement on their ownership rights. The protection once afforded to these lands through their remote location and inaccessibility is rapidly diminishing as Alaska's non-Native rural population grows, as easement reservations provide increased access to remote areas, and as competition for the land and its resources intensifies.

There are two principal categories of unauthorized use.

1. Casual use whereby an individual strays from adjacent public land or easements. This type of use generally occurs without a permit or license, while an individual is hunting, fishing, hiking, camping, etc. These forms of

trespass are usually inadvertent, but over a period of time may adversely impact subsistence or Native lifestyles. Although these activities do not create immediate problems, there is the possibility that they will significantly impact land management policies or create a possessory right, if ignored.

2. Unauthorized use whereby an individual damages the land or removes resources found on the land thereby affecting the economic base of a Native corporation. Such activities may include cutting timber, illegal exploration for minerals or removal of sand and gravel.

The trespass problem is difficult to handle because Native land holdings are often remote and cover vast undeveloped areas which are not always easily accessible by the land owner or its managers. Some of the trespass problems are endemic to any large tract of undeveloped land; others have been precipitated by the massive change in the State's land status that has occurred in recent years and is still occurring. The trespass problem, however, is not confined to land owned solely by Native corporations, nor is the problem limited to remote areas of the state. Other private landowners, in particular, those in the Kenai Peninsula and the Matanuska-Susitna Borough are also experiencing trespass problems due to rapid growth and increased recreational use.

TYPES OF TRESPASS

Native corporations are experiencing several forms of trespass on their lands. Many instances of trespass are inadvertent, but many times the trespass is intentional and causes significant harm to the landowner.

Trespass Resulting From Misuse of Public Easements

In the State of Alaska there are many types of easements, including trails of varying widths, public rights-of-way, site easements for vehicle parking, temporary camping, and loading and unloading of supplies, utility easements, railroad rights-of-way, section line easements and easements for communication systems, oil and gas activities, etc.

Although there are many types of easements, the misuse of ANCSA 17(b) easements is of particular concern to Native landowners since these easements were reserved only on Native corporation land. ANCSA 17(b) easements now encumber vast amounts of Native corporation land and go largely unmanaged. Under Section 17(b) of ANCSA, the Secretary of Interior was authorized to reserve public easements across land selected by Native corporations pursuant to ANCSA. The purpose of these easements is to provide public access to publicly owned land and major waterways. These easements were to be reserved so that their impact on the Native culture, lifestyle and subsistence resources was minimized. ANCSA 17(b) easements are for a specific use, location and size and they may be used only for a specific purpose which is described in a corporation's interim conveyance documents. For example, many 17(b) easements are limited to winter use and, therefore, cannot be used at other times of the year. Section 17(b) of ANCSA does not give the public the right to use Native lands for recreational purposes; it only provides access to public recreational areas. All too often, the public misunderstands the purpose of the 17(b) easement or that the use of the easement is regulated by law, thereby failing to realize that the land underlying the easement is private property and should be respected as such.

A key factor contributing to the trespass problem is the absence of a program for managing and protecting 17(b) easements against misuse. The various federal and state agencies have been unable to implement regulations for easement management because each agency is faced with vastly different objectives. Although federal

agencies within the Department of Interior are permitted, within established guidelines, to adopt their own procedures for 17(b) easement management, state and other federal agencies are not bound by these guidelines. Consequently, federal and state agencies are reluctant to manage public use of the 17(b) easements, citing lack of legal authority and funding.

Under existing policies and practices there is no way for the public to know when or if they are trespassing on private land. In most areas, there are no indicators of private ownership (i.e., signs or fences) which identify the location of 17(b) easements or property boundaries for private owned land. Furthermore, there is no single agency or source (i.e., map, brochure, guidebook, etc.) to which the public may go for information about land ownership and land status, including the location of private land, permissible activities on easements, and laws concerning trespass and public use of undeveloped land.

