

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 86/2

4680

HJUD

HB 198

22

5-0758X

Bradley

4/5/88

Original sponsors: Hoffman and Wallis

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 198 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the permissive and nonpermissive
7 use of land."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 05 is amended by adding a new chapter to read:

10 CHAPTER 40. RECREATIONAL USE OF LAND.

11 Sec. 05.40.010. NONLIABILITY OF LANDOWNER FOR RECREATIONAL USE
12 OF LAND. A person who uses land in the possession or control of
13 another for recreation with or without permission and without compen-
14 sation uses the land without an assurance from the landowner that the
15 land is safe for any purpose. A landowner does not owe a recreational
16 user a duty of care with respect to the condition of the land except
17 that a landowner is liable to a recreational user for an injury to
18 person or damage to property resulting from an act or omission that
19 constitutes gross negligence or reckless or intentional misconduct.

20 Sec. 05.40.020. LAND TITLE UNAFFECTED. (a) This chapter does
21 not affect the title or ownership of land within the state.

22 (b) The use of land for recreation does not create nor grant an
23 easement or right in the user or in the public to enter onto or cross
24 the land of another in order to use the land for recreation. (1)(2)

25 Sec. 05.40.030. DEFINITIONS. In this chapter,

26 (1) "compensation" does not include a processing or appli-
27 cation fee ^{not to exceed \$25.-} for a permit to use land for recreational purposes;

28 (2) "landowner" includes an agent of the owner and tenants;

29 (3) "recreation" includes hunting, fishing, swimming,

1 boating, water skiing, camping, picnicking, pleasure driving, snow-
2 mobiling, winter sports, hiking, touring, viewing cultural and histor-
3 ical sites and monuments, or other pleasure expeditions.

4 * Sec. 2. AS 09.45.730 is amended by adding a new subsection to read:

5 (b) A person who enters upon the land of another to gather
6 geotechnical data or take mineral resources without lawful authority
7 is liable to the owner of the land for treble the amount of damages
8 that may be assessed in a civil action. If the trespass is uninten-
9 tional or involuntary, or the defendant had probable cause to believe
10 that the land on which the trespass was committed was the defendant's
11 own or that of the person in whose service or by whose direction the
12 act was done, only actual damages may be recovered.

13 * Sec. 3. AS 09.45.795 is amended to read:

14 Sec. 09.45.795. CIVIL LIABILITY FOR PERSONAL INJURIES OR DEATH
15 OCCURRING ON UNIMPROVED LAND. An owner of unimproved land is not
16 liable in tort, except for an act or omission that constitutes gross
17 negligence or reckless or intentional misconduct, for damages for the
18 injury to or death of a person who enters onto or remains on the
19 unimproved portion of land if

20 (1) the injury or death resulted from a natural condition
21 of the unimproved portion of the land or the person entered onto the
22 land for recreation [PROPERTY]; and

23 (2) the person had no responsibility to compensate the
24 owner for the person's use or occupancy of the land [PROPERTY].

25 * Sec. 4. AS 09.45.795 is amended by adding a new subsection to read:

26 (b) In this section, "unimproved land" includes land that con-
27 tains

28 (1) a trail;

29 (2) a road built to provide access for natural resource

which exists without
the knowledge or permission
of the landowner.

1 extraction, but which is no longer maintained or used; or

2 (3) a structure, fixture, device, or other improvement that
3 ~~enables, assists, or otherwise furthers the subsistence or other~~
4 customary or traditional use of the land.

5 * Sec. 5. AS 11.46.330 is amended by adding a new subsection to read:

6 (c) A violation of (a) of this section includes

7 (1) hunting, fishing, trapping, or removing animal, vegeta-
8 ble, or mineral material on the premises of another after having been
9 forbidden to do so under AS 11.46.350(b);

10 (2) intentionally entering on or crossing over property of
11 another to gain access to a valid easement or navigable water;

12 (3) intentionally or unlawfully entering or remaining on
13 the premises of another to acquire geotechnical, geological, geophysi-
14 cal, or geochemical data;

15 (4) entering and remaining on the premises of another
16 without the permission of the person in charge of the premises, for
17 profit, by hunting or fishing guides, river guides, recreation guides,
18 air taxi operators, and commercial carriers.

19 * Sec. 6. AS 11.46.350 is amended by adding a new subsection to read:

20 (c) A notice against trespass is given if the notice

21 (1) is printed legibly in English;

22 (2) is at least 144 square inches in size;

23 (3) contains the name and address of the person under whose
24 authority the property is posted and the name and the address of the
25 person who is authorized to grant permission to enter the property;

26 (4) is placed at each roadway or at each way of access onto
27 the property that is known to the landowner;

28 (5) in the case of isolated tracts, is placed along the
29 perimeter at each cardinal point of the ~~isolated tract~~ and

1 (6) states any specific prohibition that the posting is
2 directed against, such as "no trespassing," "no hunting," "no fish-
3 ing," "no digging," or similar prohibitions.
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13 another for recreation with or without permission and without compen-
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15 land is safe for any purpose. A landowner does not owe a recreational
16 user a duty of care with respect to the condition of the land except
17 that a landowner is liable to a recreational user for an injury to
18 person or damage to property resulting from an act or omission that
19 constitutes gross negligence or reckless or intentional misconduct.

20 Sec. 05.40.020. LAND TITLE UNAFFECTED. (a) This chapter does
21 not affect the title or ownership of land within the state.

22 *prescriptive easement* (b) The use of land for recreation does not create nor grant an
23 easement or right in the user or in the public to enter onto or cross
24 the land of another in order to use the land for recreation.

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26 (1) "compensation" does not include a processing or appli-
27 cation fee *not to exceed \$25* for a permit to use land for recreational purposes;

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29 (3) "recreation" includes hunting, fishing, swimming,

landowner
prescriptive easement
delete
delete

1 boating, water skiing, camping, picnicking, pleasure driving, snow-
2 mobiling, winter sports, hiking, touring, viewing cultural and histor-
3 ical sites and monuments, or other pleasure expeditions.

4 * Sec. 2. AS 09.45.730 is amended by adding a new subsection to read:

5 (b) A person who ^{trespass} enters upon the land of another to gather
6 geotechnical data or take mineral resources without lawful authority
7 is liable to the owner of the land for treble the amount of damages
8 that may be assessed in a civil action. If the trespass is uninten-
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10 that the land on which the trespass was committed was the defendant's
11 own or that of the person in whose service or by whose direction the
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14 Sec. 09.45.795. CIVIL LIABILITY FOR PERSONAL INJURIES OR DEATH
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17 negligence or reckless or intentional misconduct, for damages for the
18 injury to or death of a person who enters onto or remains on the
19 unimproved portion of land if

20 (1) the injury or death resulted from a natural condition
21 of the unimproved portion of the land or the person entered onto the
22 land for recreation [PROPERTY]; and

23 (2) the person had no responsibility to compensate the
24 owner for the person's use or occupancy of the land [PROPERTY].

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26 (b) In this section, "unimproved land" includes land that con-
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29 (2) a road built to provide access for natural resource

no needed

1 extraction, but which is no longer maintained or used; or

2 (3) a structure, fixture, device, or other improvement that
3 *which exist w/o knowledge of owner.*
4 enables, assists, or otherwise furthers the subsistence or other
5 customary or traditional use of the land.

6 * Sec. 5. AS 11.46.330 is amended by adding a new subsection to read:

7 (c) A violation of (a) of this section includes

8 (1) hunting, fishing, trapping, or removing animal, vegeta-
9 ble, or mineral material on the premises of another after having been
10 forbidden to do so under AS 11.46.350(b);

11 (2) intentionally entering on or crossing over property of
12 another to gain access to a valid easement or navigable water;

13 (3) intentionally or unlawfully entering or remaining on
14 the premises of another to acquire geotechnical, geological, geophys-
15 ical, or geochemical data;

16 (4) entering and remaining on the premises of another
17 without the permission of the person in charge of the premises, for
18 profit, by hunting or fishing guides, river guides, recreation guides,
19 air taxi operators, and commercial air carriers.

20 * Sec. 6. AS 11.46.350 is amended by adding a new subsection to read:

21 (c) A notice against trespass is given if the notice

22 (1) is printed legibly in English;

23 (2) is at least 144 square inches in size;

24 (3) contains the name and address of the person under whose
25 authority the property is posted and the name and the address of the
26 person who is authorized to grant permission to enter the property;

27 (4) is placed at each roadway or at each way of access onto
28 the property that is known to the landowner;

29 (5) in the case of isolated tracts, is placed along the
perimeter at each cardinal point of the isolated tract; and

Why do we need this section

Islands

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(6) states any specific prohibition that the posting is directed against, such as "no trespassing," "no hunting," "no fishing," "no digging," or similar prohibitions.

Original sponsor: Hoffman

IN THE HOUSE

BY THE JUDICIARY COMMITTEE

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nonpermissive use of land."

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read:

CHAPTER 40. RECREATIONAL USE OF LAND

Sec. 05.40.010. NONLIABILITY OF LANDOWNER, AGENT OR
TENANT FOR RECREATIONAL USE OF LAND. A person who makes
recreational use of any property in the possession or under
the control of another, with or without permission and
without giving compensation therefor, does so without any
assurance from the landowner, his agent, or his tenant that
the property is safe for any purpose. The landowner, his
agent, or his tenant owes the person no duty of care with
respect to the condition of the property, except that the
landowner, his agent, or his tenant is liable to such
person for any injury to person or property for an act or
omission that constitutes gross negligence or reckless or
intentional misconduct.

Sec. 05.40.020. RECREATIONAL USES AND COMPENSATION DEFINED. (1) "Recreational uses", as used herein, shall include hunting, fishing, swimming, boating, water skiing, camping, picnicking, pleasure driving, snowmobiling, winter sports, hiking, touring or viewing cultural and historical sites and monuments, or other pleasure expeditions.

(2) "Compensation", as used herein, does not include a processing or application fee for a permit to use land for recreational purposes.

Sec. 05.40.030. LAND TITLE UNAFFECTED. (1) The provisions of this Chapter do not affect the title or ownership of any property within this state.

(2) The act of a person making recreational use of property does not create nor grant any easement or right to that person or to the public to enter onto or cross such property or the private property of another in order to make recreational use of such property.

*Section 2. AS 09.45.730 is amended by adding a new subsection to read:

(b) A person who enters upon the land of another to gather geotechnical data or take mineral resources without lawful authority or license, is liable to the owner of that land for treble the amount of damages that may be assessed in a civil action. If the trespass is inadvertent, or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or

that of the person in whose service or by whose direction the act was done, only actual damages may be recovered.

*Sec. 3. AS 09.45.795 is amended to read:

Sec. 09.45.795. CIVIL LIABILITY FOR PERSONAL INJURIES OR DEATH OCCURRING ON UNIMPROVED LAND. An owner of unimproved land is not liable in tort, except for an act or omission that constitutes gross negligence or reckless or intentional misconduct, for damages for the injury to or death of a person who enters onto or remains on the unimproved portion of land if

(1) the injury or death resulted from a natural condition of the unimproved portion of the land or the person entered onto the land for recreation [PROPERTY].

*Sec. 4. AS 09.45.795 is amended by adding a new subsection to read:

(b) In this section, "unimproved land" includes land that contains

(1) a trail;

(2) a road built to provide access to the land for the purpose of natural resources extraction, but which is no longer maintained or used for that purpose; or

(3) any structure, fixture, device or other improvement which enables, assists or otherwise furthers the subsistence or other customary or traditional uses of the land.

*Sec. 5. AS 11.46.330 is amended by adding a new subsection to read:

(c) A violation of (a) of this section includes, but not limited to:

(1) hunting, fishing, trapping, or removing animal, vegetable, or mineral material on the premises of another without permission after having been forbidden to do so by signs posted under AS 11.46.350(b);

(2) willfully entering on or crossing over property of another to gain access to a valid easement or navigable water;

(3) knowingly or unlawfully entering or remaining on the premises of another to acquire geotechnical, geological, geophysical, or geochemical data for the purpose of locating minerals;

(4) being a person engaged in business for profit, including hunting or fishing guides, river guides, recreation guides, air taxi operators, and commercial air carriers, entering and remaining on the premises of another without the permission of the person in charge of the premises.

*Sec. 6. AS 11.46.350 is amended by adding a new subsection to read:

(c) A notice against trespass is given if the notice

(1) is printed legibly in English;

(2) is at least 144 square inches in size;

(3) contains the name and address of the person under whose authority the property is posted and the name and the address of the person who is authorized to grant permission to enter the property;

(4) is placed at each roadway or at each way of access onto the property which is known to the landowner; in the case of isolated tracts, notice may be placed along the perimeter at each cardinal points of the isolated tract; and

(5) states any specific prohibition that the posting is directed against such as "no trespassing," "no hunting," "no fishing," "no digging," or a similar prohibition.

STATE OF ALASKA
THE LEGISLATURE

POUCHY STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 30, 1988

SUBJECT: Permissive and nonpermissive use of land
[CSSS HB 198(Judiciary)]

TO: Representative John Sund, Chair
House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

John Hartle has asked that I prepare the bill for the committee.

Some brief observations may be useful.

In sec. 2 of the bill, the section added presumably tracks the concepts suggested in existing AS 09.45.730. In the second sentence, the request to us provided that "If the trespass is inadvertant, . . ." While the change to "inadvertent" may have been inadvertent, I believe that the language of the material added should track the concepts of AS 09.45.730. But there are problems there that are being addressed in the Revisor's bill, presently CSSB 413(Judiciary); the Alaska Supreme Court noted the misunderstandings involved in the use of "casual" in Matanuska Electric Ass'n. v. Weissler, 723 P.2d 600. The present format of the section tracks the suggested change made to AS 09.45.730 in the Revisor's bill.

In sec. 3 of the bill, the draft omitted paragraph 2 of AS 09.45.795. It did not seem that there was an intention to repeal that provision and I have restored it.

In sec. 4 of the bill, I note that the provisions of (b)(2) may be susceptible to more interpretations than intended. Consider, for example, if the road is no longer maintained but is used for a purpose other than natural resource extraction, such as a supermarket. Under the language, it would be described as "unimproved land."

If I may be of further assistance, please advise.

RAB:gc
WKG2:087

5-0758X
Bradley
3/30/88

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11 Sec. 05.40.010. RECREATIONAL USE. (a) An owner of land who
12 makes land available to the public for recreational purposes without
13 compensation owes no duty of care to keep the land safe for entry or
14 use by others or to give a warning of an unknown dangerous condition,
15 use, structure, or activity on the land to persons entering.

16 (b) An owner of land who invites or permits an individual to use
17 the land for recreational purposes without compensation does not

18 (1) make a representation or extend an assurance that the
19 land is safe for any purpose; or

20 (2) incur liability for injury, loss, or death to an indi-
21 vidual or property caused by an act or omission of the owner.

22 (c) Where ^{lessee} the owner of land charges a person who enters or goes
23 on the land for a recreational purpose, unless the land is leased by
24 the owner to the state or a municipality of the state. consideration
25 received by the owner for the lease is not compensation within the
26 meaning of this section. defined (g)(1)

27 (d) This section does not limit the liability of an owner of
28 land for a wilful or malicious failure to guard or warn against a
29 known dangerous condition, use, structure, or activity.

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by landowner

1 (e) This section may not be construed to relieve a person using
 2 the land of another for recreational purposes without compensation
 3 from an obligation to exercise care in the use of the land and in
 4 activities on the land, or from the legal consequences of a failure to
 5 employ care.

6 (f) An individual using the land of another for recreational
 7 purposes without compensation is liable for damages to the property
 8 caused while on the property.

9 (g) In this section

10 (1) "compensation" does not include a processing or appli-
 11 cation fee for a permit to use land for recreational purposes;

12 (2) "land" means ~~private land~~, roads, water, watercourses,
 13 private ways and buildings, structures, and machinery or equipment
 14 when attached to the land;

15 (3) "owner" means the possessor of a fee interest, a
 16 tenant, lessee, occupant, or person in control of the premises.

17 Sec. 05.40.020. PERMISSIVE RECREATIONAL USE. (a) An owner of
 18 land who invites or permits a person to use land for recreational
 19 purposes without compensation does not give the person a right to
 20 continue the use of the land for a recreational purpose without con-
 21 sent.

22 (b) The permission of an owner of land for recreational use of
 23 land without posting or fencing or otherwise restricting use of the
 24 land does not raise a presumption that the owner intended to give the
 25 public a right to use the land.

26 * Sec. 2. AS 09.45.730 is amended by adding a new subsection to read:

27 (b) A person who enters upon the land of another to gather
 28 geotechnical data or take mineral resources without lawful authority
 29 or license, is liable to the owner of that land for treble the amount

1 of damages that may be assessed in a civil action. If the trespass is
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 10 or death of a person who enters onto or remains on the unimproved
 11 portion of land if

IF 2 and (A or B)

12 (1) the injury or death resulted from

13 (A) a natural condition of the unimproved portion of
 14 the property; or

15 (B) the condition of a portion of the land that was
 16 improved by a third party without the knowledge or permission of
 17 the owner; or [AND]

*(2) Same as
 CP whole
 Bill*

18 (2) the person had no responsibility to compensate the
 19 owner for the person's use or occupancy of the land.

20 * Sec. 4. AS 09.45.795 is amended by adding a new subsection to read:

21 (b) A land owner is not liable in tort for damages for the
 22 injury to or death of a person who enters on the land of another in
 23 violation of AS 11.46.

*Criminal
 Trespass 1st Degree
 Move to 330 1st
 degree*

24 * Sec. 5. AS 11.46.320 is amended by adding a new subsection to read:

25 (c) A violation of (a) of this section includes, but is not
 26 limited to,

27 (1) wilfully entering or remaining unlawfully on the prem-
 28 ises of another knowing that the consent to enter or remain on the
 29 premises has been denied or withdrawn by a person in charge of the

1 premises;

2 (2) wilfully entering on premises owned, operated, or con-
3 trolled by the state or a municipality of the state knowing that
4 consent to enter the premises has been denied or withdrawn by the
5 person in charge of the premises;

6 (3) without authority of law, going upon and remaining on
7 the premises of another after having been denied entry on the premises
8 either orally or in writing by the person in charge of the premises or
9 after having been forbidden to do so by signs posted under AS 11.46.-
10 350(b);

11 (4) entering enclosed premises of another or premises of
12 another posted under AS 11.46.350(b) on foot or by a vehicle without
13 the express or implied consent of the person in charge of the premises
14 except through a road, airstrip, or other apparent way of access;

15 (5) hunting, fishing, trapping, or removing animal, vege-
16 table, or mineral material on the premises of another without permis-
17 sion after having been forbidden to do so by signs posted under
18 AS 11.46.350(b);

19 (6) entering the premises of another to remove or use the
20 property of another without the permission of the person in charge of
21 the premises;

22 (7) wilfully entering on or crossing over private premises
23 to gain access to a valid easement or navigable water;

24 (8) entering on the premises of another without permission
25 and damaging a part of the premises;

26 (9) knowingly or unlawfully entering or remaining on the
27 premises of another to acquire geotechnical, geological, geophysical,
28 or geochemical data for the purpose of locating minerals;

29 (10) being a person engaged in business for profit,

1 including hunting or fishing guides, river guides, recreation guides,
2 air taxi operators, and commercial air carriers, entering and remain-
3 ing on the premises of another without the permission of the person in
4 charge of the premises.

5 * Sec. 6. AS 11.46.350(b) is amended to read:

6 (b) For purposes of this section, a person who, without intent
7 to commit a crime on the land, enters or remains upon unimproved and
8 apparently unused land, which is neither fenced nor otherwise enclosed
9 in a manner designed to exclude intruders, is privileged to do so
10 unless

11 (1) notice against trespass is personally communicated to
12 that person by the owner of the land or some other authorized person;
13 or

14 (2) notice against trespass is given by posting in the
15 manner described in (c) of this section [IN A REASONABLY CONSPICUOUS
16 MANNER UNDER THE CIRCUMSTANCES].

17 * Sec. 7. AS 11.46.350 is amended by adding a new subsection to read:

18 (c) A notice against trespass is given if the notice

19 (1) is printed legibly in English;

20 (2) is at least 144 square inches in size;

21 (3) contains the name and address of the person under whose
22 authority the property is posted and the name and the address of the
23 person who is authorized to grant ~~permission to enter the property;~~

24 (4) is placed at each roadway or apparent ^{to whom} way of access
25 onto the property; and *K. Down*

26 (5) states any specific prohibition that the posting is
27 directed against such as "no trespassing," "no hunting," "no fishing,"
28 "no digging," or a similar prohibition.