Perhaps the most bothersome and complex trespass problem is the misuse or non-use of 17(b) easements. In most instances, the public is not aware that the easements exist, so noncompliance is a common occurrence. It is very easy for individuals to stray beyond the boundaries of the easements because there are no signs or markings on the ground delineating easement location. This results in a high incidence of trespass, much of which is inadvertent or unintentional. However, the most troublesome problem is that the public uses the easement for purposes other than what was designated in the interim conveyance document. For example, 25 ft. winter trails are used as summer haul roads or one acre site easements are used for long-term camping. These situations are difficult to monitor because the Native landowner, usually a village corporation, is not aware of the procedures pertaining to the management of 17(b) easements, nor does the corporation know the exact location of the easement on its land.

The location of a 17(b) easement is obviously an important factor in easement management and trespass enforcement. Since the easements are on private land, the state of Alaska's trespass laws are in effect. This creates a difficult situation because the state's criminal law on trespass cannot be held to apply in most instances of trespass occurring off 17(b) easements. The law excludes from criminal trespass any entry upon unimproved land where there is no marker, sign or fence indicating a prohibition against such intrusion.* As the statute is now written, it encourages and permits casual trespass on private land, rather than preventing it. The law currently sanctions this type of activity so long as an individual is not intending to commit a crime and the land is unused and unfenced, or the individual using the land has not been advised by the land owner that the land is indeed private land. It should be remembered that many casual trespassers carry guns for bear protection or hunting. It is not an enviable position for a village land manager, who has no law enforcement training or authority to approach these individuals to inform them that they are trespassing.

Trespass off a Navigable Waterbody

Problems of trespass occurring off of navigable waterbodies are similar to those associated with trespass off 17(b) easements. The problem, however, has been compounded because there are disagreements about where the boundary of the uplands is located along navigable waterbodies. Typically, uplands are defined as that land above the mean high water mark; the state, however, tends to view the demarcation more liberally. In any event, the trespass problem usually involves people boating up a river or flying in by float plane and then using the uplands along the shoreline of the navigable waterbody for recreational purposes such as camping, fishing, hunting, firewood gathering or other incidental activities.

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* AS 11.46.350

It is nearly impossible to prosecute these types of trespass because state law currently requires the land to be posted before a law enforcement officer can take action on a trespass violation. Under the law, such a minimal intrusion upon the land is not a criminal offense unless reasonable notice is provided. However, it is difficult for the village corporations to comply with the law and provide adequate notice along rivers or lakes since many are inholdings on Native corporation land. In most cases, posting signs forbidding trespass cannot be done without great expense or difficulty to the large landowner.

Recreational Trespass

A large number of trespass actions may be described as "recreational trespass." This type of trespass usually involves a one-time situation where individuals stray onto Native corporation lands from adjacent public lands or 17(b) easements and then camp overnight, go hiking, fishing, hunting, trapping, gather firewood or do a wide array of similar activities. Many of these trespass occurrences seem to be inadvertent and appear to occur because the public does not have adequate information about the use of 17(b) easements or land ownership patterns.

Due to the vast amount of private land in Alaska and the remote location of much of the land, it is quite possible that there are improvements on the land for which a landowner has no actual knowledge. Although AS 09.45.795 provides liability protection against injuries received by trespassers on unimproved and apparently unused land, no liability protection is provided to the landowner for those situations involving unknown improvements, such as mine shafts, gravel pits, old abandoned cabins, and old roads, trails and airstrips. Under the present law, it is quite possible for a trespasser to sue a landowner for injuries received while trespassing on private land if any of these improvements are present in these situations. The courts typically examine the nature of the improvement, the cost of removing the improvement, the landowner's likeliness and actual knowledge of the improvement's existence, and the extent to which the improvement can be considered an attractive nuisance. In those cases involving a trespass action, the courts in other states have held that a landowner owes a minimum of care to a trespasser.* Since Alaska has almost no case law dealing with trespass or wrongful death or injury of a trespasser, it is possible that a private landowner could be held liable in a personal injury suit involving a trespasser on unimproved lands.