29

5-0758L ✓

Bradley
2/18/88

Original sponsor: Hoffman

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 198 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the permissive and nonpermissive
7 use of land."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 05 is amended by adding a new chapter to read:

10 CHAPTER 40. RECREATIONAL USE OF LAND.

11 Sec. 05.40.010. RECREATIONAL USE. (a) An owner of land who
12 makes land available to the public for recreational purposes without
13 compensation, owes no duty of care to keep the land safe for entry or
14 use by others or to give a warning of an unknown dangerous condition,
15 use, structure, or activity on the land to persons entering.

16 (b) An owner of land who invites or permits an individual to use
17 the land for recreational purposes without compensation does not

18 (1) make a representation or extend an assurance that the
19 land is safe for any purpose; or

20 (2) incur liability for injury, loss, or death to an indi-
21 vidual or property caused by an act or omission of the owner.

22 (c) Where the lessee of land charges a person who enters or goes
23 on the land for a recreational purpose, unless the land is leased by
24 the owner to the state or a municipality of the state, consideration
25 received by the owner for the lease is not compensation within the
26 meaning of this section.

27 (d) This section does not limit the liability of an owner of
28 land for a wilful or malicious failure to guard or warn against a
29 known dangerous condition, use, structure, or activity.

See statute in state law

(e) This section may not be construed to relieve a person using the land of another for recreational purposes without compensation from an obligation to exercise care in the use of the land and in activities on the land, or from the legal consequences of a failure to employ care.

(f) An individual using the land of another for recreational purposes without compensation is liable for damages to the property caused while on the property.

(g) In this section

(1) "compensation" does not include a processing or application fee for a permit to use land for recreational purposes;

(2) "land" means private land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the land;

(3) "owner" means the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises.

Sec. 05.40.020. PERMISSIVE RECREATIONAL USE. (a) An owner of land who invites or permits a person to use land for recreational purposes without compensation does not give the person a right to continue the use of the land for a recreational purpose without consent.

(b) The permission of an owner of land for recreational use of land without posting or fencing or otherwise restricting use of the land does not raise a presumption that the owner intended to give the public a right to use the land.

* Sec. 2. AS 09.45.730 is amended by adding a new subsection to read:

(b) A person who enters upon the land of another to gather geotechnical data or take mineral resources without lawful authority or license, is liable to the owner of that land for treble the amount

Table or actual

1 of damages that may be assessed in a civil action. If the trespass is
2 inadvertent, or the defendant had probable cause to believe that the
3 land on which the trespass was committed was the defendant's own or
4 that of the person in whose service or by whose direction the act was
5 done, only actual damages may be recovered.

6 * Sec. 3. AS 09.45.795 is amended to read:

7 Sec. 09.45.795. CIVIL LIABILITY FOR PERSONAL INJURIES OR DEATH
8 OCCURRING ON IMPROVED OR UNIMPROVED LAND. A land [AN] owner [OF
9 UNIMPROVED LAND] is not liable in tort for damages for the injury to
10 or death of a person who enters onto or remains on the unimproved
11 portion of land if

12 (1) the injury or death resulted from

13 (A) a natural condition of the unimproved portion of
14 the property; or

15 (B) the condition of a portion of the land that was
16 improved by a third party without the knowledge or permission of
17 the owner; and

18 (2) the person had no responsibility to compensate the
19 owner for the person's use or occupancy of the land.

20 * Sec. 4. AS 09.45.795 is amended by adding a new subsection to read:

21 *immunity* (b) A land owner is not liable in tort for damages for the
22 injury to or death of a person who enters on the land of another in
23 violation of AS 11.46.

24 * Sec. 5. AS 11.46.330 is amended by adding a new subsection to read:

25 (c) A violation of (a) of this section includes, but is not
26 limited to,

27 (1) wilfully entering or remaining unlawfully on the prem-
28 ises of another knowing that the consent to enter or remain on the
29 premises has been denied or withdrawn by a person in charge of the

1 premises;

2 (2) wilfully entering on premises owned, operated, or con-
3 trolled by the state or a municipality of the state knowing that
4 consent to enter the premises has been denied or withdrawn by the
5 person in charge of the premises;

6 (3) without authority of law, going upon and remaining on
7 the premises of another after having been denied entry on the premises
8 either orally or in writing by the person in charge of the premises or
9 after having been forbidden to do so by signs posted under AS 11.46.-
10 350(b);

11 (4) entering enclosed premises of another or premises of
12 another posted under AS 11.46.350(b) on foot or by a vehicle without
13 the express or implied consent of the person in charge of the premises
14 except through a road, airstrip, or other apparent way of access;

15 (5) hunting, fishing, trapping, or removing animal, vege-
16 table, or mineral material on the premises of another without permis-
17 sion after having been forbidden to do so by signs posted under
18 AS 11.46.350(b);

19 (6) entering the premises of another to remove or use the
20 property of another without the permission of the person in charge of
21 the premises;

22 (7) wilfully entering on or crossing over private premises
23 to gain access to a valid easement or navigable water;

24 (8) entering on the premises of another without permission
25 and damaging a part of the premises;

26 (9) knowingly or unlawfully entering or remaining on the
27 premises of another to acquire geotechnical, geological, geophysical,
28 or geochemical data for the purpose of locating minerals;

29 (10) being a person engaged in business for profit,

1 including hunting or fishing guides, river guides, recreation guides,
2 air taxi operators, and commercial air carriers, entering and remain-
3 ing on the premises of another without the permission of the person in
4 charge of the premises.

5 * Sec. 6. AS 11.46.350(b) is amended to read:

6 (b) For purposes of this section, a person who, without intent
7 to commit a crime on the land, enters or remains upon unimproved and
8 apparently unused land, which is neither fenced nor otherwise enclosed
9 in a manner designed to exclude intruders, is privileged to do so
10 unless

11 (1) notice against trespass is personally communicated to
12 that person by the owner of the land or some other authorized person;
13 or

14 (2) notice against trespass is given by posting in the
15 manner described in (c) of this section [IN A REASONABLY CONSPICUOUS
16 MANNER UNDER THE CIRCUMSTANCES].

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18 (c) A notice against trespass is given if the notice

19 (1) is printed legibly in English;

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21 (3) contains the name and address of the person under whose
22 authority the property is posted and the name and the address of the
23 person who is authorized to grant permission to enter the property;

24 (4) is placed at each roadway or apparent way of access
25 onto the property; and

26 (5) states any specific prohibition that the posting is
27 directed against such as "no trespassing," "no hunting," "no fishing,"
28 "no digging," or a similar prohibition.

Original sponsor: Hoffman

Light Title

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 198 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the permissive and nonpermissive
7 use of land."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 05 is amended by adding a new chapter to read:

10 CHAPTER 40. RECREATIONAL USE OF LAND.

11 Sec. 05.40.010. RECREATIONAL USE. (a) An owner of land who
12 makes land available to the public for recreational purposes without
13 compensation owes no duty of care to keep the land safe for entry or
14 use by others or to give a warning of an unknown dangerous condition,
15 use, structure, or activity on the land to persons entering.

16 (b) An owner of land who invites or permits an individual to use
17 the land for recreational purposes without compensation does not

18 (1) make a representation or extend an assurance that the
19 land is safe for any purpose; or

20 (2) incur liability for injury, loss, or death to an indi-
21 vidual or property caused by an act or omission of the owner.

22 (c) Where the lessee of land charges a person who enters or goes
23 on the land for a recreational purpose, unless the land is leased by
24 the owner to the state or a municipality of the state, consideration
25 received by the owner for the lease is not compensation within the
26 meaning of this section.

27 (d) This section does not limit the liability of an owner of
28 land for a wilful or malicious failure to guard or warn against a
29 known dangerous condition, use, structure, or activity.

*Consistency
problem*

1 (e) This section may not be construed to relieve a person using
2 the land of another for recreational purposes without compensation
3 from an obligation to exercise care in the use of the land and in
4 activities on the land, or from the legal consequences of a failure to
5 employ care.

6 (f) An individual using the land of another for recreational
7 purposes without compensation is liable for damages to the property
8 caused while on the property.

9 (g) In this section

10 (1) "compensation" does not include a processing or appli-
11 cation fee for a permit to use land for recreational purposes;

12 *Ugh! What to know* (2) "land" means private land, roads, water, watercourses,
13 private ways and buildings, structures, and machinery or equipment
14 when attached to the land;

15 (3) "owner" means the possessor of a fee interest, a
16 tenant, lessee, occupant, or person in control of the premises.

17 Sec. 05.40.020. PERMISSIVE RECREATIONAL USE. (a) An owner of
18 land who invites or permits a person to use land for recreational
19 purposes without compensation does not give the person a right to
20 continue the use of the land for a recreational purpose without con-
21 sent.

22 (b) The permission of an owner of land for recreational use of
23 land without posting or fencing or otherwise restricting use of the
24 land does not raise a presumption that the owner intended to give the
25 public a right to use the land.

26 * Sec. 2. AS 09.45.730 is amended by adding a new subsection to read:

27 (b) A person who enters upon the land of another to gather
28 geotechnical data or take mineral resources without lawful authority
29 or license, is liable to the owner of that land for treble the amount

1 of damages that may be assessed in a civil action. If the trespass is
2 inadvertent, or the defendant had probable cause to believe that the
3 land on which the trespass was committed was the defendant's own or
4 that of the person in whose service or by whose direction the act was
5 done, only actual damages may be recovered.

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7 Sec. 09.45.795. CIVIL LIABILITY FOR PERSONAL INJURIES OR DEATH
8 OCCURRING ON IMPROVED OR UNIMPROVED LAND. A land [AN] owner [OF
9 UNIMPROVED LAND] is not liable in tort for damages for the injury to
10 or death of a person who enters onto or remains on the unimproved
11 portion of land if

12 (1) the injury or death resulted from

13 (A) a natural condition of the unimproved portion of
14 the property; or

15 (B) the condition of a portion of the land that was
16 improved by a third party without the knowledge or permission of
17 the owner; (or) [AND]

18 (2) the person had no responsibility to compensate the
19 owner for the person's use or occupancy of the land.

20 * Sec. 4. AS 09.45.795 is amended by adding a new subsection to read:

21 (b) A land owner is not liable in tort for damages for the
22 injury to or death of a person who enters on the land of another in
23 violation of AS 11.46.

24 * Sec. 5. AS 11.46.320 is amended by adding a new subsection to read:

25 (c) A violation of (a) of this section includes, but is not
26 limited to,

27 (1) wilfully entering or remaining unlawfully on the prem-
28 ises of another knowing that the consent to enter or remain on the
29 premises has been denied or withdrawn by a person in charge of the

1 premises;

2 (2) wilfully entering on premises owned, operated, or con-
3 trolled by the state or a municipality of the state knowing that
4 consent to enter the premises has been denied or withdrawn by the
5 person in charge of the premises;

6 (3) without authority of law, going upon and remaining on
7 the premises of another after having been denied entry on the premises
8 either orally or in writing by the person in charge of the premises or
9 after having been forbidden to do so by signs posted under AS 11.46.-
10 350(b);

11 (4) entering enclosed premises of another or premises of
12 another posted under AS 11.46.350(b) on foot or by a vehicle without
13 the express or implied consent of the person in charge of the premises
14 except through a road, airstrip, or other apparent way of access;

15 (5) hunting, fishing, trapping, or removing animal, vege-
16 table, or mineral material on the premises of another without permis-
17 sion after having been forbidden to do so by signs posted under
18 AS 11.46.350(b);

19 (6) entering the premises of another to remove or use the
20 property of another without the permission of the person in charge of
21 the premises;

22 (7) wilfully entering on or crossing over private premises
23 to gain access to a valid easement or navigable water;

24 (8) entering on the premises of another without permission
25 and damaging a part of the premises;

26 (9) knowingly or unlawfully entering or remaining on the
27 premises of another to acquire geotechnical, geological, geophysical,
28 or geochemical data for the purpose of locating minerals;

29 (10) being a person engaged in business for profit,

1 including hunting or fishing guides, river guides, recreation guides,
2 air taxi operators, and commercial air carriers, entering and remain-
3 ing on the premises of another without the permission of the person in
4 charge of the premises.

5 * Sec. 6. AS 11.46.350(b) is amended to read:

6 (b) For purposes of this section, a person who, without intent
7 to commit a crime on the land, enters or remains upon unimproved and
8 apparently unused land, which is neither fenced nor otherwise enclosed
9 in a manner designed to exclude intruders, is privileged to do so
10 unless

11 (1) notice against trespass is personally communicated to
12 that person by the owner of the land or some other authorized person;
13 or

14 (2) notice against trespass is given by posting in the
15 manner described in (c) of this section [IN A REASONABLY CONSPICUOUS
16 MANNER UNDER THE CIRCUMSTANCES].

17 * Sec. 7. AS 11.46.350 is amended by adding a new subsection to read:

18 (c) A notice against trespass is given if the notice

19 (1) is printed legibly in English;

20 (2) is at least 144 square inches in size;

21 (3) contains the name and address of the person under whose
22 authority the property is posted and the name and the address of the
23 person who is authorized to grant permission to enter the property;

24 (4) is placed at each roadway or apparent way of access
25 onto the property; and

26 (5) states any specific prohibition that the posting is
27 directed against such as "no trespassing," "no hunting," "no fishing,"
28 "no digging," or a similar prohibition.
29

1 IN THE HOUSE

BY HOFFMAN

2 SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 198
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FIFTEENTH LEGISLATURE - FIRST SESSION
5 A BILL

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7 use of land."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 05 is amended by adding a new chapter to read:

10 CHAPTER 40. RECREATIONAL USE OF LAND.

11 Sec. 05.40.010. RECREATIONAL USE. (a) Except as provided in
12 AS 09.45.795, an owner of land who makes land available to the public
13 without compensation for recreational purposes owes no duty of care to
14 keep the land safe for entry or use by others for recreational pur-
15 poses or to give a warning of a dangerous condition, use, structure,
16 or activity on the land to persons entering for recreational purposes.

17 (b) Except as provided in AS 09.45.795, an owner of land who
18 invites or permits without compensation an individual to use the land
19 for recreational purposes does not

20 (1) make a representation or extend an assurance that the
21 land is safe for any purpose;

22 (2) confer upon the individual who uses the land for recre-
23 ational purposes the legal status of an invitee or licensee to whom a
24 duty of care is owed; or

25 (3) incur liability for injury, loss, or death to an indi-
26 vidual or property caused by an act or omission of the owner.

27 (c) Where the owner of land charges a person who enters or goes
28 on the land for a recreational purpose, unless the land is leased by
29 the owner to the state or a municipality of the state, consideration

1 received by the owner for the lease is not compensation within the
2 meaning of this section.

3 (d) This section does not limit the liability of an owner of
4 land for a wilful or malicious failure to guard or warn against a
5 dangerous condition, use, structure, or activity.

6 (e) This section may not be construed to relieve a person using
7 the land of another for recreational purposes from an obligation to
8 exercise care in the use of the land and in activities on the land, or
9 from the legal consequences of a failure to employ care.

10 (f) An individual using the land of another for recreational
11 purposes, with or without permission, is liable for damages to the
12 property caused while on the property.

13 (g) In this section

14 (1) "compensation" does not include a processing or appli-
15 cation fee for a permit to use land for recreational purposes;

16 (2) "land" means private land, roads, water, watercourses,
17 private ways and buildings, structures, and machinery or equipment
18 when attached to the land;

19 (3) "owner" means the possessor of a fee interest, a
20 tenant, lessee, occupant, or person in control of the premises;

21 (4) "recreational purposes" means a use done without com-
22 pensation to the owner.

23 Sec. 05.40.020. PERMISSIVE RECREATIONAL USE. (a) An owner of
24 land who invites or permits a person to use land for recreational
25 purposes without compensation does not give the person a right to
26 continue the use of the land for a recreational purpose without con-
27 sent.

28 (b) The permission of an owner of land for recreational use of
29 land without posting or fencing or otherwise restricting use of the

1 land does not raise a presumption that the owner intended to give the
2 public a right to use the land.

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4 (b) A person who enters upon the land of another to gather
5 geotechnical data or take mineral resources without lawful authority
6 or license, is liable to the owner of that land for treble the amount
7 of damages that may be assessed in a civil action. If the trespass is
8 inadvertent, or the defendant had probable cause to believe that the
9 land on which the trespass was committed was the defendant's own or
10 that of the person in whose service or by whose direction the act was
11 done, only actual damages may be recovered.

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13 Sec. 09.45.795. CIVIL LIABILITY FOR PERSONAL INJURIES OR DEATH
14 OCCURRING ON IMPROVED OR UNIMPROVED LAND. A land [AN] owner [OF
15 UNIMPROVED LAND] is not liable on tort for damages for the injury to
16 or death of a person who enters onto or remains on the unimproved
17 portion of land if

18 (1) the injury or death resulted from a natural condition
19 of the unimproved portion of the property; or [AND]

20 (2) the person had no responsibility to compensate the
21 owner for the person's use or occupancy of the property.

22 * Sec. 4. AS 09.45.795 is amended by adding new subsections to read:

23 (b) A landowner is not liable in tort for damages for the injury
24 to or death of a person who trespasses on the land of another in
25 violation of AS 11.46 whether the land is improved or unimproved.

26 (c) For the purposes of this section, "unimproved" means land
27 found in its natural condition or if improved, the improvement was
28 placed on the land by a third party without the knowledge or permis-
29 sion of the owner.

1 * Sec. 5. AS 11.46.320 is amended by adding a new subsection to read:

2 (c) A violation of (a) of this section includes, but is not
3 limited to,

4 (1) wilfully entering or remaining unlawfully on the prem-
5 ises of another knowing that the consent to enter or remain on the
6 premises has been denied or withdrawn by a person in charge of the
7 premises;

8 (2) wilfully entering on premises owned, operated, or con-
9 trolled by the state or a municipality of the state knowing that
10 consent to enter the premises has been denied or withdrawn by the
11 person in charge of the premises;

12 (3) without authority of law, going upon and remaining on
13 the premises of another after having been denied entry on the premises
14 either orally or in writing by the person in charge of the premises or
15 after having been forbidden to do so by signs posted under AS 11.46.-
16 350(b);

17 (4) entering enclosed premises of another or premises of
18 another posted under AS 11.46.350(b) on foot or by a vehicle without
19 the express or implied consent of the person in charge of the premises
20 except through a road, airstrip, or other apparent way of access;

21 (5) hunting, fishing, trapping or removing animal, vege-
22 table, or mineral material on the premises of another without permis-
23 sion;

24 (6) entering the premises of another to remove or use the
25 property of another without the permission of the person in charge of
26 the premises;

27 (7) wilfully entering on or crossing over private premises
28 to gain access to a valid easement or navigable water;

29 (8) entering on the premises of another without permission

1 and damaging a part of the premises;

2 (9) knowingly or unlawfully entering or remaining on the
3 premises of another to acquire geotechnical, geological, geophysical,
4 or geochemical data for the purpose of locating minerals;

5 (10) being a person engaged in business for profit, includ-
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8 the premises of another without the permission of the person in charge
9 of the premises.

10 * Sec. 6. AS 11.46.350(b) is amended to read:

11 (b) For purposes of this section, a person who, without intent
12 to commit a crime on the land, enters or remains upon unimproved and
13 apparently unused land, which is neither fenced nor otherwise enclosed
14 in a manner designed to exclude intruders, is privileged to do so
15 unless

16 (1) notice against trespass is personally communicated to
17 that person by the owner of the land or some other authorized person;
18 or

19 (2) notice against trespass is given by posting in the
20 manner described in (c) of this section [IN A REASONABLY CONSPICUOUS
21 MANNER UNDER THE CIRCUMSTANCES].

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24 (1) is printed legibly in English;

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27 authority the property is posted and the name and the address of the
28 person who is authorized to grant permission to enter the property;

29 (4) is placed at each roadway or apparent way of access

1 onto the property; and

2 (5) states any specific prohibition that the posting is
3 directed against such as "no trespassing," "no hunting," "no fishing,"
4 "no digging," or a similar prohibition.