The size of the land area, duration, impact and intent, all to one degree or another determine how severe a trespass activity may be. Not all trespass actions are equally severe, nor are they all harmless activities. It is important to note there is a significant difference between an individual hiking across the land and a "D-8 cat" crossing the land. A bulldozer crossing the tundra only one time can cause severe surface degradation, whereas a camper may cause no permanent damage. However, the potential for damages by the camper from fire and litter are ever present regardless of the type, extent and frequency of the unauthorized use. Furthermore, there is the ever present possibility that historical sites and cemeteries may be damaged or looted by the casual trespasser. This situation is most common on Native land.

Unauthorized Use of Land and Natural Resources

Unauthorized use of land and natural resources usually results in a loss of revenue to the Native corporation. In some cases, physical damage to the land itself may occur. Over a long period of time, removal of valuable resources through gravel extraction, gold mining, cutting of timber, or even extensive fishing and hunting can significantly impact the economic viability of a Native corporation and its

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* LeBlanc, E.M., "Section-by-Section Analysis - HB 660," April, 1986, unpublished report to the State of Alaska Legislature.

individual shareholders. The hunting and fishing issue is particularly sensitive in those areas dependent on subsistence activities or dependent on commercial fishing along rivers.

Although most of these trespass activities result only in a loss of revenue, they can create a possessory right if ignored. Fishermen, trappers, miners, etc., have built structures of varying types on Native owned lands. Some of these people moved onto the land prior to the passage of ANCSA in 1971, but did not file the proper paperwork to establish their residence or activity. In the absence of these records, they appear to have no "valid existing right" under ANCSA and hence, may be trespassing unless they have occupancy rights under Section 14(c) of ANCSA. Others who moved onto the lands after ANCSA are in a similar, but less defensible position. In addition, historical roads and trails which were not reserved by 17(b) easements are present on Native corporation land. Continued use of these rights-of-way by the public could lead to the creation of a prescriptive easment across the corporation's land. Should this type of trespass go unchallenged, it may lead to an eventual claim of adverse possession against a Native corporation's lands or the creation of an additional easement which will result in an actual loss of land.

Geological and Geophysical Trespass

In recent years, Native corporations have discovered that illegal geologic exploration activities have been occurring on their land. In these situations, mineral exploration companies have gone onto or flown over regional and village corporation land to conduct geologic exploration activities without the permission of the subsurface owner. In the Lower 48, these activities are a recognized form of trespass and are considered to be a tort known as wrongful appropriation of the right to explore for a resource.* The courts have recognized a landowner's right of recovery against a geophysical explorer who enters upon land without authority and conducts a geophysical survey. Damages have been awarded to a landowner for geophysical trespass based on actual surface damages, on loss of the exploration rights, and on loss of the leasing value.*

In the case of a geophysical trespass, physical harm to the property is usually only of minor consequence because modern surveying methods cause little or no physical damage to the land. Consequently, the greatest concern of a landowner is not damage to land, but the loss of prospective economic advantages. A landowner's major losses occur when information regarding the mineral estate is misappropriated. The landowner is then deprived of a valuable exploration right, and if the survey tends to demonstrate that the land is valueless for mineral development, a landowner may be denied the opportunity to lease or sell his rights to the mineral estate, thereby denying the landowner any profits and placing him in an unequal bargaining position.

PROBLEMS RELATIVE TO ENFORCEMENT AND PROSECUTION OF TRESPASS

Trespass in its many aspects is a problem that impacts all private landowners in Alaska, whether they be a Native corporation or a homesteader. It is a problem which must be addressed on a statewide basis in order to resolve the fundamental issues of law and public responsibility.

Jurisdiction for Trespass Enforcement

While the division of responsibility between the state and federal government relative to trespass seems clear, actual determination of responsibility is usually complicated because of the changing land status. There is no disagreement that

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* LeBlanc, E.M., "Section-by-Section Analysis - HB 660," April 1986, Unpublished Report to State of Alaska Legislature.

federal agencies are responsible for trespass enforcement on Native land during the withdrawal, selection and adjudication processes. However, once title is transferred by interim conveyance, such land is considered private land, subject only to completion of a survey. At this point, Native corporation land falls under the State of Alaska's jurisdiction. Since it is private land, it is the state's responsibility to provide law enforcement and respond to trespass complaints and if necessary prosecute trespassers.