A M E N D M E N T

Offered in the HOUSE

by Hoffman

TO: SSB 198

Page 4, line 22, AFTER "permission":

Add:

"after having been forbidden to do so by signs posted
under AS 11.46.350(b);"

PROPOSED CHANGES TO CS SSHB 198

* Sec. 5. AS 11.46.350(a) is amended to read:

(a) As used in AS 11.41.300 -- 11.41.350, unless the context requires otherwise, "enter or remain unlawfully" means to

(1) enter or remain in or upon premises or in a propelled vehicle when the premises or propelled vehicle, at the time of the entry or remaining, is not open to the public and when the defendant is not otherwise privileged to do so; or

(2) fail to leave premises or a propelled vehicle that is open to the public after being lawfully directed to do so personally by the person in charge;

(3) enter or remain upon premises or in a propelled vehicle in violation of a provision in an order issued under AS 25.35.010(b) or 25.35.020; [.]

(4) enter or remain on premises, even if for the purpose of gaining access to an easement, navigable water, or other premises, having been forbidden to do so by the person in charge or by a sign posted under AS 11.46.350(b);

(5) enter, remain, cross, or travel upon premises except by a designated road, airstrip or other apparent way of access, when use of any other way of access has been prohibited by the person in charge or by a sign posted under AS 11.46.350(b);

(6) hunt, fish, trap or otherwise search for or use animals, plants, or minerals, having been forbidden to do so by the person in charge or by a sign posted under AS 11.46.350(b);

(7) enter or remain on premises for purposes of furthering a guiding, recreation or transportation business, having been forbidden to do so by the person in charge or by a sign posted under AS 11.46.350(b); and

(8) damage a part of premises without the permission of the person in charge.

* Sec. 6. AS 11.46.350(b) is amended to read:

(b) For purposes of this section, 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 unless

(1) notice against trespass is personally communicated to that person by the owner of the land or some other authorized person; or

(2) notice against trespass or other conduct is given by posting, at each roadway or apparent way of access onto the property, a sign that [IN A REASONABLY CONSPICUOUS MANNER UNDER THE CIRCUMSTANCES.]

(A) is printed legibly in English;

(B) is at least 144 square inches in size; and

(C) contains the name and address of the person under whose authority the property is posted and the name and the address of the person who is authorized to grant permission to enter the property.

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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 unless

(1) notice against trespass is personally communicated to that person by the owner of the land or some other authorized person; or

(2) notice against trespass or other conduct is given by posting, at each roadway or apparent way of access onto the property, a sign that [IN A REASONABLY CONSPICUOUS MANNER UNDER THE CIRCUMSTANCES.]

(A) is printed legibly in English;

(B) is at least 144 square inches in size; and

(C) contains the name and address of the person under whose authority the property is posted and the name and the address of the person who is authorized to grant permission to enter the property.

PROPOSED SUBSTITUTE FOR SECTION 7
OF CS FOR SPONSOR SUBSTITUTE FOR
HOUSE BILL NO. 198

* Sec. 7. AS 11.46.350 is amended by adding a new subsection to read:

(c) A notice against trespass is given if the notice

(1) is printed legibly in English;

(2) is at least 144 square inches in size;

(3) contains the name and address of the person under whose authority the property is posted and the name and the address of the person who is authorized to grant permission to enter the property;

(4) is placed at each roadway or at each way of access onto the property which is known to the landowner; in the case of isolated tracts, notice may be placed along the perimeter at each cardinal points of the isolated tract; and

(5) states any specific prohibition that the posting is directed against such as "no trespassing," "no hunting," "no fishing," "no digging," or a similar prohibition.

s\sec7.doc

PROPOSED SUBSTITUTE FOR SECTION 3
OF CS FOR SPONSOR SUBSTITUTE FOR
HOUSE BILL NO. 198

*Sec. 3. AS 09.45.795 is amended to read:

Sec. 09.45.795. CIVIL LIABILITY FOR PERSONAL INJURY OR
DEATH OCCURRING ON IMPROVED OR UNIMPROVED LAND.

(a) An owner of unimproved land owes no duty of care to keep the land safe for entry or use by others in violation of AS 11.46, or to give a warning of a dangerous condition, use, structure or activity on the land.

(b) A land [AN] owner [OF UNIMPROVED LAND] is not liable in tort for damages for the injury or death of a person who enters onto or remains on the unimproved portion of the land if

(1) the injury or death resulted from

(A) the failure of the person entering the land to exercise care; or

(B) a natural condition of the unimproved portion of the property; or

(C) a man-made condition on a portion of the unimproved property existing after that portion of

the property has been abandoned and the property has begun to revert to an unimproved state; or

(D) the condition of a portion of land that was improved by a third-party without the knowledge or permission of the owner; or [AND]

(2) the person had no responsibility to compensate the owner for the person's use or occupancy of the land.

(c) "Unimproved land" shall include land upon which the construction, installation, or placement of any structure, fixture, device or other improvement enables, assists or otherwise furthers the subsistence or other customary or traditional uses of such land, or the harvest of timber thereon, including road construction and activities relating to reforestation, silviculture or other similar resource enhancement practices.

RATIONALE:

MUCH OF THE PRIVATE LAND IN SOUTHEAST ALASKA CONTAINS LOGGING ROADS. WHEN TIMBER HARVESTING IS COMPLETED, THESE LOGGING ROADS ARE PUT TO BED, WITH CULVERTS AND BRIDGES REMOVED AND NATURAL VEGETATION IS PERMITTED TO GROW OVER THE ROADS. THIS IS DONE AS REQUIRED BY ALASKA'S FOREST PRACTICES ACT.

UNDER THE CURRENT PROVISIONS OF THIS BILL, A PRIVATE LANDOWNER WOULD NOT BE LIABLE FOR INJURY OR DEATH IF PERMISSION WAS GIVEN FOR RECREATIONAL USE, NOR WOULD THERE BE ANY LIABILITY FOR ANY INJURY OR DEATH IF THE PROPERTY WERE UNIMPROVED. HOWEVER, BECAUSE OF THESE ABANDONED ROADS, LIABILITY COULD ATTACH. THE PROPOSED SECTION 3 ADDRESSES THIS CONCERN. FURTHER, IF NO DUTY OF CARE IS OWED TO AN INVITEE, PERMITTEE, OR LICENSEE, THEN NO DUTY SHOULD BE OWED TO A TRESPASSER. THIS WOULD BE IN ACCORD WITH THE COMMON LAW PRINCIPLE THAT NO DUTY OF CARE IS OWED TO A TRESPASSER. THIS PRINCIPLE SHOULD BE CLEARLY ESTABLISHED IN THIS BILL. THE PROPOSED NEW SECTION 3 FOR HOUSE BILL 198 COVERS THIS AS WELL.

FISCAL NOTE

REQUEST:

Revision Date: 2/1/88
Title: Permissive and nonpermissive use of land.
Sponsor: Hoffman
Requestor: House Judiciary Comm.

Agency Affected: DIR
BRU: Land and Water Mgt.
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Janet Burleson Phone: 465-3400
Division: Land and Water Management Date: 2/1/88
Approved by Commissioner: [Signature] Date: 2-2-88
Agency: 11

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

FISCAL NOTE

REQUEST:

Revision Date: January 19, 1988
Title: "An Act relating to permissive
and nonpermissive use of land."
Sponsor: Repr. Hoffman (by request)
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Prosecution
Components: Third Judicial District,
Fourth Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		77.9	80.2	82.6	85.1	87.7
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	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		112.7	109.9	113.2	116.7	120.3
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		112.7	109.9	113.2	116.7	120.3
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 I. Pegues

Prepared by: Richard I. Pegues, Director Phone: 465-3672
Division: Administrative Services (Pegues/1002) Date: January 19, 1988
Grace Berg Schauble
Approved by Commissioner: Attorney General Date: January 19, 1988
Agency: Department of Law

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

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	41.4	36.5	77.9
Travel	7.2	7.2	14.4
Contractual	4.2	4.2	8.4
Supplies	4.5	4.5	9.0
Equipment	<u>1.5</u>	<u>1.5</u>	<u>3.0</u>
TOTAL	58.8	53.9	112.7

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

Position Title Attorney III		No. of Positions 1	Range/Step 22A	Barg. Unit PX	
Time Status PPT	Staff Months 12	Location Fairbanks		Election District 19/20/21	
Type of Expenditure		Justification			
Amount		<p>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 misdemeanor 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.</p>			
1	2				3
Salary	28,122				
Benefits	8,383				
Premium Pay					
Other					
Total Personal Services					36,505
Travel					7,200
Contractual					4,200
Commodities					4,500
Equipment		1,500			
Other					
Total Cost		53,905			
Funding Source for Total Cost					
Federal Receipts	1002				
G. F. Match	1003				
General Fund	1004	53,905			
GF Program Receipts	1005				
Other					

Request For
New Position

Agency Department of Law
 DRU Prosecution
 Component Fourth Judicial District

Page 1 of 2
 Revised Date 1/19/88

FY 89

Position Title Attorney III		No. of Positions 1	Range/Step 22A	Barg. Unit PX	
Time Status PPT	Staff Months 12	Location Bethel		Election District 25	
Type of Expenditure		Justification			
		<p>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 misdemeanor 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.</p>			
Amount					
1	2				3
Salary	32,310				
Benefits	9,077				
Premium Pay					
Other					
Total Personal Services					41,387
Travel					7,200
Contractual					4,200
Commodities					4,500
Equipment					1,500
Other					
Total Cost					58,787
Funding Source for Total Cost					
Federal Receipts	1002				
G. F. Match	1003				
General Fund	1004	58,787			
GF Program Receipts	1005				
Other					

**Request For
New Position**

Agency Department of Law
 BRU Prosecution
 Component Third Judicial District

Page 2 of 2
 Revised Date 1/19/88

FY 89

FISCAL NOTE

REQUEST:

Revision Date: April 14, 1988
Title: "An Act relating to the permissive and nonpermissive use of land."
Sponsor: House Judiciary
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Prosecution
Components: All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The committee substitute for HB 198 removed all of the references to the criminal law and criminal penalties contained in the original version of the bill. Consequently, there will not be a fiscal impact on the Department of Law.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services

Phone: 465-3672
Date: April 14, 1988

Approved by Commissioner: Grace Berg Schaible, Atty. Gen.
Agency: Department of Law

Date: April 14, 1988

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____

Bill Version : SSHB 198

Publish Date : _____

Revision Date: April 24, 1987

Agency Affected: Department of Law

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

BRU: Prosecution

Sponsor: Repr. Hoffman (by request)

Components: Third Judicial District,

Requestor: Repr. Hoffman

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 L. 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

SSHB 198

For Bill/Resolution No. _____

	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	<u>1.5</u>	<u>1.5</u>	<u>3.0</u>
TOTAL	54.3	53.1	107.4

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

Position Title Attorney III		No. of Positions 1	Range/Step 22A	Barg. Unit PX
Time Status PPT	Staff Months 12	Location Fairbanks		Election District 19/20/21
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 misdemeanor 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.				
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				

**Request For
New Position**

Agency Department of Law
 BRU Prosecution
 Component Fourth Judicial District

Page 1 of 2
 Revised Date _____

FY 88

Position Title Attorney III		No. of Positions 1	Range/Step 22A	Barg. Unit PX
Time Status PPT	Staff Months 12	Location Bethel		Election District 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			
Gener ' Fund	1004	54,276		
I-A Receipts	1006			
CIP Receipts	1061			
Other				
Justification				
<p>This part-time attorney position will be needed to handle the increased number of trespass cases growing out of the adoption of SSIIB 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 misdemeanor 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.</p>				

**Request For
New Position**

Agency Department of Law
 BRU Prosecution
 Component Third Judicial District

Page 2 of 2
 Revised Date

FY 88

From: Representative Lyman Hoffman

Sectional analysis of proposed technical changes to SSHB 198 for a committee substitute.

Section 05.40.010, page 1, line 11 and line 17.

.....DELETE "Except as provided in AS 09.45.795"

AS 09.45.795 is not an exception to the limitation stated on Sec. 05.40.010.

Section 05.40.010, page 1, line 15 AFTER "warning of a"

.....ADD "unknown"

Section 05.40.010, page 1, lines 22, 23, 24.

.....DELETE "confer upon the individual who uses the land for recreational purposes the legal status of an invitee or licensee to whom a duty of care is owed"

Refer to memorandum from Dick Bradley to Representative Lyman Hoffman concerning the "Webb" case.

Section 05.40.010, page 2, line 4 AFTER "warn against a"

.....ADD "known"

Section 09.45.795, page 3, line 19

.....ADD "land or a condition of a portion of the land that was improved by a third party without the knowledge or permission of the owner;"

Since SSHB 198 defines "unimproved land" to include improved land, this is an awkward result.

Section 09.45.795, page 3, line 21

.....DELETE "property"

.....ADD "land"

Improves the language.

Section 09.45.795(b), page 3, line 25

.....DELETE "whether the land is improved or unimproved"

Improves the language.

Section 09.45.795(c), page 3, lines 26 thru 29

.....DELETE entirely.

Moved to Sec. 09.45.795(1).

Section 11.46.320, page 4, line 22, AFTER "permission":

.....ADD "after having been forbidden to do so by signs posted under AS 11.46.350(b);"

From: Representative Lyman Hoffman

SUMMARY OF SECTION BY SECTION ANALYSIS - SSHB 198

Section 1.

To encourage private landowners to open their lands for recreational use by the public. In exchange for opening private lands to public use, landowners would be protected from liability claims by recreational users.

Section 2.

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 geotechnical trespasser.

Section 3.

Amends so the landowners are protected against liability suits resulting from injuries caused by isolated and unknown improvements which may be on an individual's land.

Section 4.

States that a landowner is not liable to a trespasser for damages for an injury received or wrongful death which occurs on a landowner's land whether it is improved or unimproved.

Section 5.

Outlines several forms of trespass which shall be considered criminal in nature, and therefore, subject to criminal prosecution.

Section 6.

Allows "notice" be given through the use of alternative forms of posting.

Section 7.

Provides specific requirements for posting private land.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465 3800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 2, 1988

SUBJECT: Use of land
(CSSSHB 198(Judiciary))

TO: Representative Lyman Hoffman

FROM: Richard A. Bradley
Legislative Counsel 

I note a long standing problem with the bill though I may not have commented on it before. The provisions of Sec. 05.40.010(a) ("no duty to warn") seem in conflict with Sec. 05.40.010(d) ("liability for a failure to warn"). It seems that the logical basis for the liability of an owner "for a wilful or malicious failure to guard or warn" will probably result from the knowledge of a condition on the land against which no warning was issued. While Sec. 05.40.010(a) intends reasonably enough to avoid liability for the owner who fails to warn when he is ignorant of the condition, the situation of the owner who knows and fails to warn, assuming proof is possible of that fact, seems to raise entirely different considerations.

I again express my concern that whatever is intended by Sec. 05.40.010(c), it is not expressed well.

Finally, the usage of "recreational purposes" and "without compensation" in the same sections, taken together with the definition at Sec. 05.40.010(g)(4) seems awkward. While I considered deleting "without compensation" throughout the section and relying on the definition to supply that concept, it seems that this is a case where a commonly understood phrase is given an uncommon meaning and it seems better to leave the phrases in the substantive sections as they are. The logic of that is that the definition of "recreational purposes" may be deleted; the definition is awkward and artificial. Because of the elimination of the definition, I have added "without compensation" to both (e) and (f).

If I may be of further assistance, please advise.

RAB:bb
wkb2/030

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 2, 1988

SUBJECT: Permissive and nonpermissive use of land
(CSSSHB 198(Judiciary))

TO: Representative John Sund
Chairman
House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

John Hartle has asked for a new CS; it has been provided to the committee.

I have added "unknown" in front of "dangerous condition" in Sec. 05.40.010(a). I have added "known" in front of "dangerous condition" in Sec. 05.40.010(d). The subsections then are consistent with one another and establish a rational public policy.

I have advised Representative Hoffman that I believe that Sec. 05.40.010(c) seems out of focus.

I believe that there is a policy implied in the bill that a landowner should not be liable for a permissive recreational use of owned land if the owner does not receive substantial consideration for the use. The consistent phrase "recreational purposes without compensation" in Sec. 05.40.010 states this policy. Part of the problem is that the bill then seems to make some exceptions to that policy that may prove difficult to reconcile. Note Sec. 05.40.010(c) and (g)(1).

I have not solved my reservations about Sec. 05.40.010(c).

If I may be of further assistance, please advise.

RAB:bb
wkb2/034

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465.3800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 23, 1988

SUBJECT: Use of land
[CSSSHB 198(), 4/29/87]

TO: Representative Lyman Hoffman

FROM: Richard A. Bradley
Legislative Counsel 

A point has come to my attention of a somewhat technical nature that AFN may wish to consider.

The bill (at page 1, line 23 and perhaps elsewhere) uses some terminology that may be obsolete. I refer to the phrase "invitee or licensee".

In Webb v. City and Borough of Sitka, 561 P.2d 731 (Alaska 1977), the Alaska Supreme Court suggested that that terminology and its implied legal results was obsolete.

We have decided to join the jurisdictions which have rejected the difference between the common law categories and no longer will predicate liability of a landowner upon the status of the person entering upon the land. We apply instead ordinary principles of negligence to govern the conduct of a landowner. The rule that we adopt is this: A landowner or owner of other property must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury to others, and the burden on the respective parties of avoiding the risk. * * * [Webb, 561 P.2d at 733.]

As I say this, I recognize two things. The Webb case arose in a common law context. Your bill establishes a statutory framework and it is, I assume, the case that if the legislature establishes a statutory framework, the court will work within that framework and accept the benchmarks of the

Representative Hoffman
Page 2
January 23, 1988

framework established by the legislature, even if it would not otherwise prefer their use.

The other point goes back to what I believe I have suggested before; that the courts may use these frameworks to achieve what they consider "substantial justice", even if that results in some technical damage to the law that the legislature has enacted. Another way of saying this is simply that the terminology of "licensee," "invitee," and "trespasser" is not that precise as applied to facts and courts have in past applied the terms less than logically and with an eye on the result sought in a case. This result reflects less than a perfect respect for the legislatively established framework -- but is, I think, the reality.

You may wish to reconsider the particular usage and the message of the Webb case.

I have included a copy of the case for your information.

If I may be of further assistance, please advise.

RAB:mkr
wkb1/094

Enclosure

ly, other considerations not present before emerge at the age of majority. Possible educational pursuits by the children which before were not considerations might well interest the father, and his participation in financially assisting the child cannot be ruled out.

I am also troubled by the fact that today's holding has set up the presumption of majority as a vehicle to cut off dependency insofar as the children are concerned, but has set up no corresponding presumption for the wife. Perhaps statistical evidence should be utilized in calculating the wife's chances of remarriage, and thus the loss of her legal right to dependency. Such evidence could then be utilized as a presumption as rational, I believe, as the presumption of majority operative against the children.

Finally, to allow the presumption to be adjusted upon a showing of the children of evidence of circumstances indicating a longer period of dependency or evidence furnishing a basis for finding a continued expectation of pecuniary contributions beyond the age of majority

is to unfairly place on the children a burden which cannot be realistically met. How could a child of two years demonstrate the intention of a deceased parent to financially participate in an educational plan which is to occur sixteen years later? What evidence of circumstances could demonstrate such an intention?

On the facts before us the court has held that the existence of a valid four-month marriage conclusively demonstrates the deceased's intentions to support his current wife, yet the majority cuts off any expectancy by his two children upon their reaching the age of legal majority. Such an apportionment of the deceased's estate to his immediate family seems to me to be justified nowhere in the record.¹

1. Appellee herein received social security benefits almost equal to those received by the children. workmen's compensation benefits of

Dorothy E. WEBB, Appellant,

v.

CITY AND BOROUGH OF
SITKA, Appellee.

No. 2888.

Supreme Court of Alaska.

March 21, 1977.

Pedestrian sued city for injuries sustained when she stubbed her toe in a crack in sidewalk and fell. The Superior Court, First Judicial District, Thomas E. Schulz, J., granted summary judgment for city and pedestrian appealed. The Supreme Court, Dimond, J. pro tem., held that court will no longer predicate liability of landowner upon the status of the person entering upon the land; that landowner must act as a reasonable person in maintaining his property in a reasonable safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk; and that question of fact existed as to whether there was negligence either on part of city or on part of pedestrian.

Reversed and remanded.

1. Negligence ⇔ 28

The common-law classifications of trespassers, licensees and invitees will no longer be applied in determining liability of a landowner; ordinary principles of negligence govern the conduct of a landowner.

2. Negligence ⇔ 28

Landowner or owner of other property must act as a reasonable person in maintaining his property in a reasonably safe

\$13,795 which must likely be repaid, a cash advance of \$35,000, and final payments of \$130,349.

condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk.