The most difficult situation, however, is determining who is responsible for trespass situations involving the misuse of 17(b) easements. In those situations where the easement user strays from the 17(b) easement onto adjoining land, the trespass is on the property rights of the private land owner. Therefore, the responsibility for any action rests with the owner because it is a trespass on the corporation's property rights. Furthermore, if an easement user utilizes land within the 17(b) easement for purposes other than what was specified for that easement, but does not obstruct or damage the easement (e.g. overnight camping on a 17(b) easement), the underlying landowner must take action on the unauthorized use. The exception is when damage or obstruction to the 17(b) easement occurs. In this situation, the easement holder (BLM or other governmental agency) is responsible for taking action because actual interference or damage to the easement itself has occurred.

It is difficult for private landowners to get state officials to aggressively prosecute those cases involving trespass on private land. The various law enforcement agencies by and large do not view trespass as a major crime, consequently little is done to enforce the state's trespass laws, even when requested to do so by a landowner experiencing trespass problems. However, more frequently, agencies responsible for trespass enforcement take no action whatsoever on reported trespass violations, either due to lack of time, funding or manpower.

Lack of Surveys on Conveyed Land and 17(b) Easements

A potential stumbling block to effective enforcement against trespass lies in the lack of identifiable boundaries of the property and easements. Since the majority of the land which has been conveyed to Native corporations is not yet surveyed, there is the possibility that some instances of trespass are occurring on the periphery of Native corporation land. Consequently, there may be cases where legitimate questions will arise as to whether an alleged trespass did, in fact, occur. In those situations, the only way to settle the dispute is to have the area in question surveyed.

As long as Native corporation land remains unsurveyed, it will be difficult to make a clear determination as to whether or not a trespass did occur. Without such a determination, prosecutors may actually decline to prosecute trespass cases. The need to determine boundaries prior to prosecuting trespass cases places an undue burden on Native corporations and substantially increases the costs associated with trespass enforcement and prosecution.

Statutory Issues

The initial determination of whether to pursue a civil or criminal action against a trespass is usually made on a case-by-case basis by the affected Native corporation. In determining which cases to prosecute the guideline is usually intent--was it inadvertent or deliberate and is the impact minimal or profound. Clearly any use of the land which can lead to a claim of adverse possession or a prescriptive easement, thereby jeopardizing or diminishing a Native corporation's ownership rights is a situation which justifies pursuing a trespass action.

The primary problem associated with trespass enforcement is the statutory requirement that notice against trespass be "given by posting in a reasonably conspicuous manner" (AS 11.46.350). The posting requirement is ambiguous since the definition of "a reasonably conspicuous manner" is subject to varied

interpretations. In most situations under the present law, posting is interpreted to mean that the land must be posted at frequent intervals, i.e., every 100 feet along all exterior property boundaries including lake and river edges. Given the vastness of Native corporations' land holdings, this requirement for posting or fencing is unrealistic. The present law leaves everything to interpretation. This can lead to conflict between a landowner and the law enforcement officer and prosecutor. A landowner's interpretation of the minimum posting requirement may result in the land owner not posting his land sufficiently to satisfy law enforcement officers or prosecutors. For example, under a strict interpretation of the law, if a float plane lands on a lake or river inside a private landowner's property boundaries, the land would not be considered to be posted "in a reasonably conspicuous manner," if signs were posted only on the property's exterior boundaries. To be considered adequately posted, the courts could interpret the law to mean that signs have to be posted along the shores of all interior lakes and rivers.

As it now stands, private landowners are unable to gain assistance from the state criminal process even if there is a flagrant and purposeful instance of trespass if the landowner has not met the posting requirements. Private landowners with large tracts of land must post literally hundreds and thousands of signs to meet the letter of the law. This is a very expensive and burdensome requirement for landowners. The law does not consider the uniqueness of Native land ownership patterns (vast tracts of undeveloped private land). In fact, in many areas of the state, it is impossible for landowners to post signs simply because there are no trees on which to attach "no trespassing" signs.