3. Municipal Corporations ⇨763(1)

The status of pedestrian while using city's sidewalks is not solely determinative of the city's duty of care.

4. Judgment ⇨185(2)

On motion for summary judgment all inferences from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

5. Judgment ⇨180

Issues of negligence are generally not susceptible to summary determination, but should be resolved by trial in the ordinary manner.

6. Judgment ⇨181(33)

Issue of fact existed as to whether there was negligence either on part of pedestrian who stubbed her toe in crack in sidewalk and fell or on part of city in maintaining the sidewalk, precluding summary judgment for city.

7. Jury ⇨25(2)

Plaintiff could rely on defendant's demand for jury trial of personal injury action. Rules of Civil Procedure, rule 38(b, d)

William H. Babcock, Sitka, for appellant.

Jan Van Dort, Faulkner, Banfield, Doo-gan & Holmes, Juneau, for appellee.

Before BOOCHEVER, Chief Justice, RABINOWITZ, CONNOR and BURKE, Justices, and DIMOND, Justice Pro Tem.

1. In the area where Mrs. Webb fell, there were two large cracks about four feet apart, each running the full width of the sidewalk. The cracks were each three to four inches wide at their maximum width and one to one and one-half inches deep. The edge of the sidewalk on one side of at least one of the cracks was about one inch above the edge on the other side of the crack.

DIMOND, Justice Pro Tem.

Dorothy Webb suffered a broken hip when she stubbed her toe in a crack in a Sitka sidewalk and fell to the concrete surface.¹ She brought this action for damages against the City & Borough of Sitka (hereafter called the City) on the theory that the City had negligently failed to remedy a dangerous condition of the sidewalk. The superior court granted the City's motion for summary judgment, holding that there was no liability on the part of the City. Mrs. Webb has appealed.

The court, in its memorandum decision, and the parties in their briefs, refer to the status of Mrs. Webb as a licensee or invitee as bearing on the degree of care to be exercised by the City and its resulting liability or non-liability for Mrs. Webb's injury. This is understandable because in some of our past decisions we have followed the views expressed in the Restatement of Torts, which are reflective of the common law.² In some of those cases we have followed the Restatement of Torts in determining the various degrees of care which an occupier, possessor or owner of land must exercise toward a person coming on the land, and we have looked to whether he is a trespasser, licensee or invitee.³

[1] Upon re-examining the basis for these decisions, we have reached the conclusion that the subtleties and refinements of the rigid common law classifications of trespassers, licensees and invitees adds confusion to the law and is no longer desirable in modern times. This conclusion was reached by the Supreme Court of the United States approximately 18 years ago, when it was held that the law of admiralty would not recognize the same distinctions between an

2. *Sloan v. Atlantic Richfield Co.*, 552 P.2d 157, 160 (Alaska 1976).

3. *Kremer v. Carr's Food Center, Inc.*, 462 P.2d 747 (Alaska 1969); *Chugach Elec. Assn. v. Lewis*, 453 P.2d 345, 348-49 (Alaska 1969); *McKean v. Hammond*, 445 P.2d 679 (Alaska 1968); *Correa v. Stephens*, 429 P.2d 254, 258 (Alaska 1967).

invitee and licensee as does the common law. The court stated:

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances." [footnotes omitted]⁴

In more recent years, there has been a significant modern trend to abolish the classical distinctions between trespasser, licensee and invitee as the controlling factor in determining the scope and extent of the duty of care owed by landowners⁵ to persons entering upon the land.⁶ As Chief

Judge Bazelon of the District of Columbia Court of Appeals has stated, at the vanguard of this movement have been the Supreme Courts of California, Hawaii and Colorado, which have decisively rejected the differences between the common law categories.⁷ Other courts have followed this trend in more recent times.⁸

[2] We have decided to join the jurisdictions which have rejected the difference between the common law categories and no longer will predicate liability of a landowner upon the status of the person entering upon the land. We apply instead ordinary principles of negligence to govern the conduct of a landowner. The rule that we adopt is this: A landowner or owner of other property must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk.⁹ We adopt this rule in recognition of the fact that

The common law is not a rigid and arbitrary code, crystallized and immutable. Rather it is flexible and adapts itself to changing conditions. After all, the common law "is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals with respect to private disputes." What may be considered a just disposition of a dis-

4. *Kermarec v. Transatlantique*, 358 U.S. 625, 630-31, 79 S.Ct. 406, 410, 3 L.Ed.2d 550, 554-55 (1959).

5. We use the term "landowner" as encompassing also occupiers and possessors of land. See Chief Judge Bazelon's opinion in *Smith v. Arbaugh's Restaurant, Inc.*, 152 U.S.App.D.C. 86, 469 F.2d 97, 99, n. 5 (1972).

6. Annot., 32 A.L.R.3d 508, 520-21 (1970).

7. *Smith v. Arbaugh's Restaurant, Inc.*, 152 U.S.App.D.C. 86, 469 F.2d 97, 100, n. 11 (1972). See *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561 (1968); *Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969); *Mile High Fence Co. v. Rarbovich*, 175 Colo. 537, 489 P.2d 308 (1971).

8. *Smith v. Arbaugh's Restaurant, Inc.*, supra n. 11. See 32 A.L.R.3d 508, 520-21 (1970) 2nd October 1976 Supplement. *Supples v. Canadian Nat'l. R.R. Co.*, 53 A.D.2d 1017, 336 N.Y.S.2d 489, 490 (1976); *Mariorenzi v. Joseph DiPonte, Inc.*, 114 R.I. 294, 333 A.2d 127 (1975).

9. This is the rule or test announced by the Court of Appeals for the Dist. of Columbia in *Smith v. Arbaugh's Restaurant, Inc.*, 152 U.S.App.D.C. 86, 469 F.2d 97, 100 (1972).

In essence we have followed this rule, without extensive discussion, in holding that the State of Alaska has a duty to exercise reasonable care to maintain state highways in a reasonably safe condition. *State v. Abbott*, 498 P.2d 712, 725 (Alaska 1972).

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pute at one stage of history may not be the same at another stage, considering changing social, economic and other conditions of society. [footnote omitted]¹⁰

The reasons given by the courts for abolition of the trespasser-licensee-invitee distinctions are persuasive. In the words of Chief Judge Bazelon, for example:

It is the genius of the common law that it recognizes changes in our social, economic, and moral life. Legal classifications such as trespasser and licensee are judicial creations which should be cast aside when they are no longer useful as controlling tools for the jury. The principle of stare decisis was not meant to keep a stranglehold on developments which are responsive to new values, experiences, and circumstances. In our opinion, the time has come to put an end to our total reliance on these common law labels and to allow the finder of fact to focus on whether the landowner has exercised "reasonable care under all the circumstances." That standard contains the flexibility necessary to allow the jury to take account of the infinite variety of fact situations which affect the foreseeability of presence and injury, and the balance of values which determines the allocation of the costs and risks of human injury. [footnotes omitted]¹¹

[3] In applying to this case the rule we adopt, we are not holding that the City, as landowner, is now an insurer of its property or that it must endure unreasonable burdens to maintain its property. What we do hold is that the status of Mrs. Webb, while using the City's sidewalks, is not solely determinative of the City's duty of care owed to her. We recognize, of course, that the circumstances of Mrs. Webb's presence on

the City's property have some relation to the question of the City's liability. This is so because the foreseeability of her presence determines in part (a) the likelihood of injury to her, and (b) the extent to which the City must take action or the interest it must sacrifice to avoid the risk of injury to one such as Mrs. Webb.¹²

Although the trial court in this case referred to Mrs. Webb as a "licensee", it did adopt in essence the rule we state in this case by holding that the City's duty was to exercise reasonable care to maintain its sidewalks in a reasonably safe condition for travel. It also held that "there is no affirmative duty to repair [all]¹³ cracks or other conditions in municipal sidewalks, and that there was no evidence that the condition of the sidewalk where Mrs. Webb fell and was injured made it unreasonably safe [sic] for travel." On this basis, the superior court granted the City's motion for summary judgment.

[4] From considering Mrs. Webb's answers to the City's interrogatories, and from her deposition, it appears that the salient facts as to the condition of the sidewalk and Mrs. Webb's injury are largely undisputed. But there is still left the primary issue of whether the City had maintained the sidewalk in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. In determining that issue, the general rule is that on a motion for summary judgment all inferences from the underlying facts must be viewed in the light most favorable to the party opposing the motion—in this case, Mrs. Webb.¹⁴

was accidentally omitted when the memorandum of decision was typed."

10. *State v. Morris*, 555 P.2d 1216, 1223 (Alaska 1976) (dissenting opinion of Chief Justice Boochever, quoting from *Howarth v. Pfeifer*, 443 P.2d 39, 44 (Alaska 1968).

11. *Smith v. Arbaugh's Restaurant, Inc.*, *supra* n. 8 at 105.

12. *Id.*, at 105-06.

13. In its brief on appeal the City suggests that "it is reasonable to conclude that the word 'all'

14. *McKean v. Hammord*, 445 P.2d 679, 682 (Alaska 1968); *Gross v. Southern Ry. Co.*, 414 F.2d 292, 297 (5th Cir. 1969); *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 3 L.Ed.2d 176, 177 (1962).

In addition to the issue of the City's negligence under the rule adopted here, it is conceivable that if negligence is found on the part of the City, there would remain the issue of whether Mrs. Webb herself was negligent, and if so, to what degree her lack of care contributed to her injuries under the doctrine of comparative negligence, which we recently adopted in Alaska.¹⁵

[5] As a general rule, issues of negligence are generally not susceptible to summary determination, but should be resolved by trial in the ordinary manner.¹⁶ The reason for this rule is:

[B]ecause of the elusive nature of the concept of negligence, the determination of the existence of which requires the forming of a judgment as to the reasonableness of the conduct of the parties in the light of all the circumstances of the case. If reasonable minds could draw different inferences and reach different conclusions from the facts the issue must

be reserved for trial. (citations omitted)¹⁷

[6, 7] We believe that reasonable minds could differ on the question of whether there was negligence in this case, either on the part of the City or on the part of Mrs. Webb, or both.¹⁸ Therefore, these issues should be presented to a jury for determination, rather than being disposed of on a motion for summary judgment.¹⁹

The judgment is reversed and the case is remanded for further proceedings not inconsistent with the views expressed in this opinion.

REVERSED and REMANDED.

ERWIN, J., not participating.



15. *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975). See also *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976).

16. *McKean v. Hammond*, 445 P.2d 679, 682 (Alaska 1968); *Lillegraven v. Tengs*, 375 P.2d 139, 142 (Alaska 1962); 6 Pt. 2 Moore's Federal Practice § 56.17 at 56-946 (1976). There are a growing number of exceptions to this general rule, 6 Pt. 2 Moore's Federal Practice, *id.*, at 56-948-51, but we do not believe this case presents such an exception.

17. *Gross v. Southern Ry. Co.*, 414 F.2d 292, 297 (5th Cir. 1969), quoting from *Harvey v. Great Atlantic & Pacific Tea Co.*, 388 F.2d 123, 125 (5th Cir. 1968).

18. The "reasonable minds could differ" test is that which we apply under Civil Rule 50 on motions for a directed verdict or for judgment not withstanding the verdict. *National Bank of Alaska v. McHugh*, 416 P.2d 239, 242 (Alaska 1966); *Poulin v. Zartman*, 542 P.2d 251, 273 (Alaska 1975). See also 10 Wright and Miller, Federal Practice and Procedure § 2713 (1973).

The City argues that it is entitled to summary judgment because Mrs. Webb did not produce any admissible evidence which controverted the evidence relied upon by the City in support of its motion for summary judgment. Our response to this is, as we have stated, that based on Mrs. Webb's answers to the City's interrogatories and upon her deposition which was taken by the City, issues of fact are raised which should be tried and not disposed of by summary judgment. It makes no difference whether such issues of fact appear from material presented by the City or by Mrs. Webb.

19. Mrs. Webb did not demand a trial by jury as she might have done under Civil Rule 38(b). But the City did demand "a jury trial of all issues which may be tried by a jury in this action". This demand may be relied upon by Mrs. Webb, since Civil Rule 38(d) provides in part that "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties". See 5 Moore's Federal Practice § 38.45 at 344.1-3 (1976).

STATE OF ALASKA
THE LEGISLATURE

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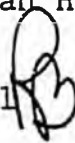
LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

January 20, 1988

SUBJECT: Use of land
(SSHB 198)

TO: Representative Lyman Hoffman

FROM: Richard A. Bradley
Legislative Counsel 

Bob Herron has asked that we comment on suggested changes to SSHB 198 offered by the Alaska Railroad Corporation. Bob has also provided me with a copy also of ARRC's justification for the changes.

I will offer my comments with reference to the sections of SSHB 198.

Sec. 05.40.010(a). The ARRC proposal deletes the reference to AS 09.45.795. They suggest that the provision be deleted because "AS 09.45.795 is not, in fact, an exception to the limitation stated" in Sec. 05.40.010. The point seems valid; the two provisions do, on the other hand, address similar concepts and it is, I believe, inevitable that they will be construed together, whether or not the introductory material is included.

ARRC suggests that "for recreational purposes" be deleted twice in the subsection. They suggest that the deletion solves liability problems. I see no problem with its deletion; it seems fair to note that the actual use, if not recreational, should not create problems for a landowner intending to permit that use.

Finally, the last phrase added, a suggestion that this chapter repeals and replaces the common law, is interesting. I am concerned, however, that the chapter may not, in fact, completely "replace" all the understandings that are addressed in the common law of the recreational use of land.

If I am correct that the issues addressed in the common law are not completely replaced, then it is at least awkward and probably misleading to include that statement. I would not include it.

Sec. 05.40.010(b). My comments regarding the reference to AS 09.45.795, above, also apply here.

Nothing is added, in context, by the "directly or indirectly" or the "thereby" and I would not add them.

The suggested change from "individual" to "person" may have some policy goal. As a matter of drafting style, we prefer to use "individual" when everyone contemplated by the section will be a natural person (as opposed to artificial persons like corporations, associations, etc.). When I drafted this provision, that was my expectation. If I was incorrect, the language may be changed.

In the suggested change to (b)(2), I would not make any of the changes suggested: (1) "such" is not good usage and we generally avoid its use; (2) the question of "individual" vs. "person" should be consistent with your earlier determination; (3) "for recreational purposes" may be desirable to limit the application of the section on the assumption that if some other purpose is involved, then AS 09.45.795 may be implicated.

In the suggested change to (b)(3), the "assume responsibility for" phrase adds nothing new. The substitution of "that person" for "the owner" makes the language less clear. I recommend against each suggestion.

Sec. 05.40.010(c). ARRC suggests the deletion of this subsection. I believe that I may have expressed some reservations about this section, in part because I am not sure that the language of the section clearly expresses its purpose. The ARRC commentary fails to offer a reason for its deletion. In the circumstances, I have no insights to offer on the suggestion.

Sec. 05.40.010(d). ARRC suggests two changes: The first would require that the owner's failure to guard or warn about the dangerous condition be both "willful and malicious", in place of the earlier "willful or malicious". I have no preference though I believe that the new test will be difficult to meet and may, from a public policy perspective, be unreasonable.

The second change seems internally inconsistent and, as stated, I suggest that it not be added. On the other hand, the ARRC suggestion may be that the section not limit the liability of an owner when the owner receives "valuable" compensation (as opposed to the nonvaluable compensation suggested in Sec. 05.40.010(g)(1)), that is, an owner who receives real compensation for the use of the land owes a higher duty to protect and warn and would, therefore, more reasonably be held liable for a failure in this area. This latter concept would not be unreasonable; it is not, however, what the ARRC suggested section says.

Sec. 05.40.010(e). It may be that the addition here of "without compensation" is intended to substitute for the deletion of Sec 05.40.010(c). I wonder whether it is desirable to add the concept of "to the public"; the user will logically be a third party or a stranger to the owner. At that point, the "public" seems an imprecise (and new) concept.

Sec. 05.40.010(f). The changes seem to be nonsubstantive. At the same time, I again note that the addition of "with or without permission" adds nothing; if permission is irrelevant, the phrase may be deleted without loss.

Sec. 05.40.010(g)(1). I have several observations. The "administrative fee" suggested seems included within the concept of "processing or application fee" already in the section. It is unwise to suggest a particular purpose for an administrative fee; the danger is that the purpose expressed might be construed to be the only purpose permitted.

And, if I understand the purpose of the reference to a "lease entered into between an owner and the state, a municipality of the state, or a public corporation of the state", I believe that it should be handled differently. The section does not seem to address the situation where the state, a municipality of the state, or a public corporation enters into a lease with an owner to make land available for recreational purposes. While it may be appropriate for the legislature to conclude that the state owes no duty of care to recreational users of land when it affirmatively leases land to make it available for recreational purposes, I do not believe that this public policy should be expressed in a definitions section.

Representative Lyman Hoffman

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On the other hand, there is a difference when the state leases land for a particular purpose--as compared to a situation where the owner simply permits use without any promises that the land is suited to specified uses.

Depending on your views, you may wish to suggest that ARRC recast its suggestion.

Sec. 05.40.010(g)(2). The bill does not seem to have been intended to address the problems of public owners of land; whether it solves those problems seems unclear. It seems that a "bridge" is a "structure" and thus that change is unnecessary.

Sec. 05.40.010(g)(4). Initially, I note that the amendments suggested do not track SSHB 198; in my view, the generic approach followed in that subsection is always better than the laundry list suggested by ARRC. The "but is not limited to" phrase following "includes" is typically unnecessary and not used in legislative drafting. The extent of the examples to be offered is usually subjective; those offered are neither objectionable nor necessary. The better choice is to use the format found in SSHB 198.

Sec. 05.40.020(a). In my view the "either directly or indirectly" phrase is unnecessary. The phrase added at the end of the subsection is unnecessary because it is clear as a matter of adverse possession law that an adverse possession claim cannot result from a permitted use.

Sec. 05.40.020(b). The suggested changes are lawyer-talk and add nothing to the meaning of the section.

Sec. 09.45.730. No changes suggested.

Sec. 09.45.795. In Sec. 05.40.010(a), above, the ARRC suggested the elimination of the reference to AS 09.45.795; I am somewhat persuaded of the correctness of their suggestion, but I wonder whether the cross reference here is any more necessary. As a matter of style, I would prefer not to use terms in AS 09 that rely on definitions contained within AS 05; if the terms require definition, then they should be defined in AS 09. I would not add "with or without permission"; if permission is in fact irrelevant, as I agree, then a reference to the concept need not be added. The material added after the "or" in (1) adds ideas found in SSHB 198 at Sec. 09.45.795(c); the change is reasonable

Representative Lyman Hoffman
Page 5
January 20, 1988

since SSHB 198 defines "unimproved land" to include improved land, an awkward result. The change in (2) is an improvement.

Sec. 09.45.795(b). As suggested above, I would not use definitions from a different title. The suggestion that "whether the land is improved or unimproved" be deleted is a good one.

Sec. 09.45.795(c). The suggestion is that it be deleted; the material has been moved Sec. 09.45.795(1). The suggestion is reasonable.

Sec. 11.46.320(c)(2). We do not use the term "political subdivision of the state" but rather, if that is what is intended, "municipality of the state". Whatever the structure of ARRC or, for that matter, the University of Alaska, they should be included within the term "state" or "agency of the state." It makes much more sense to expect ARRC to be included when an instruction is given to an agency of the state than the opposite, where they are not included unless the legislature specifically includes them. If you wish to add a definitions section to that effect, that would be certainly solve the problem; I believe that the term "public corporation" is ambiguous and should be avoided.

One solution is to delete (c)(2) and rely on (c)(1) to cover the situation; I do not understand the need for both of them.

Sec. 11.46.320(c)(10). I believe I have addressed the "included but not limited to" usage above; I would make no changes to (c)(10).

Sec. 11.46.350(b). No change suggested.

Sec. 11.46.350(c). No change suggested.

RAB:bb
WKB1/077

SSHB 198

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 provisions.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 state¹⁵ 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 damages²⁸ 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 proprietary 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 activities, the landowner can be afforded legal redress under the negligence aspect of the tort. Negligent interference with prospective advantage is recognized in California³⁸ 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 trespass 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 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, 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 willfulness 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 conspicuous 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 tracts.

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. §§IIC.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 (1973); 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. *Simpson 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, L-w 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 or 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 o. 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 artificial 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. §533.18-.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.