It is difficult to keep all private lands adequately posted in remote areas because signs weather and people constantly vandalize them. As it is now written, the state's posting requirement for large land areas, such as those owned by the Native corporations, is unrealistic and in many instances cannot be implemented economically or practically by the large landowners.

Another problem associated with prosecution of trespass cases lies with the State Criminal Code which defines trespass relative "to intent to commit a crime" The revised Criminal Code provides that "a person, who without intent to commit a crime on the land, enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, is privileged to do so, (emphasis added) unless; 1) notice against trespass is personally communicated to that person by the owner of the land or some authorized person; or 2) notice against trespass is given by posting in a reasonably conspicuous manner under the circumstances."*

For the most part, Alaska's statutes are subject to varying interpretation and place the burden of proof that trespass has occurred on the landowner. As it now stands, the statute may be interpreted in a manner which will permit a person to enter on private land to go hunting, fishing, camping, prospecting, etc., so long as the person is not intending to commit a crime and the land is unused, unfenced, and no one advises the user to the contrary. The statute reflects the philosophy that if a landowner wants to exclude intruders, the landowner should be solely responsible for taking steps to do so. The entire burden of protecting one's lands is thereby placed on the landowner.

In summary, it is difficult for Native corporations to get federal and state officials to aggressively prosecute those cases involving casual trespass on Native

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* AS 11.46.320 and AS 11.46.330

lands. In their present form, the Alaska's statutes are very vague as to what constitutes trespass, consequently they do not provide private land owners with adequate protection against trespasses nor does it allow for the prosecution of trespass even though the landowner's rights may have been infringed upon. The criminal code is not an effective tool for dealing with trespass simply because people, by and large, do not view trespass as something which should be punished by criminal statutes. This is in significant contrast to the lower 48 where several states make it a crime to hunt on private land if the hunter has not gotten permission from the landowner beforehand.*

When selecting trespass cases for prosecution care must be taken to differentiate between acts which are fundamentally civil in nature and those which constitute criminal trespass. It is not reasonable to expect that all trespass offenses will be prosecuted as criminal actions. It is important to note, however, that a civil action is usually not a very satisfactory remedy because it is expensive for the private landowner to hire attorneys to file the action and there is no certainty of recovering more than nominal amounts for damages. Unless state trespass laws are amended so that the enormous evidentiary burden placed on the landowner is removed, the majority of trespass activities will remain unabated and will continue to be difficult to prosecute.

TRESPASS AND EASEMENT MANAGEMENT POLICIES

There have been and will continue to be times when the uniqueness of each Native corporation's land management style and situation mandates a trespass policy which may differ from that of other corporations. In fact, there are numerous possible ways to address the extensive trespass issue from both the Native corporation and public agency perspective.

Native Corporation Land Management Policies and Practices

Recently, many village and regional corporations have developed their own land management policies to ensure that Native corporation land is suitably protected from trespass. It has been difficult for the Native corporations without land policies to gain agency support for enforcement of existing trespass laws. The Alaska Federation of Natives has recommended that each corporation draft an unauthorized use policy which addresses the corporation's liability should someone be injured on Native corporation land while trespassing; the corporations policy for prosecuting trespass; and a definition of what constitutes trespass. In addition, the corporations are being encouraged to establish guidelines for determining which trespass actions will be prosecuted as criminal actions and which will be prosecuted as civil cases.

Another approach village and regional corporations have taken is to identify land which is of primary interest to them and concentrate on trespass and unauthorized use on said land, recognizing that it may be impossible for law enforcement agencies to effectively respond to all trespass incidents occurring on the corporation's land. The balance of the land is then managed and protected against trespass by the Native corporation. Another alternative has been to identify classes of trespass and set priorities relative to the degree to enforcement necessary to protect the corporations' interests.

Finally, in order to provide a greater degree of protection against unauthorized use of their land, individual Native corporations have begun to implement permit systems for controlling access. The permit allows an individual to enter onto the

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* State of Wisconsin Criminal Code §94.13

corporation's land for a specific activity, thereby eliminating a part of the unauthorized use problem. Furthermore, the permit provides the corporation with a means of notifying individuals of the stipulations for using the corporation's land and protects the corporation from liability claims should the individual be injured while occupying the land.

Joint Cooperation Policies Between Native Corporations and Public Agencies

In January 1985, the Alaska Land Use Council (ALUC) adopted a work item addressing unauthorized use and trespass on both public and private land. A work group, including federal and state agencies and Native corporations, was established to develop recommendations on trespass. Under the leadership of the Alaska Federation of Natives, the group developed a comprehensive set of recommendations on the subject. The group primarily focused its attention on ways to foster cooperation among landowners, and recommend actions which should be taken by public agencies and private landowners to prevent and alleviate the growing problem of trespass and unauthorized use, especially inadvertent use which constitutes the majority of the trespass incidents now occurring. The Work Group's recommendations were adopted by the Alaska Land Use Council in November 1985 and are now in effect. They are entitled "Trespass Abatement Recommendations".

The underlying direction of the work group's recommendations is a good neighbor approach which encourages public and private land owners to cooperate to prevent trespass on adjoining land. The recommendations were designed so that they would not conflict with nor contradict the responsibility of each landowner to enforce applicable laws and regulations on his own land.

The work group paid considerable attention to the question of who should be responsible for implementing the recommendations. It was recognized that the affected land owner, public or private, has the primary responsibility for initiating actions to prevent trespass, as well as working with neighboring landowners to develop ways to resolve trespass problems occurring on one another's land.

Although the ALUC trespass abatement recommendations provide direction to state and federal agencies on trespass and easement management, several problems still exist. Under existing policies and procedures, public agencies are unable or unwilling to respond to the trespass problems that now exist. On the state level, this may result from there being no state policy about investigating and prosecuting instances of trespass on Native corporation land. Furthermore, it does not appear that the relationships, if any, have been determined between state and federal law enforcement and prosecution agencies in relation to trespass enforcement and abatement responsibilities on Native corporation land.

The problem between federal and state agencies is further compounded because the incidence of unauthorized use and lack of information about land ownership and trespass policies is so widespread that a rigid policy of enforcement and prosecution by the agencies cannot be implemented at this time. Often times trespass problems go unsubstantiated due to uncertainties about land status including: location of boundaries between uplands and the beds of navigable waters, the location of on-the-ground boundaries, the timeliness of Native allotment applications, and so forth.

Because of the complexity of the problems involved in the overall trespass issue and agency perception that the public dislikes trespass enforcement, there has been a reluctance on the part of public agencies to expend the manpower and resources necessary to effectively deal with the problem. Trespass prevention and abatement problems continue to be of very low priority in terms of personnel and funding. Furthermore, state and federal policies and laws must be written so that they provide the private landowner with adequate protection against trespass. State and federal policies and laws need to be established or revised so they are easier to enforce, allow for prosecution of trespassers and provide the private land owner with greater protection against trespasses than now exists.

SUMMARY

Trespass often occurs because of the complexity of land ownership patterns in Alaska and the common misconception that any open and unused land is public land. The confusion is further compounded by the fact that federal and state agencies have different land management policies which may affect private landowners. Consequently, it is often difficult to determine whether a trespass was caused by inadvertence or by indifference to private property rights. It is safe to assume that the public will never be knowledgeable about all aspects of the trespass problem in Alaska, therefore the problems will continue to occur as both in-state and out-of-state residents continue to hunt, fish, camp, etc., in remote areas of Alaska. As more people move to and visit Alaska, it is expected that this situation will intensify. At the same time, Native corporations and other landowners will become more sophisticated in the management of their lands and more concerned about easement control and trespass in general. The days when various segments of the public could assume a right to relatively uncontrolled use of land in Alaska are over.

Increasing recognition of land values and the competing demands for the use of land resources requires a more vigorous and effective program to facilitate lawful use of private land. Land managing agencies need to recognize the opportunities to educate the public about changes in land ownership and identify specific land that has been transferred to the private sector. Since the Native corporations' land holdings are so vast and the boundaries so intermingled with other state, federal and private land, any reasonable approach to the trespass problem clearly must be multifaceted if it is to be successfully addressed in a manner that will not tax the resources of the private landowner or the management agencies.

Furthermore, existing laws and public policy must be redirected to help protect vast privately owned tracts of land from trespass in a manner that continues to provide access to public land. It is an appropriate time to consider amending the inadequate trespass laws with the intent of protecting the private property rights of Alaskans.

REFERENCES

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No trespassing — protecting private property in Alaska

by Janie Leask

Several members of a hunting party stray onto private land without realizing it. The land is unmarked, and each of the hunters assumes they are still on public land. At the end of the day, the hunters build a fire and camp overnight. Is this a trespass situation?

A contractor needs to clear some land for construction of a small structure on public land. Rather than keeping to the easement with the bulldozer he needs to do the work, he decides to take a shortcut across some privately owned land. What harm can there be in crossing just once?

In another area of the state, several men make their way furtively onto unmarked land they clearly know is privately owned. They vandalize the area by digging up some old gravesites, in search of native artifacts they can sell. They find nothing of value, and do irreparable damage to the site.

Everyone would certainly recognize the latter incident as a serious case of trespass, and few would argue the need for prosecution. But there is also the potential for serious harm in the first two cases cited. In the first, there is the potential for a forest fire, as well as some likelihood for adverse impact to the subsistence resources of the region. In the second, there is a possibility of serious damage to the land by heavy equipment. A bulldozer crossing the tundra only one time can cause severe surface degredation. In both of the first two cases, repeating the trespass violations over a period of time may have a much more adverse impact on the land, and on subsistence activity in the area.

My last column focused on trespass problems brought about by the complex and time-consuming process of land transfer initiated by the Statehood Act and the Alaska Native Claims Settlement Act. The need for public education on the issue was also discussed. Today's column will focus on efforts being undertaken to alleviate the problem of trespass in Alaska.

In January of 1985, the Alaska Land Use Council began work to address unauthorized use and trespass on both public and private land. A working group was established with representation from the state of Alaska, the federal government and a representative of the Alaska Federation of Natives.

The result of the working group's efforts was a formal set of Trespass Abatement Recommendations that was unanimously adopted by the ALUC in October of 1985.

The Trespass Abatement Recommendations took a "good neighbor" approach which encourages public and private landowners to cooperate to prevent trespass on adjoining land. The recommendations identify specific ways to offer public education intended to prevent unauthorized use of public and private land. For example, state and federal agencies are now providing trespass related information on agency maps, brochures and land planning documents. Private and public landowners are jointly establishing priorities for preparation of user information maps. They are also identifying and focusing attention on areas subject to high use and trespass.

The state's Department of Natural Resources, in cooperation with Bristol Bay Native Corporation, is developing an Easement Atlas for the Bristol Bay region. This joint mapping program will not only provide accurate land ownership information, but will also show the location of all valid public easements and right of way in the region.

These and other efforts to identify privately held lands adjoining public areas are the impossibility of marking the boundaries of the vast land tracts privately held in Alaska. For example, Doyon Ltd., one of the regional corporations created by ANCSA, is the largest private landowner in the United States. Some blocks of land held by Doyon, although not entirely contiguous, would well exceed the size of Rhode Island.

Other cooperative efforts brought about by the recommendations include coordination of information for public education; public service announcements; visitor center displays that illustrate land status through maps and publications; and development of formal agreements such as Land Bank agreements and land exchanges as vehicles to report suspected trespass incidents.

In addition to actions already being implemented, the working group's recommendations included establishing a central depository for land use policies and DNR easement information; a school educational program that introduces materials on the history of the various land acts impacting Alaska and their effect on land ownership; and a landowner educational program that teaches sound land management principles and protection from trespass.

All of these recommendations are good ideas. They focus on public education of the issue, a much more reasonable approach to the problem than attempting to prosecute every person who inadvertantly crosses private land.

As a final suggestion, Alaska statutes need to be rewritten to better protect landowners under both authorized and unauthorized use situations. AFN, with input from private property owners, has drafted proposed legislation for introduction in the legislature. It is a first step to protecting private property interests.

Janie Leask, an Alaska native, is president of the Alaska Federation of Natives.